

EUROPEAN COMPANY LAW (LL301)

Course duration: 54 hours lecture and class time (Over three weeks)

LSE Teaching Department: Department of Law

Lead Faculty: Dr Carsten Gerner-Beuerle and Mr Edmund-Philipp Schuster

Pre-requisites: Introduction to legal methods or equivalent.

Course Introduction:

This course will examine the European law aspects of corporate law. We will analyse the harmonised areas of company law and discuss common features of and variation in national corporate law practices across Europe. We will look at the mechanisms which allow EU companies to operate and move across national borders, choose between different company law systems, and restructure their business operations.

In that context, we will also analyse the extent to which EU law restricts divergent national practices in company law. The course will look at the relevant Treaty provisions (particularly the right of establishment and free movement of capital), the company law directives regarding company formation, capital, disclosure, takeovers and corporate restructuring (mergers & divisions), as well as the European Company (SE) and its relevance within the internal market. Differences in national corporate governance approaches and the relevant European soft law initiatives in this area will also be covered.

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Based on our analysis of the law in this area, we will then discuss the impact of company law harmonisation and choice of law on developments in national company law as well as the relevance of regulatory competition and regulatory arbitrage for the internal market more broadly.

Seminars will cover:

- EU company law harmonization programme
- Right of establishment: primary and secondary establishment, transfer of seat, jurisprudence of the European Court of Justice (in particular: *Centros*, *Überseering*, *Inspire Art*, *SEVIC*, *Cartesio*, *VALE*)
- Free movement of capital: “Golden Shares” jurisprudence of the European Court of Justice, *BAA*, *KPN/TPG*, *VW*; proportionality principle in the EU
- 1st Company Law Directive: formation and disclosure
- 2nd Directive and capital structure: minimum capital; payment for shares; publicity; distributions; stock repurchase; increases in capital and capital reductions; serious loss of capital; case law interpreting the 2nd Directive; reform initiatives (e.g. SLIM Working Group)
- Corporate governance regulation in the EU: abandoned 5th Directive; Recommendation on the role of non-executive or supervisory directors of listed companies; remuneration policies; Shareholder Rights Directive
- Domestic and cross-border mergers and divisions (3rd, 6th and 10th Directives)

- European Takeover Regulation
- European company forms: European company (SE) and the proposed European private company (SPE) and single-member private limited liability companies (SUP)
- State of European company law harmonisation; potential for regulatory competition and regulatory arbitration

Lectures: 36 hours **Classes:** 18 hours

Assessment: Written work and one written examination

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Teaching method and preparation for class:

In order to prepare for each lecture, students should study the core readings in advance. Students are expected to come to classes prepared to discuss the readings. The articles and book chapters listed under optional readings are intended to give students an opportunity to follow up on certain issues of particular interest and obtain a deeper understanding of the topics discussed in class. They may also serve as a starting point for further research, but they do not need to be read as preparation for the class.

Course text:

The course is not taught on the basis of a single recommended textbook. Rather, for each seminar, we will assign a number of articles, book chapters, and court decisions as readings and also make available handouts with additional information and questions for discussion. A number of good books on European company law are available at the LSE library or the library of the Institute of Advanced Legal Studies (IALS). An excellent discussion of the core principles, but not up-to-date, is V Edwards, *EC Company Law*. All relevant directives

and regulations are discussed in detail in S Grundmann, *European Company Law*, and C Gerner-Beuerle and S Fleet (eds), *Gore-Brown on EU Company Law*. For additional books see the list provided below.

Students not familiar with EU law, the law-making process of the institutions or the operation and effect of directives and regulations may also want to consult a treatise on general EU law. We recommend P Craig and G de Búrca, *EU Law*, and for a focus on the substantive law of the internal market (including the right of establishment and free movement of capital, which we will discuss in detail) C Barnard, *The Substantive Law of the EU: The Four Freedoms*. Bibliographical information is given below.

General bibliography; resources useful for this course:

European and comparative company law:

