in keeping with the usual approach of the European Court (*Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, HL).

(p. 8) Even where the local legislation does not itself implement a Directive, but merely covers similar ground, the European Court has ruled that it must be interpreted in the light of the wording and purpose of the Directive (*Marleasing SA v La Comercial Internacional de Alimentación SA* **[1.01]**), although not where this would distort the natural meaning of the legislation (*Duke v GEC Reliance Ltd* [1988] AC 618, HL).

And if a member state has implemented a Directive, or has failed to do so within the time limit fixed for implementation, the terms of the Directive may be relied on as against the member state itself or a government agency or public body. Thus, in *Karella v Ministry of Industry, Energy and Technology* **[1.02]**, it was held that an individual could invoke the Second EU Company Law Directive for the purpose of having legislation of the Greek Parliament declared unlawful.

By and large, the object of a Directive is to set *minimum* standards: there is ordinarily nothing to stop a member state from enacting legislation which goes further than the Directive prescribes. Thus, most of the provisions of the Second Company Law Directive are made to apply only to public companies, but under the UK legislation many of them were made to apply to private companies as well. And in *Siemens AG v Nold* [1997] 1 BCLC 291, the Court of Justice of the European Union held that it was in order for German law to give shareholders greater protection than was required by the Directive when a company makes an issue of new shares. Even when a Directive or proposed Directive is only in a draft stage, it may be important to know about it, since it may indicate the lines along which tomorrow's law is likely to develop.

Regulations

EU law may also be made by Regulations. A Regulation, in contrast to a Directive, has direct effect as part of the domestic law of each member state, although local legislation may be necessary to supplement a Regulation by, for instance, providing administrative facilities.

A Directive does not have direct effect so as to impose obligations on an individual. Domestic legislation of a member state must be interpreted so far as possible in the light of the wording and purpose of any relevant Directive.

[1.01] Marleasing SA v La Comercial Internacional de Alimentación SA [1992] 1 CMLR 305 (Court of Justice of the European Union)

Marleasing sued a number of companies, including La Comercial. It alleged, inter alia, that the formation of La Comercial was void because it had been formed for the purpose of defrauding the creditors of one of its founding shareholders. The Court ruled that even though this might have been a ground for declaring that a company's incorporation was a nullity under Spanish domestic law, it was not consistent with Art 11 of the First EU Company Law Directive, so that the defence could not be relied on.

The Court delivered the following judgment:

> … It is apparent from the grounds set out in the order for reference that Marleasing's primary claim, based on, ss 1261 and 1275 of the Spanish Civil Code, according to which contracts without cause or whose cause is unlawful have no legal effect, is for a declaration that the founders' contract establishing La Comercial is void on the ground that the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the creditors of Barviesa SA, a co-founder of the defendant company. La Comercial contended that the action should be dismissed in its entirety on the ground, in particular, that Article 11 of Directive 68/151, which lists exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them.
>
> **(p. 9)** The national court observed that in accordance with Article 395 of the Act concerning the Conditions of Accession of Spain and the Portuguese Republic to the European Communities, the Kingdom of Spain was under an obligation to bring the directive into effect as from the date of accession, but that had still not

been done at the date of the order for reference. Taking the view, therefore, that the dispute raised a problem concerning the interpretation of Community law, the national court referred the following question to the Court:

> Is Article 11 of Council Directive 68/151, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said Article? …

With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person: Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*.[20]

However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

In order to reply to that question, it should be observed that, as the Court pointed out in Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen*,[21] the member states' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 EEC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC.

It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public l imited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

With regard to the interpretation to be given to Article 11 of the directive, in particular Article 11(2)(b), it should be observed that that provision prohibits the laws of the member states from providing for a judicial declaration of nullity on grounds other than those exhaustively listed in the directive, amongst which is the ground that the objects of the company are unlawful or contrary to public policy.

According to the Commission, the expression 'objects of the company' must be interpreted as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association. It follows, in the Commission's view, that a declaration of nullity of a company cannot be made on the basis of the activity actually pursued by it, for instance defrauding the founder's creditors.

That argument must be upheld. As is clear from the preamble to Directive 68/151, its purpose was to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure 'certainty in the law as regards relations between the company and third parties, and also between members' (sixth recital). Furthermore, the protection of third parties 'must be ensured by provisions which restrict to the greatest possible extent the grounds on **(p. 10)** which obligations entered into in the name of the company are not valid'. It follows, therefore, that each ground of nullity provided for in Article 11 of the directive must be interpreted strictly. In those circumstances the words 'objects of the company' must be understood as referring to the objects of the company as described in the instrument of incorporation or the articles of association.

