

Integration Through Law

Europe and the American Federal Experience

A Series under the General Editorship of
Mauro Cappelletti · Monica Seccombe · Joseph Weiler

Volume 4

Legal Harmonization and the Business Enterprise

Corporate and Capital Market Law Harmonization Policy
in Europe and the U.S.A.

Richard M. Buxbaum and Klaus J. Hopt



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General Editors' Foreword

The Florence Integration Through Law Series is the product of a research project centered in the Law Department of the European University Institute, and as such it reflects the research interests of the Department: it is a contextual examination of European legal developments in comparative perspective. In the general introduction to the Series (published in Book One of Volume I), we explained fully the philosophy, methodology and scope of the Project. Here we wish merely to recapitulate some of the principal themes of special relevance to this Volume on Enterprise Law.

The European Legal Integration Project set out to examine the role of law in, and the legal impact of, integration in Europe, using the United States federal system as a comparative point of reference. The Project was conceived and executed in two parts. In Part One (published in Volume I entitled "Methods, Tools and Institutions"¹) a number of teams of American and European scholars examined a wide range of legal techniques and mechanisms for integration and undertook an overall general analysis of law and integration. The first book of Volume I ("A Political, Legal, and Economic Overview") establishes the comparative and interdisciplinary context, providing background studies on the political, legal and economic implications of integration in Europe and America and including studies on other federal systems (Australia, Canada, Germany and Switzerland) to add comparative perspective. The second book ("Political Organs, Integration Techniques, and Judicial Process") analyzes the pre- and post-normative stages, examining the decision-making and implementation problems, and the role of political techniques available in a federal or supranational context.

The third and final book of Volume I ("Forces and Potential for a European Identity") focusses on how the law can be harnessed to promote the governmental or integrational objectives of union. It isolates for consideration some substantive goals (foreign policy, free movement of goods and persons, human rights protection and legal education), in order to elucidate the ways in which law has been or can be used to promote substantive objectives. This approach is more fully developed in the studies in Part Two of the Project which deals in greater detail with substantive areas of federal/transnational policy and is open-ended. To date, in addition to the present volume on enterprise law, monographs have been written in the following four areas: environmental

¹ Published by Walter de Gruyter (Berlin/New York) in January 1986.

policy,² consumer protection,³ energy policy,⁴ and regional policy.⁵ It is hoped that further studies may be undertaken in the future.

No justification is needed for the choice of corporate law and capital market harmonization as a topic to be included among the five substantive studies. One of the great benefits the Common Market was to yield was to be the easing of transnational enterprise and entrepreneurship. Indeed, the United States was often cited as a model of a non-unitary legal order in which companies could nevertheless operate as if in a single market with all the advantages of size, and in which investors and creditors would receive federal protection. In fact the Community has often been accused of "pandering" to the interests of the business community to the exclusion of other societal sectors. The fact is that harmonization of enterprise law has proved to be a much greater task than was originally envisaged. Obstacles of a legal, political and economic nature have impeded the desired transformation, and at a deeper level the very philosophy and alleged gains have come under strict scrutiny.

The authors of this study capture the totality of the debate. The theoretical grounds of transnational enterprise law are re-examined and then confronted with the complex reality of the two legal orders. The conclusions, as the reader will discover, are often startling. Thus we find, to give but one example, that a principal objection to harmonization may be not so much that the substantive contents of a compromise directive are unacceptable, but the fact that once a measure is "Communitarized," the tortuous EC decision-making structure might consign it to almost automatic obsolescence given the difficulties in passing new amending legislation. Transnationalism might thus be impeded by the very success of the initial Community process.

Corporation law as a topic for legal analysis has, of course, already elicited a substantial amount of scholarly attention. Why then present this new examination? First and foremost is the value of a fresh analysis by the distinguished authors of this volume. But in addition, it is our belief that the Integration Project provided a special context for specific and unique insights. Most obvious is the comparative context: this study presents a tight comparative analysis of the European and American experiences. Through this comparative

² E. REHBINDER & R. STEWART, *Environmental Protection Policy* (Vol. 2 *Integration Through Law*) was published by Walter de Gruyter (Berlin/New York) in December 1985.

