The Spirit of Corporate Law
Core Principles of Corporate Law in Continental Europe

Günter H. Roth
Professor of Law emeritus at the university of Innsbruck

Peter Kindler
Professor of Law at the university of Munich

C. H. Beck · Hart · Nomos
# Table of Contents

Preface .......................................................................................................................... V

Selected Abbreviations ................................................................................................. XIII

Bibliography .................................................................................................................. XIX

Chapter 1. Introduction

I. Freedom and responsibility in European Corporate Law ........................................ 1
   1. European Company Law at a crossroads .............................................................. 1
   2. The purpose of Corporate Law ............................................................................ 3
      a) Regulatory philosophies .................................................................................. 3
      b) Regulatory competition ................................................................................... 5
   3. Key issues of legal protection in Continental Europe ........................................ 7
      a) Capital structure ............................................................................................... 8
      b) Organisational structure .................................................................................. 9
      c) Protection of minority interests ....................................................................... 9
      d) External control ............................................................................................... 11

II. Regarding the selection of legal systems under review ........................................ 12

III. The current legal policy background of this study ............................................... 18
   1. Diversity in the laws governing small corporations and the state of EU legal policy in the area of corporate law ................................................................. 18
      a) Starting point .................................................................................................. 18
      b) Low degree of “Europeanization” of the small corporation ......................... 19
      c) State of EU legal policy .................................................................................. 20
   2. The EU Action Plan 2003 on the modernisation of Company Law and improvement of Corporate Governance ............................................................... 20
      a) Overview ....................................................................................................... 20
      b) Election between monistic and dualistic management structure .................... 21
      c) Capital maintenance and changes in capital ................................................... 21
   3. Reform Initiative 2011/12 ..................................................................................... 21
      a) The EU Green Paper “European Corporate Governance Framework” .......... 21
      b) “Reflection Group” and Action Plan 2012 ....................................................... 22

4. European private company (SPE) ........................................................................... 23
   a) Status of preliminary work ............................................................................... 23
   b) Registration formalities and control of legal conformity ................................... 24
   c) List of shareholders ......................................................................................... 24
   d) Transfer of shares ............................................................................................. 25
   e) Raising capital ................................................................................................. 25
   f) Status and powers of the general meeting ....................................................... 26

Chapter 2. Minimum Capital and Capital Protection

I. Limitations on liability and transfer of risks .............................................................. 27
   1. Entrepreneurial liability ...................................................................................... 27
   2. Limited liability and creditor protection .............................................................. 29

II. Fixed capital and minimum capital ......................................................................... 32
   1. Liable equity capital levels ............................................................................... 32
   2. Analysis ............................................................................................................. 34
      a) Capitalisation .................................................................................................. 34
      b) Sharing the risk ............................................................................................... 36
Table of Contents

3. International criticism .......................................................... 38
4. Most recent developments in national law .................................. 39

III. Raising capital ........................................................................ 40
   1. The principle ................................................................. 40
   2. Cash contributions and contributions in kind .......................... 42
      a) Contributions in cash ................................................. 42
      b) Contributions in kind ............................................... 43
      c) Flow back ................................................................ 46
   3. Analysis ............................................................................ 47
4. Pre-formation corporate liability .................................................. 48
5. The capital increase .................................................................... 48
6. Securing capital contributions in special cases ......................... 50
      a) Shareholder loans ...................................................... 50
      b) Shelf company ......................................................... 50
      c) Formation benefits ................................................... 51

IV. Other aspects of corporate formation ........................................ 51
   1. The act of incorporation .................................................... 51
      a) Contents .................................................................. 51
      b) Form ....................................................................... 52
   2. Analysis ............................................................................ 53

V. Capital maintenance .................................................................... 54
   1. Contributed equity capital .................................................. 54
   2. Mere distribution of profits ............................................... 56
   3. Constructive distributions .................................................. 58
   4. Shareholder loans ............................................................ 61
   5. Acquisition of own shares ................................................. 62
   6. Analysis ............................................................................ 63
      a) Capital protection ...................................................... 63
      b) Crisis parameters ...................................................... 65
   7. Capital reduction .............................................................. 66

VI. Piercing the corporate veil (reach-through liability) ...................... 66
   1. Limitations on liability and reach-through ............................ 66
   2. Risk to the company as a going concern, insolvency trigger ...... 68
   3. Analysis ............................................................................ 69