> The answer to the question submitted must therefore be that a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

➢ Note

It will be seen that Art 11 of the Directive allows a judicial declaration of nullity to be made on the ground that a company's objects are unlawful or contrary to public policy. When the UK implemented this Directive by domestic legislation, no steps were taken to include any provision based on Art 11, for the reasons given at Note 1 following *HA Stephenson & Son Ltd v Gillanders, Arbuthnot & Co* **[1.07]**, p 29. But, as the case of *R v Registrar of Companies, ex p AG* **[1.08]** shows, such a declaration is not unknown in the UK.

A Directive may be invoked by an individual directly against a member state or government agency.

[1.02] Karella v Ministry of Industry, Energy and Technology [1991] ECR I-2691, [1993] 2 CMLR 865 (Court of Justice of the European Union)

Legislation enacted by the Greek Parliament (Law No 1386/1983) empowered a governmental authority called the Business Reconstruction Organisation (OAE) to take over control of a company and to increase the capital of such a company by administrative decision. The OAE took control of a company called Klostiria Velka AE and decided to increase its capital from Dr 220 million to Dr 400 million. Two shareholders successfully argued that this was contrary to the Second EU Company Law Directive Art 25(1), which requires an increase of capital, except in limited circumstances, to be effected by a resolution of the shareholders.

The Court delivered the following judgment:

> The national court's questions essentially raise two issues. The first is concerned with art 25(1) of the Second Directive. The national court wishes to establish whether, having regard to art 41(1) of the Second Directive, art 25(1) may be relied upon against the administration by individuals in the national courts. It then asks whether art 25(1), in conjunction with art 21(1), is applicable with regard to public rules, such as those provided for in Law No 1386/1983, which govern the completely exceptional cases of undertakings which are of particular economic and social importance for society and are undergoing serious financial difficulties.
>
> The second issue is concerned with art 42 of the Second Directive. The national court asks whether that provision may be relied upon by individuals and whether it has to be interpreted as precluding national rules of the type referred to above. …
>
> *The direct effect of art 25(1) of the Second Directive*
>
> As the court has consistently held, wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, individuals are entitled **(p. 11)** to invoke them against the state (see, in particular, the judgment in Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53).
>
> Consequently, it should be examined whether art 25(1) of the Second Directive, which provides that any increase in capital must be decided upon by the general meeting, satisfied those conditions.
>
> It must be held in that connection that that provision is clearly and precisely worded and lays down, unconditionally, a rule enshrining the general principle that the general meeting has the power to decide upon increases in capital.

The unconditional nature of that provision is not affected by the derogation provided for in art 25(2) of the Second Directive to the effect that the company's instrument of incorporation or the general meeting may authorise an increase in the subscribed capital up to a maximum amount which is to be fixed with due regard for any maximum amount provided for by law. That individual, clearly defined derogation does not leave member states any possibility of making the principle of the power of the general meeting subject to any exceptions other than that for which express provision is made.

The same applies to art 41(1) of the Second Directive, under which member states may derogate from art 25(1) and art 9(1) and the first sentence of art 19(1)(a) and (b) to the extent that such derogations are necessary to encourage the participation of employees or other groups of persons defined by national law in the capital of undertakings. That derogation, too, is strictly confined to the case provided for.

Moreover, the fact that the Community legislature provided for precise, concrete derogations confirms the unconditional character of the principle set forth in art 25(1) of the Second Directive.

It is appropriate therefore to answer the national court by stating that art 25(1) of the Second Directive may be relied upon by individuals against the public authorities before national courts.

Scope of art 25(1) of the Second Directive

As for the scope of art 25(1) of the Second Directive with respect to a law, such as Law No 1386/1983, it should be examined in the first place whether such a law falls within the field of application of the directive, since that legislation does not set out the basic rules on increases of capital and merely seeks to deal with exceptional situations. If that legislation falls within the field of application of the Second Directive, it should then be considered whether it can qualify for the benefit of the derogation provided for in art 41(1) of that directive.

