

## Chapter 2

### Sources of Company Law and Corporate Governance

Here, basic guidance to the end-of-chapter questions will be provided.

**1. Define the following terms:**

- **right of establishment;**
- **comply or explain;**
- **apply and explain.**

Term	Definition
right of establishment	The right to set up and manage undertakings, particularly companies, in any EU Member State
comply or explain	The basis on which the UK Corporate Governance Code operates. Companies with a premium listing must apply the Code's Principles, and must apply the Code's Provision or explain non-compliance
apply and explain	The basis on which the Wates Corporate Governance Principles operate. Companies to whom the Principles apply should apply the Principles and explain how they have addressed them

**2. State whether each of the following statements is true or false and, if false, explain why:**

- **all company law legislation is contained in the CA 2006;**
- **the CA 2006 provides a set of model articles that companies may use;**
- **the Department for Business, Energy and Industrial Strategy is the governmental department responsible for company law reform;**
- **the UK Corporate Governance Code applies to public companies;**
- **companies have human rights.**

- **All company law legislation is contained in the CA 2006:** This statement is false. There are several other notable pieces of company law legislation (e.g. the Financial Services and Markets Act 2000, the Insolvency Act 1986, the Company Director Disqualification Act 1986).
- **The CA 2006 provides a set of model articles that companies may use:** This statement is false. Whilst the CA 2006 empowers the Secretary of State to create sets of model articles, the model articles are actually found in the Companies (Model Articles) Regulations 2008.
- **The Department for Business, Energy and Industrial Strategy is the governmental department responsible for company law reform:** This statement is true.
- **The UK Corporate Governance Code applies to public companies:** This statement is false. The Code applies to companies with a premium listing (which most public companies are not).

- **Companies have human rights:** This statement is true. Parts of the European Convention on Human Rights apply to legal persons, such as companies.

**3. 'The vast bulk of UK company law is home-grown and so leaving the EU will only have a minimal effect on UK company law.' Discuss this quote.**

### **Introduction**

- Every essay should begin with a succinct introduction that demonstrates that you understand the essay question. Briefly explain what the essay is about and set out what the essay will discuss and how it will be structured.
- This statement requires you to discuss the sources of UK company law, notably the extent to which these sources are of UK or EU origin.

### **UK and EU sources of company law**

- Here, you should discuss the extent to which UK company law is home-grown and the impact that EU law has had upon UK company law.
- It is true that the bulk of UK company law is domestically derived. Most of the provisions of company law legislation do not owe their origins to EU law.
- However, this does not mean that EU law has not had a notable effect upon UK company law or that Brexit will not have a notable effect upon UK company law. There are numerous elements of company law that have been heavily influenced by EU law and you should discuss these. Examples include the law relating to company formation, rules governing pre-incorporation contracts, the ultra vires doctrine, the market abuse regime, the regulation of auditors, the capital maintenance rules, the rules regarding the regulation of listed companies (e.g. prospectuses), and the provision of shareholder rights.
- Currently, the European Union (Withdrawal) Act 2018 would essentially preserve EU law on exit day. As a result, the UK's withdrawal would, in the short-term not have a major effect upon our system of company law. Over the long-term, however, Parliament would be able to diverge from EU law in a way that was not possible when the UK was a Member State, so more major changes may be forthcoming in the longer term.
- EU law also provides EU citizens with a right of establishment and this right will be lost (based upon the government's current deal with the EU). Passporting rights would also be lost.

### **Conclusion**

- Every essay should end with a conclusion. Briefly summarise the main points/arguments and, if possible, come to a conclusion regarding the essay topic (i.e. which of the opposing views has the stronger arguments).

**4. 'The comply or explain approach has failed to bring about a sufficient increase in**

**corporate governance standards, and it is time that Parliament passed a Corporate Governance Act.' Do you agree with this quote? Provide reasons for your answer.**

### **Introduction**

- Every essay should begin with a succinct introduction that demonstrates that you understand the essay question. Briefly explain what the essay is about and set out what the essay will discuss and how it will be structured.
- This statement requires you to discuss two issues, namely (i) the extent to which the comply or explain approach adopted by the UK Corporate Governance Code has improved corporate governance standards, and (ii) whether placing our corporate governance principles into statute would be an improvement.

### **Comply or explain**

- Begin by briefly explaining what comply or explain is.
- Discuss the extent to which comply or explain has been effective. In order to do this, you might want to focus on a number of issues. You might want to examine the extent to which those companies subject to the Code comply with it. Grant Thornton's Annual Corporate Governance Review provides an excellent analysis of compliance levels, and notes areas where compliance is weak.
- Note, however, that high levels of compliance do not, in themselves, indicate effectiveness. If the Code's principles are too weak, high levels of compliance could still result in weak governance arrangements. Discuss how the Code has evolved over time and whether developments have made the Code more or less effective. Again, Grant Thornton's Corporate Governance review is useful here, but also look at the FRC's Annual Review of Corporate Governance and Reporting.

### **Passing a Corporate Governance Act**

- Here, you will want to compare whether placing our corporate governance rules into statute is preferable to keeping them in the UK Corporate Governance Code.
- Discuss the advantages and disadvantages of the Code-based system that we have in the UK and compare this to the advantages and disadvantages of regulation via statute.

### **Conclusion**

- Every essay should end with a conclusion. Briefly summarise the main points/arguments and, if possible, come to a conclusion regarding the essay topic (i.e. which of the opposing views has the stronger arguments).