- M Andenas and F Wooldridge, *European Comparative Company Law*, Cambridge University Press 2009
- S M Bartman (ed), *European Company Law in Accelerated Progress*, Kluwer Law International 2006
- U Bernitz and W-G Ringe, *Company Law and Economic Protectionism: New Challenges to European Integration*, Oxford University Press 2010
- A Cahn and D C Donald, *Comparative company law: text and cases on the laws governing corporations in Germany, the UK and the USA*, Cambridge University Press 2010 ([e-book](#) and in the library course collection K1315 C13)
- PL Davies et al. (eds.), *Corporate boards in law and practice: a comparative analysis in Europe*, Oxford University Press 2013
- A F M Dorresteyn et al (eds), *European Corporate Law*, Kluwer Law International 2009
- F Dornseifer, *Corporate Business Forms in Europe*, Sweet & Maxwell 2005
- V Edwards, *EC Company Law*, Clarendon Press 1999
- A M Fleckner and K J Hopt (eds), *Comparative corporate governance: a functional and international analysis*, Cambridge University Press 2013
- C Gerner-Beuerle and S Fleet (eds), *Gore-Brown on EU Company Law* (Jordans Publishing, 2011-2015)
- S Grundmann, *European Company Law*, 2nd ed, Hart 2012
- N Moloney, *EC Securities Regulation*, 2nd ed, Oxford University Press 2008
- J Rickford (ed), *The European Company: Developing a Community Law of Corporations*, Intersentia 2003
- R Veil, *European Capital Markets Law*, Hart 2013
- G J Vossestein, *Modernisation of European Company Law and Corporate Governance*, Kluwer Law International 2010

Books on selected national corporate law systems:

- P L Davies and S Worthington, *Gower and Davies' Principles of Modern Company Law*, 9th ed, Sweet & Maxwell 2012
- A Dignam and J Lowry, *Company Law*, 7th ed, Oxford University Press 2012
- D Kershaw, *Company Law in Context*, 2nd ed, Oxford University Press 2012

- J P Le Gall, *French Company Law*, 2nd ed, Longman 1992
- P Mäntysaari, *Comparative Corporate Governance*, Springer 2005
- J J du Plessis et al, *German Corporate Governance in International and European Context*, Springer 2012
- G Wirth, M Arnold, R Morshäuser and M Greene, *Corporate Law in Germany*, 2nd ed, Beck 2010

Books on general EU law:

- C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed, Oxford University Press 2013
- D Chalmers, G Davies, and G Monti, *European Union Law*, 2nd ed, Cambridge University Law, 2010
- P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 5th ed, Oxford University Press 2011
- P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd ed, Oxford University Press 2011
- T Hartley, *The Foundations of European Union Law*, 7th ed, Oxford University Press 2010
- L Woods and P Watson, *Steiner & Woods EU Law*, 11th ed, Oxford University Press 2012

Websites:

- <http://europa.eu.int/eur-lex/lex/> (EUR-Lex: Official Journal of the European Union, treaties, legislation, case-law, and legislative proposals.)
- http://curia.europa.eu/jcms/jcms/Jo1_6308/curia (European Court of Justice)
- Treaty on the Functioning of the European Union: <http://eur-lex.europa.eu/en/treaties/new-2-47.htm>
- All Company Law Directives, Regulations and Recommendations are listed here:
http://ec.europa.eu/justice/civil/company-law/eu-company-law/index_en.htm
- Website of the European Commission concerning regulatory activity in company law and corporate governance: http://ec.europa.eu/justice/civil/company-law/index_en.htm
- Website of the European Commission concerning financial services and capital markets regulation:
http://ec.europa.eu/internal_market/top_layer/financial_capital/index_en.htm

Course overview:

The course will be taught in twelve seminars of 3 hours each.

1. Introduction; the EU company law harmonisation programme, primary and secondary legal sources of EU company law; nature of EU law-making and the effect of EU law
2. Nature and effect of EU law cont'd / First Company Law Directive: formation and disclosure
3. Right of establishment I
4. Right of establishment II
5. Free movement of capital I
6. Free movement of capital II / Second Directive and capital structure I
7. Second Directive and capital structure II
8. Corporate Governance Regulation in the EU
9. European Company Law Forms
10. European Takeover Regulation
11. Corporate Restructuring (Mergers & Divisions)
12. Concluding session: state of European company law harmonisation; potential for regulatory competition and regulatory arbitrage

DETAILED SYLLABUS

1. Introduction; the EU company law harmonisation programme, primary and secondary legal sources of EU company law; nature of EU law-making and the effect of EU law

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In the first session of our course, we will outline the subject areas covered by the course and discuss their relevance for business operations across Europe and beyond. Unlike national legal systems, EU law does not provide a single framework for the organisation of business associations across the Union. Ambitious plans for the creation of such a single European company law have proven unrealistic for a variety of reasons, economic, political and legal, and as a matter of fact more than forty years after the beginning of a wide-ranging harmonisation programme, most areas of what we could call “core” company law firmly remain in the hands in national legislators.

Corporations are by far the most important way to organise business activities in virtually all (market) economies across the world. We will use our first session to discuss the obstacles created for the integration of national economies by the existence of different company law systems, in particular for corporations active across borders. We will analyse the advantages and disadvantages of harmonisation, as well as the main economic and political factors affecting national states’ incentives for an approximation of company laws.