As far as the field of application of the Second Directive is concerned, it should be stated first of all that, in accordance with art 54(3)(g) of the Treaty, it seeks to coordinate the safeguards which, for the protection of the interests of members and others, are required by member states of companies and firms within the meaning of the second paragraph of art 58 of the Treaty with a view to making such safeguards equivalent. Consequently, the aim of the Second Directive is to provide a minimum level of protection for shareholders in all the member states.

That objective would be seriously frustrated if the member states were entitled to derogate from the provisions of the directive by maintaining in force rules—even rules categorised as special or exceptional—under which it is possible to decide by administrative measure, outside any decision by the general meeting of shareholders, to effect an increase in the company's capital which would have the effect either of obliging the original shareholders to increase their contributions to the capital or of imposing on them the addition of new shareholders, thus reducing their involvement in the decision-taking power of the company.

However, that observation does not signify that Community law prevents member states from derogating from those provisions in any circumstances. The Community legislature has made specific provision for well-defined derogations and for procedures which may result in such derogations with the aim of safeguarding certain vital interests of the member states which are liable to **(p. 12)** be affected in exceptional situations. Instances of this are arts 19(2) and (3), art 40(2), art 41(2) and art 43(2) of the Directive.

In this connection, it must be held that no derogating provision which would allow the member states to derogate from art 25(1) of the Directive in crisis situations is provided for either in the EEC Treaty or in the Second Directive itself. …

It follows that, in the absence of a derogation provided for by Community law, art 25(1) of the Second Directive must be interpreted as precluding the member states from maintaining in force rules incompatible with the principle set forth in that article, even if those rules cover only exceptional situations. …

➢ Note

Despite the extensive programme for the harmonisation of companies legislation within the EU, some quite fundamental differences remain—and in many cases are likely to continue. See 'Country of incorporation, "seat" and "COMI"', p 13 on the different means of determining 'home' for a company. What is more, these are often differences in the commercial practice or 'culture' as between one country and another, which are likely to survive any kind of legislative reform. For instance, in some jurisdictions such as the UK, a relatively high proportion of the shares in the larger companies are held by members of the public and institutional investors (eg pension funds) and are actively traded on the Stock Exchange; in others, there is extensive use of shares in 'bearer' form which can be transferred from one owner to another by simply handing over the relevant share certificate; and in yet others, major shareholdings in the leading companies are held by banks, either in their own right or as nominees for the real owners. It is very difficult to frame a single set of rules which will take account of these variations in practice. For example, it is only in a jurisdiction like the UK where there is an extensive market for shares that a 'takeover bid' can be made to work effectively; in other countries, the different patterns of shareholding (and differences in accounting practice, etc) create 'barriers' to takeovers which are every bit as insurmountable as a prohibition imposed by statute would be.

European Directives and Regulations relating to company law

The Directives that have already been implemented by the European Parliament and Council cover a wide range of company law matters, although noticeably only those where member states have a vested self-interest in harmonisation. These include Directives on formation of single member private limited liability companies, formation of public limited liability companies and the maintenance and alteration of their capital, requirements for annual accounts and consolidated accounts, prospectus requirements, cross-border mergers of limited liability companies, transparency and disclosure Directives, a takeovers Directive and market abuse Directive.

Other Directives never proceeded past the proposal stage. For example, a *Fifth Directive* has never been adopted, largely because of opposition from the UK. It would have required all companies with a workforce above a certain size to institute a system of employee participation in management decisions, and would have included provisions governing directors' duties and the function of auditors. Similarly, a draft *Ninth Directive* would have introduced rules governing the conduct of corporate groups, including intra-group liabilities on insolvency. Like many other Directives, it was based on a German model, but this has not worked well even in Germany itself, and so the Directive has now been formally withdrawn.

There are noticeably fewer Regulations. Two merit special comment, since they allow for different formal company structures. Regulation (EC) 2137/85 permits the establishment of *European Economic Interest Groupings* (EEIGs),[22] intended to be used for non-profit-making cross-border ventures for purposes such as joint research and development.

(p. 13) Regulation (EC) 2001/2157[23] (supplemented by Directive 2001/86/EC on the involvement of employees) provides a Statute for a European Company that enables the formation of supranational companies governed in important respects by EU rather than local law. This proposal was stalled for over 30 years, partly because some of its provisions (eg as regards worker participation) were met by the same self-interested objections that had stood in the way of adoption of the Directives mentioned earlier. Eventually political agreement on an amended text was reached. A company operating in more than one EU country can now incorporate as a '*European Company*' (SE or '*Societas Europaea*'), rather than a company formed under the law of an individual member state, so avoiding the need to establish subsidiaries under all the different national laws. Many details, however, from the mechanics of registration to the rules of insolvency, are delegated to the law of the member state where the company has its main base, rather than administered from Brussels and governed by provisions of EU law. In that sense, the Regulation is less ambitious than originally intended. And the vexed question of the involvement of employees is dealt with in a separate Directive.