³ T. BOURGOIGNIE & D. TRUBEK, *Consumer Law, Common Markets and Federalism in Europe and the United States* (Vol. 3 *Integration Through Law*) was published by Walter de Gruyter (Berlin/New York) in December 1986.

⁴ T. DAINITH & S. WILLIAMS, *The Legal Integration of Energy Markets* (Vol. 5 *Integration Through Law*) was published by Walter de Gruyter (Berlin/New York) in March 1987.

⁵ Y. MENY & B. DE WITTE, *Regionalism and Federalism: The Challenge of Regions in National and Transnational Politics* (Vol. 6 *Integration Through Law*) (forthcoming).

analysis we gain a better understanding not only of the problems associated with the specific subject of transnational enterprise law but also of the workings of the transnational/federal system of governance in general. There is as much to be learnt from this volume on the process of integration and its problems as there is to be learnt on the legal dimensions of corporate life and capital markets.

The Project has invited, however, more than the comparative contribution. The Florence Integration Through Law Series is dedicated to the concept of Law in Context: the examination of legal problems in their political, economic and social setting. There has been much pontification in recent years about the value of interdisciplinarity. Implementation of this value, however, often falls short of much hallowed theoretical expectations. In this regard our claims were modest: We did not ask our contributors to bring the full scientific paraphernalia of, say economics or political science to bear on their subject; we simply asked that the legal analysis be situated in, and be sensitive to, the implications of the socio-economic and political context. The present volume is, in our view, an extraordinarily successful example of this approach.

The European Integration Project follows on from an earlier wide-ranging research project which was carried out at the European University Institute – the Florence Access-to-Justice Project. Access to Justice was not only concerned with an examination and, indeed, extension of the procedural and institutional mechanisms for the vindication of rights in contemporary society. It was an approach which sought to emphasize that in legal study an analysis of the normative content of legal rules and policies – while still central – can give only a partial picture of the function and shortcomings of the law in its societal context. Normative analysis is but one layer of analysis: the effective (or otherwise) reach of the law, its implementation and enforcement, its accessibility to subjects to whom it is addressed as a source of rights and duties, is a second no less important layer. This approach has been a constant guideline to all contributions to the European Integration Project.

Problems of implementation and enforcement are notorious in the field of multinational corporations. They are aggravated in the European transnational system which has its own inherent difficulties of supervision and compliance – though this context offers the only real hope of coming to grips with the multinational corporate body. This study deals in depth with this dimension, and is one of the first of its kind in the European context.

If the Access-to-Justice philosophy postulated the addition of this post-normative layer in the analysis of law, the institutional and procedural character of the Integration Project postulated the addition of yet another layer – a pre-normative layer. Both in the first general methodological part of the Project and in its second substantive part we have given considerable attention to the decision-making process by and through which norms emerge. The necessity of this addition is so clear as to obviate any lengthy explanation. Not only is decision-making an essential component in the analysis of the system as a

whole, but it also gives, particularly in the context of the European transnational concordance of interests, an insight into the normative outcome and, as explained throughout the Project, into the very problems of implementation, application and enforcement. All studies in Part Two of the Project, have adopted what one may call a "total" approach to legal analysis. Certainly the normative, "black letter" dimension of the law is explored; but this normative analysis is sandwiched between the pre- and post-normative phase. The volume explores fully the process of policy-making, the difficulty it encounters and the political context against which normative compromises are reached.

The Integration Through Law Series represents a collective effort over a long period of time. At its inception we believed that the first methodological part of the Project would be the setting against which the subsequent substantive parts, such as this study on corporate law and capital markets would be written. Things often do not turn out as they were planned. The two parts of the project in fact evolved simultaneously, and while the Part Two studies undoubtedly did rely on the general methodological background studies of Part One, the studies in Part One equally drew upon the analysis contained in the concrete substantive studies of Part Two. In this process of cross-fertilization Professors Buxbaum and Hopt played a much appreciated part. In particular their insights into the economic dimensions of transnational processes were instructive to many other contributors. Their collegiality and cooperation with the editors significantly facilitated our task. We are truly grateful to them.

Florence, December 1986

Mauro Cappelletti
Monica Seccombe
Joseph Weiler

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