We will also review basic principles of EU law-making and the nature and effect of EU law, which are particularly important in assessing how the requirements of the Company Law Directives impact the position of shareholders, directors, and other corporate actors where the Directives have not been implemented correctly by the Member States, and how the market freedoms enshrined in the Treaty on the Functioning of the EU (TFEU) affect companies and individuals.

Core Readings:

For students not yet familiar with the European legal system, we recommend to read Chapters 1 and 4 of P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 5th ed, 2011) – Library: [KJE945 C74](#). For students with no or limited background in general company law, we recommend reading Chapters 1 and 2 of R Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd ed, 2009) – Library: [K1315 A53](#).

For a good introduction to European Company Law, as well as an overview of current discussions in this area of law, read J Armour and W-G Ringe, 'European Company Law 1999-2010: Renaissance and Crisis' (2011) 48 *Common Market Law Review* 125-174 ([available here](#)).

Discussion questions:

1. In what way can differences in national company laws affect cross-border business and trade?
2. Which law governs a company and when is a corporation “foreign”? How does the US address the “problem of the foreign corporation”?
3. What are the real seat and the incorporation doctrines?
4. What are the incentives of national legislators when regulating *international* company law?
5. What are the main instruments of EU law used in the area of company law harmonisation, and how have they affected the European corporate landscape

2. Nature and effect of EU law cont'd / First Company Law Directive: formation and disclosure

In the second seminar, we will examine the First Company Law Directive (now Directive 2009/101/EC), which deals with the formation and disclosure of companies. It does not, however, regulate these questions comprehensively. Rather, it addresses a few specific issues, namely the disclosure obligations that arise on occasion of the formation of the company, the validity of the obligations entered into by the company, and nullity of the company. The First Directive, more than any of the other company law directives, has created problems of implementation for some Member States, notably the United Kingdom. When it was drafted in the 1960s, the UK had not yet acceded to the EU. Consequently, the UK had no input in the drafting process and the principles laid down in the Directive were largely informed by continental European concepts. We will discuss the main provisions of the Directive and show how it has created conflicts with established doctrines of English common law.

Core Readings:

Please read the following materials dealing with issues raised by the First Company Law Directive:

- Directive 2009/101/EC
- Case C-97/96 *Daihatsu* [1997] ECR I-6843
- Case C-106/89 *Marleasing* [1990] ECR I-4135
- Case C-104/96, *Rabobank*, [1997] ECR I-7219
- *Cotronic (UK) Ltd v Dezonie* [1991] B.C.C. 200
- *Phonogram Ltd v Lane* [1982] QB 938
- *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653.
- *Rolled Steel Products (Holding) Ltd v British Steel Corporation* [1986] Ch 246.
- *Smith v Henniker-Major and Co* [2003] Ch 182.
- A Cahn and D C Donald, *Comparative company law: text and cases on the laws governing corporations in Germany, the UK and the USA*, Cambridge University Press 2010, Ch. 4 ([e-book](#) and in the library course collection K1315 C13)

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Optional Readings:

- Commission Green Paper: The interconnection of business registers, COM(2009) 614 final
- S Grundmann, *European Company Law*, 2nd ed, Hart 2012, §§ 7-9
- M Schillig, 'Chapter 2: Core Company Law Provisions – The First and Second Directives' in *Gore-Brown on EU Company Law* (Jordans Publishing, 2015) para. 2[0] – 2[5]
- *For a detailed discussion of UK law*: D Kershaw, *Company Law*, Oxford University Press 2012, Ch. 4

Discussion questions:

1. What is the rationale the Directive 2009/101/EC (the former First Company Law Directive)? According to *Daihatsu*, who does it aim to protect?

2. Consider Art. 12(b)(ii) of Directive 2009/101/EC, which provides that nullity of the company may be ordered if “the objects of the company are unlawful or contrary to public policy”. In *Marleasing*, the ECJ held in paragraph 11 that this provision only referred to “objects of the company as described in the instrument of incorporation or the articles of association” and not to the activity actually pursued by the company. Do you agree with the reasons of the Court for adopting such a restrictive interpretation? What is the scope of Art. 12(b)(ii) of Directive 2009/101/EC, then, after *Marleasing*? What is the effect of the decision on the rights of Marleasing SA, the plaintiff?
3. What is the consequence of the *ultra vires* doctrine? Who does it protect; who is left vulnerable?
4. How has the common law changed as a consequence of implementation of Art. 8 of Directive 2009/101/EC? Under what circumstances is the common law still important? Under English law, liability for pre-incorporation debts does not cease automatically upon registration, neither does the company automatically become a party to the contract. How can the persons who have acted on behalf of the company avoid liability after registration? How can the company adopt the respective contract?
5. Does the ECJ’s decision in *Rabobank* truly accord with the rationale of article 10 of Directive 2009/101/EC? What do you make of the Courts argument based on article 10 of the (draft) Fifth Company Law Directive?