Chapter 3. The Structure of the Corporation.................................. 71
I. Organisational structure and plurality of interests ....................... 71
II. Organisational structure and limitation of risks ........................... 76
III. The members of the management body as “mandataries” of the shareholders ........................................................................ 77
IV. Delimitation of competences and hierarchy of the company organs ..................................................................................... 80
   1. Principle of general competence ....................................... 80
   2. Fundamentals of the company .......................................... 80
   3. Personnel competence ..................................................... 83
      a) Appointment and removal of members of the management body .................................................. 83
      b) Discharge ................................................................... 84
      c) Limitations on personnel competence through employment law? ........................................... 84
      d) Shareholder liability for ineligible managers ................................................................. 86
      e) Analysis ................................................................... 87
   4. Financial structure .............................................................. 87
   5. Particular features of the organisational structure of large corporations .............................................................................. 88
      a) Variety of organisational structures ................................ 88
      b) The dualistic system ..................................................... 91
      c) Company management (“corporate governance”) .................................................................. 93
      d) Legal status and function of the general meeting in the large corporation ......................... 94
   6. Analysis ............................................................................ 95
V. Duties and liability of members of the management body ............. 98
   1. Plurality of interests and conflicting obligations ..................... 98

VIII
2. General obligation of diligent management vis-à-vis the company ........................................ 98
   a) Duties of a manager ................................................... 98
   b) Standard of care and fault .......................................... 101
   c) Joint responsibility .................................................. 101
   d) Exclusions ............................................................. 102
   e) Enforcement ........................................................... 102
3. Liability vis-à-vis the private limited company based on specific rules of
corporate law and based on tort ........................................ 103
   a) Breaches of prohibitions on disbursements ...................... 103
   b) Acquisition of own shares .......................................... 103
   c) Asset erosion ......................................................... 103
   d) False information in connection with company formation or a share capital
      increase ............................................................. 104
   e) Tort liability to the company ........................................ 104
4. Liability vis-à-vis individual shareholders .................................................. 104
5. Instances of liability under general private law vis-à-vis private law company
   creditors ........................................................................ 105
   a) Personal liability based on estoppel ............................... 106
   b) Pre-contractual liability (culpa in contrahendo) ................ 106
   c) Violation of rights and legal interests protected under tort law
   d) Violation of protective laws; liability for manager’s delay in filing for
      insolvency proceedings .............................................. 108
   e) Intentional immoral harm ............................................. 109
6. Analysis ........................................................................ 110

Chapter 4. Protection of Minority Interests

I. General principles ........................................................ 113
1. Principle of unanimity and majority decision-making .............. 113
2. Majority rule and protection of minorities ........................... 115
   a) Legitimacy and limits on majority control ....................... 115
   b) Minority protection and divestment ................................. 116
   c) Proportionate consideration of the minority interests ........ 117
   d) Qualified majorities .................................................... 119
   e) Minority protection and individual rights ......................... 119
   f) Minority participation rights ....................................... 119
   g) Minority control rights for minorities above a certain percentage
h) Individual right to information ....................................... 119
   i) Substantive limitation on majority rule by means of exclusions from voting
j) Individual right to petition to nullify a resolution ................. 120
   k) Substantive review of the contents of a resolution ............. 120
   l) Right of withdrawal and protection against exclusion ......... 120
II. Formal minority protection ............................................. 120
1. Qualified majorities ..................................................... 120
   a) Purpose ................................................................. 120
   b) Implementation ......................................................... 121
2. Ensuring participation ................................................... 122
   a) Purpose ................................................................. 122
   b) Implementation ......................................................... 123
3. Minority control rights .................................................. 127
   a) Purpose ................................................................. 127
   b) Implementation ......................................................... 128
   c) Excursus: The individual shareholder suit ....................... 129
4. The individual right to information ..................................... 130
   a) Purpose ................................................................. 130
   b) Implementation ......................................................... 131
5. Analysis ........................................................................ 132
Table of Contents

III. Substantive minority protection ................................................................. 133
   1. Voting right preclusion ........................................................................... 133
      a) Purpose .................................................................................................. 133
      b) Implementation ..................................................................................... 134
   2. Contesting majority resolutions ................................................................. 135
      a) Purpose .................................................................................................. 135
      b) Implementation ..................................................................................... 135
   3. Substantive control of resolutions ............................................................... 137
      a) Purpose .................................................................................................. 137
      b) Implementation ..................................................................................... 137
      c) Excursus: Abusive action for avoidance ............................................... 142
   4. Withdrawal and exclusion of the minority .................................................... 143
      a) Purpose .................................................................................................. 143
      b) Implementation ..................................................................................... 144
   5. Analysis ..................................................................................................... 148