In the area of insolvency law, Regulation (EC) 1346/2000 establishes common rules to deal with cross-border insolvency proceedings. See ‘Country of incorporation, “seat” and “COMI”’, p 13.

Finally, various Recommendations have been advanced. The Company Law Slim Working Group made Recommendations on the simplification of the First and Second Directives; the Commission has made Recommendations on statutory audit (2001/256/EC and 2002/590/EC) and on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies.

European law harmonisation

The EU company law harmonisation programme has attracted criticism because many of its measures have been seen as too prescriptive and regulatory in their approach, and too detailed in form, leading to widespread proliferation of rules and increases in compliance costs. This may have been true, but recent moves aim to reduce the burden, particularly for small and medium enterprises (SMEs), by (for instance) relaxing the accounting requirements and, for some, removing altogether the obligation to have accounts audited.

Of course, what for one person may be an additional constraint may for another be a positive benefit: the standardisation of accounting formats may seem tiresome for those who have to comply but makes the reading easier for those relying on the accounts; and the general tightening up of the rules governing entry to the financial services markets has led not only to a ‘level playing field’, but more importantly to the opening up of these markets to users based anywhere in the EU—a development from which UK firms probably have stood to gain more than those of any other country.

Country of incorporation, ‘seat’ and ‘COMI’

In all this talk of European harmonisation, it is important to note that there are also legal rules in particular jurisdictions which may be regarded as inviolate. One such rule divides the EU member states into two groups: those which take the country of incorporation as the state whose law is, for most purposes, the governing law, and those which consider that this should be determined by the country where the company’s main establishment or ‘seat’ (*Sitz* or *siège réel*) is located. The UK and Ireland are typical of the former; France and Germany of the latter, and it can fairly be said that ‘never the twain shall meet’. So, a company cannot be incorporated in France if its main business is to be based in another country, and if a French-registered company were to move its main activities abroad then under French law **(p. 14)** it would have to be wound up. But a company incorporated in the UK can have its centre of business anywhere.

This dichotomy seems to be far too firmly entrenched to make radical change at all likely. Even so, the following case shows that there may be rather more freedom of choice than might have been expected.

The country of incorporation.

[1.03] Centros Ltd v Erhvervs-og Selskabsstryrelsen [1999] 2 CMLR 551, [2000] Ch 446 (Court of Justice of the European Union)

Danish law requires that all companies should be formed with a prescribed minimum capital and that a substantial sum should be paid up on that capital prior to incorporation. Mr and Mrs Bryde, Danish citizens, formed a company in England with a nominal capital of £100 on which nothing was ever paid up. It never traded in the UK. They then sought to register a branch of this company in Denmark but the Danish authority (referred to in the report as ‘the Board’) refused, on the ground that this was a way of avoiding the Danish rules as to capital. The court held that the authority’s refusal to register the branch was an obstacle to the freedom of establishment conferred by Arts 52 and 58 of the Treaty of Rome.

The Court delivered the following judgment:

> …
>
> As a preliminary point, it should be made clear that the Board does not in any way deny that a joint stock or private limited company with its registered office in another Member State may carry on business in

Denmark through a branch. It therefore agrees, as a general rule, to register in Denmark a branch of a company formed in accordance with the law of another Member State. In particular, it has added that, if Centros had conducted any business in England and Wales, the Board would have agreed to register its branch in Denmark.

According to the Danish Government, Article 52 is not applicable in the case in the main proceedings, since the situation is purely internal to Denmark. Mr and Mrs Bryde, Danish nationals, have formed a company in the United Kingdom which does not carry on any actual business there, with the sole purpose of carrying on business in Denmark through a branch and thus of avoiding application of Danish legislation on the formation of private limited companies. It considers that in such circumstances the formation by nationals of one Member State of a company in another Member State does not amount to a relevant external element in the light of Community law and, in particular, freedom of establishment.

In this respect, it should be noted that a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another Member State falls within the scope of Community law. In that regard, it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted.