3+4. Right of establishment

In these two seminars, we will look at the foundations of the freedom of establishment, as they affect the operation of corporations in the European Union.

The main aims for this session are:

- i. to give you a better understanding of the problems “foreign” corporations pose, within the EU and more generally, and to give you an overview of how these problems have been addressed within the EU
- ii. to introduce you to the Treaty principles at issue in this area, including the scope of the freedom of establishment and the possible justifications Member States may have to restrict this freedom;
- iii. to analyse in some detail the case law of the European Court which as we shall see has had a profound impact on the developments in European Company Law (and company law in Europe).

Core Readings:

For Session 3

- Case 2/74 *Reyners v Belgium* [1974] ECR 631
- Case 79/85 *Segers* [1986] ECR 2375
- Case C-81/87 *Daily Mail* [1988] ECR 5483
- Case C-212/97 *Centros* [1999] ECR I-1459
- J Rickford and E Schuster, ‘Freedom of Establishment and Corporate Mobility (part I)’ [hand-out to be distributed electronically]

For Session 4

- J Rickford and E Schuster, ‘Freedom of Establishment and Corporate Mobility (part II)’ [hand-out to be distributed electronically]
- Case C-208/00 *Überseering* [2002] ECR I-9919
- Case C-167/01 *Inspire Art* [2003] ECR I-10155
- Case C-411/03 *SEVIC Systems AG* [2005] ECR I-10805
- Case C-210/06 *Cartesio Oktató és Szolgáltató bt.* [2008] ECR I-96415
- Case C-371/10 *National Grid Indus* [2011] 2011 I-12273
- Case C-378/10 *VALE Építési kft, nyr*
- C Gerner-Beuerle, and M Schillig, ‘The Mysteries of Freedom of Establishment After Cartesio’ (2010) 59 *International and Comparative Law Quarterly* 303

Optional readings:

- M Menjucq, 'Towards the end of the real seat theory in Europe?' in: M Tison and others (eds), *Perspectives in Company Law and Financial Regulation - Essays in Honour of Eddy Wymeersch* (Cambridge, Cambridge University Press 2009) 124
- J Borg-Barthet, 'Free At Last? Choice of Corporate Law in the EU Following the Judgment in Vale' (2013) 62 *International and Comparative Law Quarterly* 503
- W-G Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition' (2013) 10 *European Company and Financial Law Review* 230
- A Johnston, and P Syrpis, 'Regulatory competition in European company law after Cartesio' (2009) 34 *European Law Review* 378.

Discussion questions:

- To what extent do establishment rights promote choice of law in corporate law?
- What are the effects of the ECJ case law on national law-making?
- What are the possible policy motivations for adopting a private international law framework for companies that follows the "real seat doctrine"?
- Is it correct to state that the real seat doctrine has been outlawed by the ECJ case law in our area?

5. Free movement of capital I

In this seminar we will examine the implications that the golden shares jurisprudence of the ECJ has for the authority of Member States to design their corporate law regimes (e.g., by allowing for multiple voting rights or other control-enhancing mechanisms) and the authority of private market actors (shareholders, directors etc.) to provide for mechanisms in the articles of association that could potentially deter investors/takeover bidders.

Core readings:

- Treaty on the Functioning of the EU, Arts. 63-66
- Case C-367/98 *Commission v Portugal* [2002] ECR I-4731 (Golden shares I)
- Case C-483/99 *Commission v France* [2002] ECR I-4781 (Golden shares II/Elf-Aquitaine)
- Case C-503/99 *Commission v Belgium* [2002] ECR I-4809 (Golden shares III)
- Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641 (BAA)
- Joined Cases C-282/04 & C-283/04 *Commission v Netherlands* [2006] ECR I-9141 (KPN/TPG)
- Case C-112/05 *Commission v Germany* [2007] ECR I-8995 (VW)
- Case C-543/08 *Commission v Portugal* [2010] ECR I-11241 (Commission v Portugal II)
- W.G. Ringe, 'Company Law and Free Movement of Capital' (2010) 69 *Cambridge Law Journal* 378

Optional readings:

- Joined Cases C-463/04 & C-464/04 *Federconsumatori and Others and Associazione Azionariato Diffuso dell'AEM SpA and Others v Comune di Milano* [2007] ECR I-10419 (Federconsumatori)
- Case C-171/08 *Commission v Portugal* [2010] ECR I-6817 (Commission v Portugal I)
- Report on the proportionality principle in the European Union – ISS Europe, ECGI, Shearman & Sterling - 18 May 2007
- C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed, Oxford University Press 2013, Ch. 15
- C Gerner-Beuerle, 'Shareholders between the Market and the State. The VW Law and Other Interventions in the Market Economy' (2012) 49 *Common Market Law Review* 97-143
- J Rickford, 'Free movement of capital and protectionism after *Volkswagen* and *Viking Line*' in Tison et al. (Eds.), *Perspectives in Company Law and Financial Regulation. Essays in Honour of Eddy Wymeersch*, Cambridge University Press 2009, p. 83
- F Sanders, 'Case C-112/05, European Commission v. Federal Republic of Germany: The Volkswagen case and Art. 56 EC – A proper result, yet also a missed opportunity?' (2008) 14 *Colum. J. Eur. L.* 359

Discussion questions:

- What is the structure of the free movement of capital according to Articles 63-66 TFEU?