Chapter 5. The External Control of Corporations

I. Purposes of control and instruments of control .............................................. 151
II. Annual audit ................................................................................................. 151
III. Compulsory form ......................................................................................... 154
   1. Purposes of form requirements ................................................................... 154
   2. The functions of the civil law notary in corporate law ............................... 155
      a) General principles .................................................................................. 155
      b) Historical development of notary functions in corporate law ............... 155
      c) Notary and commercial register ............................................................. 157
      d) Notarial acts as an exercise of official authority ..................................... 158
   3. Small corporation ....................................................................................... 160
      a) Formation, capital raising, amendments to company statutes ............... 160
      b) Transfer of shares .................................................................................. 163
      c) Control deficits ...................................................................................... 163
   4. Large corporation ....................................................................................... 164
      a) Formation, raising of capital, amendments to company statutes .......... 164
      b) General meeting .................................................................................... 164
   5. Analysis ..................................................................................................... 165
IV. Disclosure .................................................................................................... 166
   1. Main principles of commercial disclosure in the European Union ................ 166
      a) Entry in the commercial registry and publication as the primary means of disclosure .................................................. 166
      b) Specific items required to be disclosed .................................................. 167
      c) Effects of disclosure .............................................................................. 167
      d) Sanctions ............................................................................................... 167
   2. Commercial law disclosure, protection of bona fide rights and protection of the public (based on the example of the acquisition of shares in a German GmbH from a transferor who is not the true owner) .................. 168
      a) General principles of the good faith acquisition of shares in a GmbH .... 168
      b) The true shareholder’s loss of rights and its constitutional boundaries .... 169
      c) Transparency of shareholding structures as a policy goal of the drafters of the 2008 corporate law reform .................. 170
      d) Quasi-constitutive effect of the notarial attestation for the acquisition of shares .................................................. 172
      e) Increasing the role of the notary for reasons of protecting property rights and public safety and order .................. 173
   3. Analysis ..................................................................................................... 176
V. The expansion of external controls as a desideratum in terms of legal policy .............................................. 176
Table of Contents

Chapter 6. The Future of European Company Law

I. At the outset ........................................................................................................... 177

II. Conclusions from the individual chapters of the book ........................................... 179

1. Capital structure (supra, Chapter 2) .................................................................... 179

2. Organisational structure (supra, Chapter 3) ......................................................... 180

3. Minority protection (supra, Chapter 4) ................................................................. 181

4. External controls (supra, Chapter 5) ..................................................................... 183

III. Conclusions for European legal policy in the area of corporate law ................. 184

Index ....................................................................................................................... 187
The Spirit of Laws (French: De l'esprit des lois, originally spelled De l'esprit des loix) is a treatise on political theory, as well as a pioneering work in comparative law, published in 1748 by Charles de Secondat, Baron de Montesquieu. Originally published anonymously, partly because Montesquieu's works were subject to censorship, its influence outside France was aided by its rapid translation into other languages. In 1750 Thomas Nugent published the first English translation. In 1751 the Roman law regarding emissions controls on diesel plants were written in the 1970s, and at the time, the only economically viable technology for diesel power generation was the diesel turbine. Nowadays, diesel engines have become economically viable for that purpose (the difference, and any engineers may correct me, is that an engine works by having explosive force directly push a rotating unit, while a turbine causes the flow of gases created by explosive force push a rotating unit), but there is technically a difference, and because of the way the regulations are written, the law co... However, statutory laws in some cases are literally interpreted and in some cases in terms of the spirit of the law. Related Questions. More Answers Below. The Spirit of Laws (1750), or L'Esprit des lois, a treatise consisting of thirty-one books written by the French philosopher Montesquieu, is considered by many a landmark contribution to political theory. Download The Spirit of the Laws Study Guide. Subscribe Now. Montesquieu divides governments into three types: republics, monarchies, and despotisms. Next, he examines the relationship between laws and political liberty. He then considers the impact of climate and terrain on the laws of a given nation and the nation’s general spirit and manners. Next, he relates laws to economic and religious systems. Finally, he launches into a historical examination of laws in different contexts, with a focus on the French context. For a more detailed summary, see the third link below.