That Mr and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not been denied either in the written observations or at the hearing. That does not, however, mean that the formation by the British company of a branch in Denmark is not covered by freedom of establishment for the purposes of Articles 52 and 58. The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

As to the question whether, as Mr and Mrs Bryde claim, the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which it **(p. 15)** has its registered office constitutes an obstacle to freedom of establishment, it must be borne in mind that that freedom, conferred by Article 52 on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.

The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person.

Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58.

Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.

> It is true that according to the case law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.
>
> However, although, in such circumstances, the national courts may, case by case, take account—on the basis of objective evidence—of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.
>
> In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.
>
> That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty. …

The other concept of 'place of business' which is increasingly important, if only on the insolvency of a company, is 'centre of main interest' (COMI). This is a term which describes the jurisdiction with which a company (or a person) is most closely associated for the purposes of cross-border insolvency proceedings. It is used in both the EC Regulation on Insolvency Proceedings (Insolvency Regulation) (1346/2000 ([2000] OJ L160/1)) and the UNCITRAL **(p. 16)** Model Law on Cross-Border Insolvency (Model Law), although it is not defined in either. The former uses the concept of COMI to determine which member state of the EU (other than Denmark) takes precedence if competing company insolvency procedures are commenced in different member states. The latter uses the concept to determine the degree to which the courts of one jurisdiction are obliged to recognise and assist insolvency proceedings commenced in a different jurisdiction.

COMI is thus an EU concept, not a feature of national law. It *must* therefore be given a consistent EU-wide interpretation: *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09) [2012] BCC 851. The fact that this measure is embodied in a Regulation with direct applicability and effect, as opposed to a Directive, helps to promote consistency of application.

Although COMI is not defined in the Insolvency Regulation or the Model Law, the preamble to the EC Insolvency Regulation states that it should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties (para 13, Preamble). In both the Insolvency Regulation and the Model Law, there is a rebuttable presumption that a corporate debtor's COMI is the location of the company's registered office (Art 3, Insolvency Regulation and Art 16(3), Model Law). But, at least in the Insolvency Regulation, that is a weak presumption, regularly displaced in practice.

The leading case on identifying COMI is still *Eurofood IFSC Ltd* (Case C-341/04) [2006] ECR I-3813, [2006] BCC 397. Here the European Court of Justice indicated that the presumption that a company has its COMI in the member state where it is registered is not rebutted simply because it is a subsidiary subject to a degree of economic control from a parent located in another member state. All factors need to be considered, in particular where its presence is *objectively* ascertainable to creditors.

More significantly, COMI need not be static. And, indeed, a deliberate change of COMI may reflect a concerted attempt to forum shop, typically to relocate to the UK at the eleventh hour to take advantage of the UK's more debtor-friendly insolvency rules. See, for example, *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] BCC

949. This has been sufficiently lucrative to national professional practices, that overseas jurisdictions have moved to amend their own insolvency laws to align better with UK practices. In this field, as in many others, however, the legislation does not deal effectively with corporate groups, and that remains an area of significant controversy: see, for example, *Eurofood* (in the previous paragraph); *Re Daisytek-ISA Ltd* [2003] BCC 562.

There is also the comity mechanism located in Insolvency Act 1986 s 426 which is available to the courts in a number of scheduled jurisdictions with an English common law heritage. *Re Integrated Medical Solutions Ltd* [2012] BCC 215 examines the interrelationship between the IA 1986 and the Insolvency Regulation, and applied the former in the light of the latter. Indeed, the Insolvency Regulation has become even more important given the Supreme Court's recent retrenchment of the common law position: *Rubin v Eurofinance SA* [2012] UKSC 46, [2012] 3 WLR 1019, which, perhaps unexpectedly, disapproved of *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508.

Human rights legislation

The UK has been a signatory to the European Convention on Human Rights from as long ago as 1950, but the principles of the Convention were not incorporated into its domestic law until the enactment of the Human Rights Act 1998. Until this Act came into force, very few cases which had implications for company law were taken to the European Court of Human Rights in Strasbourg—one notable exception being *Saunders v UK* (1996) 23 EHCR 313.[24]

(p. 17) However, there is now a far greater awareness of these principles and their effect. See, for example, amendments made to the law which now restrict the use of self-incriminating statements made under compulsion in a later prosecution, and changes to the City Code on Takeovers and Mergers.