- Consider the “first generation” free movement of capital case-law (Golden shares I-III): when are special rights of the State as a shareholder, such as appointment or veto rights, compatible with free movement of capital under the TFEU?
- Beyond “special rights”: BAA and VW
 - Consider the arguments advanced by the UK and German governments in BAA and VW that the challenged laws did not vest special rights in the State as such, but that ownership restriction, voting caps, and supermajority requirements arose as the result of the normal operation of company law and were applicable without distinction to all shareholders of the companies concerned. Why did the Court nevertheless hold that the challenged laws constituted restrictions of the free movement of capital that were not justified? What are the risks that state ownership of shares in companies may create, and can the Court’s holdings be conceptualised as addressing these risks?
 - Horizontal reach of Article 63 TFEU: In light of BAA and VW, are now all provisions of a Member State’s corporate law in need to justification under the Treaty, including those that do not favour a state body, but apply between private parties? For example, consider a private incorporator who adopts voting caps or issues shares with multiple voting rights in order to entrench control. Does Article 63 TFEU apply here?

6+7. Free movement of capital II / Second Directive and capital structure

In these two seminars we will finish our discussion of the Court's golden shares jurisprudence and give an overview of the Second Company Law Directive. In particular, we will discuss the economic rationale and effectiveness of legal capital, and analyse in more detail minimum capital rules, distributions to shareholders, and changes in the company's capital structure. These areas are regulated in fairly great detail in the Directive, but the reach and interpretation of the provisions of the Directive have given rise to repeated litigation. The problems often concerned the possibility of Member States to go beyond the Directive and impose more stringent requirements to safeguard the legal capital of the company. We can again see a certain clash of regulatory philosophies: in some Member States, for example Germany, legal capital plays a central role as a mechanism to protect creditors and is, accordingly, regulated strictly. Other Member States, for example the UK, employ different strategies to protect creditors. Consequently, they have traditionally been lenient in imposing restrictions on the company's freedom to make distributions or change the capital structure. We will discuss the relevant case law of the Court of Justice and also make references to the laws of some Member States and decisions of national courts.

Core readings:

- Handout (to be distributed to students)
- J Armour 'Legal Capital: An Outdated Concept?' (2006) 7 *European Business Organisation Law Review* 5
- Joined Cases C-19/90, 20/90 *Kerrella and Kerellas* [1991] ECR I-2691
- Case C-42/95 *Siemens AG v Nold* [1996] ECR I-6017
- Case C-101/08 *Audiolux SA* [2009] ECR I-9823

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Optional readings:

- Company Law SLIM Working Group on The Simplification of the First and Second Company Law Directives: Proposals submitted to the European Commission, 1999
- J Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 *Modern Law Review* 355
- L Enriques and J Macey, 'Creditors versus Capital Formation: The case Against the European Legal Capital Rules' (2001) 86 *Cornell L. Rev.* 1165
- S Grundmann, *European Company Law*, 2nd ed, Hart 2012, § 11
- P Mulbert and M Birke, 'Legal Capital – Is there a case against the European legal Capital Rules?' (2002) 3 *European Business Organisation Law Review* 695
- J Rickford (ed), 'Reforming. Capital: Report of the Interdisciplinary Committee on Capital Maintenance' (2004) *European Business Law Review* 919-1027

- M Schillig, 'Chapter 2: Core Company Law Provisions – The First and Second Directives' in *Gore-Brown on EU Company Law* (Jordans Publishing, 2015) para. 2[8] – 2[15]
- *For a detailed discussion of UK law:* D Kershaw, *Company Law*, Oxford University Press 2012, Chs. 17, 19

Further relevant case law:

- Case C-83/91 *Meilicke* [1992] ECR I-4871
- Case C-441/93 *Pafitis* [1996] ECR I-1347
- Case C-367/96 *Kefalas* [1998] ECR I-2843
- Case C-373/97 *Dionysios Diamantis* [2000] ECR I-1705
- Case C-338/06 *Commission v Spain* [2008] ECR I-10139
- Case C-174/12 *Alfred Hirman v Immofinanz AG*, nyr

Discussion questions:

- What is “legal capital” and why does it need to be protected?
- Is the capital maintenance regime as designed by the Second Company Law Directive fit for purpose?
- What are the requirements for an increase of capital according to the Directive and when do these requirements have to be complied with (see *Kerrella and Kerellas*)? Consider also that, when deciding *Kerrella and Kerellas* and other Greek cases dealing with similar issues (such as *Panagis Pafitis*), the ECJ based its holdings on the rules of a Directive that had not been implemented correctly in the Member State. Are there any problems with the enforcement of not, or not correctly, implemented Directives?
- What is the economic function of pre-emption rights?
- Why does German law, as reviewed by the ECJ in *Siemens v Nold*, provide for a so-called “substantive review” of the decision of the general meeting to remove pre-emptive rights? Is this review, which goes beyond the requirements of the Second Company Law Directive, in line with European law? If the substantive review is applied strictly, does it create problems of a practical nature for companies?

8. Corporate Governance Regulation in the EU

Corporate governance is probably the least harmonised area of corporate law in the EU. Initial harmonisation efforts go back as far as 1972, when the Commission proposed an ambitious Draft Fifth Company Law Directive containing rules on board structure and the powers and obligations of the organs of public limited companies. The original proposal provided for a mandatory two-tier system of corporate governance consisting of a management board and a supervisory board. This rigid regime met with little enthusiasm by Member States with a unitary board system, notably the United Kingdom that had acceded to the EU in 1973. An amended proposal, published in 1983, sought to ameliorate the concerns by allowing companies to choose between a two-tier and a one-tier board structure. However, other controversial issues, for example employee participation in the management of the company, were not solved by the amendments. Several additional proposals presented by the Commission in the following years could likewise not attain sufficient approval, and the Draft Fifth Directive was eventually withdrawn in 2001. Since then, the Commission has focussed efforts on soft-law measures, for example recommendations concerning board composition and remuneration, and binding initiatives with a narrow scope, such as Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies. In this seminar, we will discuss the failed Fifth Directive and other relevant regulatory initiatives at the European level, but also looks at essential features of national corporate governance regimes, in particular board structure models and approaches to constraining the discretion of directors by means of fiduciary duties.

Core readings:

- Draft Fifth Company Law Directive (will be made available to students)
- Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, OJ 25.2.2005 L 52/51-63
- Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, OJ 14.7.2007 L 184/17-24
- PL Davies and KJ Hopt, 'Corporate Boards in Europe—Accountability and Convergence' (2013) 61 *American Journal of Comparative Law* 301–376. Also available as ECGI - Law Working Paper No. 205/2013 at <http://ssrn.com/abstract=2212272>
- Holger Fleischer, 'Legal Transplants in European Company Law – The Case of Fiduciary Duties' (2005) 2 *ECFR* 378–397

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Optional readings:

- Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM/2014/0213 final
- Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM/2012/0740 final
- Green Paper: The EU corporate governance framework COM(2011) 164 final

- C Gerner-Beuerle and EP Schuster, 'Mapping Directors' Duties: The European Landscape, in: Hanne Birkmose, Mette Neville & Karsten Engsig Sørensen (eds.), *Boards of Directors in European Companies*, Kluwer Law International 2013. Available at: <http://ssrn.com/abstract=2249050>
- S Grundmann, *European Company Law*, 2nd ed, Hart 2012, §§ 12-14
- KJ Hopt, 'Better Governance of Financial Institutions' (2013) 13 *Journal of Corporate Law Studies* 219-253; also available as ECGI Law Working Paper No. 207/2013, <http://ssrn.com/abstract=2212198>
- KJ Hopt, 'Comparative corporate governance: The state of the art and International Regulation' (2011) 59 *American Journal of Comparative Law* 1-63
- KJ Hopt, 'The German Two-Tier Board (Aufsichtsrat) – a German View on Corporate Governance' in: K Hopt and E Wymeersch (eds), *Comparative Corporate Governance – Essays and Materials*, pp. 3 et seq.
- KJ Hopt and PC Leyens, 'Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy' (2004) 2 *ECFR* 135
- *UK law*: D Kershaw, *Company Law*, Oxford University Press 2012, Ch. 7
- *Governance of financial institutions and risk-taking*: D Ferreira, D Kershaw, T Kirchmaier and EP Schuster, 'Shareholder Empowerment and Bank Bailouts', ECGI Finance Working Paper No. 345/2013. Available at: <http://ssrn.com/abstract=2170392> (analysing the link between corporate governance arrangements of banks and their risk exposure, measured as the likelihood to receive TARP money as part of the US government bailout after the subprime mortgage crisis)

Discussion questions:

- Did the draft Fifth Directive really give Member States a choice between the one-tier and the two-tier board system? How did the draft Directive balance the competences of the different company organs?
- Is it convincing to regulate board structure by means of a recommendation (Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board) and corporate governance codes? How are corporate governance codes enforced? In its 2012 Action Plan, the Commission criticised that the explanations provided by companies that deviate from the applicable corporate governance code are often insufficient. Isn't this proof that regulation by means of soft law does not work, and how can the situation be improved?
- Do we need more diversity on corporate boards? Is the Commission's approach to provide for a fixed quota for the underrepresented sex as regards non-executive board positions the right way?
- Should shareholders have a greater say on various issues of business administration, for example the determination of executive pay or the approval of related party transactions?
- Why has there not been more harmonisation of corporate governance rules and in particular harmonisation of the law on directors' duties?

9. European Company Law Forms

In this seminar we will examine European forms of business associations, in particular the European Company ("Societas Europaea" / SE). We will discuss how differences in corporate law and governance across the 28 Member States affected the creation of a "pan-European" company form. We will also analyse the way in which the resulting problems have been addressed by the EU legislature, and assess the value of the SE as a legal vehicle for doing business in Europe. Brief mention will be made of other (existing and proposed) company forms stemming from EU law.

Core readings:

- J Rickford, 'The European Company', in J Rickford (ed.), *The European Company*, Amsterdam: Intersentia (2004), Chapter 2 only (pp 13-33); available in the library: KJE2448 E81 (Course Collection)
- European Company Statute (Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294/1): Please look at Arts. 15-37 (formation); 9, 10 (status), 7 and 8
- Proposal for a Directive on single-member private limited liability companies ([available here](#))
- Study on the operation and the impacts of the Statute for a European Company (2009), ([available here](#) – please just take a brief look at the executive summary)
- P Davies, 'Workers on the Board of the European Company?' (2003) 32 Industrial Law Journal 75 (skim-read to get an idea of the employee participation dimension)

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Optional readings:

- WG Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 *Journal of Corporate Law Studies* 185 (this links to our discussion of Freedom of Establishment – is this still convincing after Cartesio)?
- H Eidenmüller, A Engert and L Hornuf, 'How Does the Market React to the Societas Europaea?' in: Ringe and Bernitz (eds) *Company Law and Economic Protectionism: New Challenges to European Integration* (2010)
- PL Davies, "The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws" (2011) – [available here](#)
- J Kirshner, 'A Third Way: Regional Restructuring and the Societas Europaea' (2010) 7 *European Company and Financial Law Review* 444

10. European Takeover Regulation

In this seminar we will provide an overview of the European regulatory framework for takeover offers. We will discuss the relevance of corporate control transactions for the internal market, and provide an overview of the political dimension of this area of law. The main aim of this session is to familiarise you with the regulatory challenges in this area and the interconnection between takeover law, primary EU law, and national corporate law. We will focus in particular on the European Takeover Directive and its implementation in different Member states, the regulation of takeover defences, "mandatory bids" as well as the underlying rationales.

Core readings:

- PL Davies, EP Schuster and E van de Walle De Ghelcke, 'The Takeover Directive as a Protectionist Tool?' ECGI Working Paper 141/2010 (available at SSRN: <http://ssrn.com/abstract=1554616>)
- V Edwards, 'The Directive on Takeover Bids – Not Worth the Paper It's Written On?' (2004) 1 *European Company and Financial Law Review* 416
- Handout on EU Takeover Regulation (to be distributed online)

Optional readings:

- C Gerner-Beuerle, D Kershaw, and M Solinas, 'Is the board neutrality rule trivial? Amnesia about corporate law in European takeover regulation' (2011) 22 *European Business Law Review* 559
- EP Schuster, "The Mandatory Bid Rule: Efficient, After All?" (2013) 76 *Modern Law Review* 529
- B Clarke, 'The Takeover Directive: is a little regulation better than no regulation?' (2009) 15 *European Law Journal* 174
- L Enriques, 'European Takeover Law: The Case for a Neutral Approach' (2011) 22 *European Business Law Review* 623
- B Clift, 'The Second Time as Farce? The EU Takeover Directive, the Clash of Capitalisms and the Hamstrung Harmonization of European (and French) Corporate Governance' 47 *Journal of Common Market Studies* 55

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Other useful resources for reference

- AMF General Regulation (French takeover regulation) - see Title III (p 38) [English version] - [\[link\]](#)
- German Securities Acquisition and Takeover Act (WpÜG) [English version] [\[link\]](#)
- Italian Consolidated Law on Financial Intermediation [English version] - [\[link\]](#)
- Commission Report on the revision of the Takeover Directive [\[link\]](#)
- External Study on the application of the Directive on takeover bids [\[link\]](#)

Discussion questions:

- What were the main challenges for the European legislator in harmonising takeover law across the EU?
- Should managers have any influence over the outcome of a takeover bid?
- To what extent do general European corporate laws limit the ability of directors to defend a company against a “hostile” takeover bid?
- How does the “mandatory bid rule” operate? Who does this rule intend to protect, and how?
- What are the likely costs and benefits of the mandatory bid rule for the bidder, shareholders of the target company and the economy at large?