Self-regulation

Finally, mention should be made of various initiatives taken independently of government which have led to reforms of a self-regulatory nature, some of them of considerable significance. The City Code on Takeovers and Mergers used to be the most notable of these, although now much of this work has been put on a statutory basis. Before these recent changes, however, the Code, and the Panel on Takeovers and Mergers which administered it, which had been set up by the Bank of England and representatives of various professional and financial bodies without the backing of legislation, had discharged the important public function of regulating the conduct of takeovers for several decades.

Now the most important self-regulatory regime is found in the UK Corporate Governance Code. This is a statement of principles of good governance and a code of best practice, appended to the listing rules of the Stock Exchange. It must be adhered to by all listed companies on a 'comply or explain' basis (see Chapter 5). The current version of the UK Corporate Governance Code was issued in September 2012 by the Financial Reporting Council (FRC), the UK's independent regulator responsible for promoting confidence in corporate reporting and governance. It revises a previous version from 2010, which was based on a 1998 version prepared by the Committee on Corporate Governance chaired by Sir Ronald Hampel, which in turn built on the 1992 work of the Cadbury Committee and others. Again, this Code operates without legislative backing.

The Bank of England sponsors an independent body, the Financial Markets Law Committee, whose role is to identify issues of legal uncertainty or misunderstanding, both present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed. The Committee also acts as a bridge to the judiciary to help UK courts remain up to date with developments in financial markets practice.

The process of company law reform

Company law, perhaps more so than any other branch of commercial law, is not a field where finality is ever to be expected. There is always pressure for it to be modernised so as to take account of new developments in business practice, or for it to be reformed for some other reason (eg because the drafting of an earlier statute has proved to be defective, or because a ruling of the courts is thought to have left the law in an unsatisfactory state). The substantive aspects of the various statutory changes were summarised at 'Sources of company law', pp 3ff. However, the *process* of company law reform also merits attention.

In the past, a practice developed of establishing a committee, appointed by the government every 20 years or so, with a general brief to look at the subject as a whole and make recommendations for reform. This would be followed shortly after by an amending Act, which in turn was very soon consolidated with the previous Act so that it was all brought together. The last of such committees was the Jenkins Committee, which reported in 1962. But at that point the pattern was broken. No amending legislation was introduced to implement the committee's proposed reforms (apart from an abortive Bill in the late 1970s, and some piecemeal measures in the ensuing decade), and the practice of setting up such committees was abandoned.

(p. 18) Besides these committees with a general brief, there were others appointed from time to time to look at a particular topic, such as the Bodkin Committee on sharepushing (1937). These reports (many never followed by legislation) contain some material of great interest, although they are now rather dated. They do, however, serve as a pointed reminder that some problems have been in need of a solution for decades.[25]

From the 1980s onwards, all the initiative for reform came from within government, and legislation was usually put in place after the publication of a consultative document inviting comments from members of the public and interested bodies. The driving force behind many statutory changes was the need to implement numerous EU Directives. Time constraints meant that amendments to the primary legislation were often made by statutory instrument, frequently by enacting additional 'layers' of law which left the existing legislation in place and supplemented or qualified it with further rules.

In the course of the 1990s, the DTI set up a succession of working groups to examine possible reforms of particular topics, and also published a number of discussion documents inviting comments and suggestions from the public at large. In a few cases amending legislation followed, usually where this could be done by statutory instrument. But other reforms were simply left in abeyance until time could be found in the parliamentary schedule for a Bill. Significantly, the DTI also adopted an occasional practice of referring certain specific areas of company law to the Law Commissions. They were in a position to examine the subjects in depth, consult widely and publish reports containing recommendations for reform. Unhappily, these recommendations, too, were put on hold until an opportunity arose to enact primary legislation.[26]

It was widely accepted that, as a result of this piecemeal approach to reform, the UK companies legislation had become very untidy, complex and difficult to understand. A thorough overhaul was thought to be essential. This was eventually initiated in 1998 with the creation of the Company Law Review (see 'The Company Law Review', p 6).

The ambitious nature of this review helped to determine the reform *process*. Mrs Margaret Beckett, then Secretary of State for Trade and Industry, published a consultation paper with the challenging title *Modern Company Law for a Competitive Economy*. The focus was to be on the framework of 'core' company law,[27] reviewing every aspect of the subject, even the foundations which were put in place by the Victorians in the mid-nineteenth century. The emphasis was on clarity, simplification, consistency, predictability and transparency, with the aim of promoting competitiveness in the modern commercial and technological environment.

The project involved very large numbers of people, many of them serving on 'working groups' charged with examining separate areas of the law. At the head of all these bodies was **(p. 19)** a 'Steering Group' whose members included representatives of commerce, the professions, the judiciary, academics and the DTI itself. There was, in addition, a Consultative Committee of some 40 members, and, beyond this, others assisted by undertaking research or providing information from overseas jurisdictions. All in all, the Review was the most thorough and comprehensive undertaking since the introduction of limited liability and the other reforms of the 1850s.

All these outputs then had to be converted into legislation. This was an enormous task, although one advantage of comprehensive redrafting is the opportunity to eliminate accumulated legislative flaws. These were numerous. From the 1970s, many corporate law reforms were effected by statutory instrument under provisions such as the

European Communities Act 1972 and the Deregulation and Contracting Out Act 1994. These Acts, exceptionally, authorise the amendment of primary legislation by subordinate 'regulations' that by-pass the usual full parliamentary procedure (see 'Regulatory amendments to CA 2006', p 4). This has certain advantages—for instance, it enables the UK government to honour its obligations to implement EU Directives promptly without taking up precious parliamentary time—but it also has its drawbacks. There is not the same opportunity for scrutiny and debate that a normal Bill receives. And the amendments are necessarily restricted to doing no more than the empowering Act permits: the statutory instrument cannot effect related changes to other parts of company law, however logical or desirable such further measures might be. As a consequence, before the enactment of CA 2006, the companies legislation had become progressively more and more diffuse and untidy.

Despite acknowledging this, any future reforms of CA 2006 will still have to pursue these familiar and rather unsatisfactory reform routes. The CLR had usefully recommended that there should be a permanent Company Law Reporting Commission to keep company law and governance under review and submit an annual report to the Secretary of State. In turn, the Secretary of State would be under a duty to consult the Commission on proposed secondary legislation (*Final Report*, Vol 1, paras 5.21–5.37). The government rejected this suggestion, however, saying it preferred a flexible approach, and had already shown its commitment to reform and consultation by setting up the CLR itself (White Paper, Cm 5553-I, 2002, part II, paras 5.25–5.27).

In its 2005 White Paper, the government countered with its own proposal (Cm 6456, para 6.1). It suggested that after CA 2006 was enacted, future reform and restatement of company law should be made by a special form of secondary legislation, using a procedure like that for regulatory reform orders under the Regulatory Reform Act 2001. This would have involved consultation by the Secretary of State, examination by committees of both Houses and final approval by a resolution of each House. However, despite widespread earlier support, this proposal was defeated as an inappropriate process for large and potentially controversial reforms.

> ➢ Question
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> What are the advantages and disadvantages of these different models for law reform in ensuring that the UK has a 'modern company law for a competitive economy'? (In 2010, BIS conducted an evaluation of the main provisions of CA 2006, and concluded that further significant amendments were not warranted, although a number of smaller and more technical issues are now under review (eg narrative reporting by directors).[28])

(p. 20) The purpose of company law: enabling or regulatory?

Legal scholars, economists and social scientists have between them established an extensive body of literature that focuses on variants of the question: what is company law *for* ?—or, perhaps, what *should* it be for? At the one extreme, there are those who advocate that its role should be primarily that of *enabling* those engaged in commerce to order their affairs in whatever way suits their purpose best, with minimal interference from the state. A strong belief in the principle of freedom of contract and in the power of market forces characterises this philosophy. At the other extreme, it is contended that the potential for abuse inherent in the concept of limited liability and in the massive economic power wielded by the largest corporations requires the imposition of strong *regulatory* measures by the lawmakers—or, alternatively, that rules of a similar prescriptive nature can be used to make the company a powerful instrument of social engineering, supplementing the law in other areas such as employment law, environmental law, and so on.[29]

To some extent linked with these debates is a well-established classification of the rules of company law into those which are permissive ('may'), those which are presumptive ('may waive') and those which are mandatory ('must' or 'must not'). This analysis was pioneered by the doyen of American company law scholars, Professor Eisenberg, in an article in (1989) 89 Colum LR 1461.

The corporation laws of the United States jurisdictions are generally regarded as the most liberal and permissive, and those of Germany as among the most prescriptive. So far as English law is concerned, it is fair to say that