11. Corporate Mergers & Restructuring in Europe

In this lecture we will provide you with an overview of the restructuring mechanisms made available under EU law. We will look at domestic company mergers, corporate divisions (“de-mergers”/“scissions”), and cross-border mergers. The lecture is intended to give you an idea of the regulation of mergers and divisions, and the risks these transactions can pose for shareholders, creditors, and employees.

Core readings:

- E Schuster, “Handout on Mergers & Divisions” (to be made available electronically)
- T Papadopoulos, 'EU regulatory approaches to cross-border mergers: exercising the right of establishment', (2011) 36 *European Law Review* 71
- M Gelter, 'Tilting the Balance between Capital and Labor - The Effects of Regulatory Arbitrage in European Corporate Law on Employees' (2010) 33 *Fordham International Law Journal* 792

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Optional readings:

- J Rickford, 'The Proposed Tenth Company Law Directive on Cross-Border Mergers and its impact in the UK' (2005) 16 *European Business Law Rev* 1393
- J Payne, “Schemes of Arrangement, Takeovers and Minority Shareholder Protection” (2011) 11 *Journal of Corporate Law Studies* 67
- PL Davies, Gower and Davies: Principles of Modern Company Law (8th ed) 29-1 to 29-11 (pages 1059-1073) - KD2079.A7 G72 [schemes of arrangement in the UK]
- M Pannier, 'The EU Cross Border Merger Directive - A New Perspective for Company Restructuring and Employee Participation', (2005) 16(6) *European Business Law Review* 1424
- EU Commission Study on Cross-Border Merger Directive [available [here](#)]

Discussion questions:

- What are the main risks for minority shareholders of a merging company?
- What are the risks for creditors in mergers and divisions? What are the main strategies for addressing these risks?

- How can cross-border mergers be used for implementing re-incorporations?
- How effectively does European law protect existing employee participation arrangements in cross-border mergers?
- What are the differences between mergers and share-for-share takeover offers?
- Why did the European legislator decide to harmonise purely domestic mergers before attempting to simplify cross-border merger procedures?

12. Concluding session: state of European company law harmonisation; potential for regulatory competition and regulatory arbitrage

We will use this session to revise what we have learned in the previous seminars and embed the revision in a discussion of regulatory competition and arbitrage. We start by introducing the concepts of regulatory competition and regulatory arbitrage. We will then ask whether a market for corporate charters exists in the EU as it does in the US, or whether such a market is likely to emerge. This clearly depends on the ease with which companies and incorporators can choose between different (company) laws and take advantage of the differences in connecting factors – as discussed in the context of the *Centros* line of cases. A related point concerns the reach of company law from a European perspective, which we will analyse in the context of the EU insolvency regulation.

Core readings:

- J Armour and W-G Ringe, 'European company law 1999 2010: Renaissance and crisis' (2011) 48 *Common Market Law Review* 125-174
- C Gerner-Beuerle and EP Schuster, 'The Costs of Separation: Friction between Company and Insolvency Law in the Single Market' (2014) *Journal of Corporate Law Studies* 14(2), also available as LSE Law, Society and Economy Working Papers 6/2014, <http://ssrn.com/abstract=2346676>
- Wolf-Georg Ringe, 'Corporate mobility in the European Union – a flash in the pan? An empirical study on the success of lawmaking and regulatory competition' (2013) 10 *European Company and Financial Law Review* 230–267
- Roberta Romano, 'Law as a product: Some Pieces of the Incorporation Puzzle', (1985) 1 *J.L.E.&O.* 225

Optional readings:

- John Armour, 'Who should make corporate law? EC legislation versus regulatory competition' (2005) 58 *Current Legal Problems* 369–413
- Lucien A Bebchuk, 'Federalism and the corporation: the desirable limits on state competition in corporate law' (1992) 105 *Harvard Law Review* 1435–1510
- L.A. Bebchuk, A. Cohen & A. Ferrell, 'Does the Evidence Favor State Competition in Corporate Law?', (2002) 90 *Cal. L. Rev.* 1775

- W. Cary, 'Federalism and Corporate Law: Reflections Upon Delaware', (1974) 83 Yale L. J. 663
- Simon Deakin, 'Two types of regulatory competition: competitive federalism versus reflexive harmonisation. A law and economics perspective on Centros' (1999) 2 Cambridge Yearbook of European Legal Studies 231–260
- Horst Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' (2005) 6 European Business Organization Law Review (EBOR) 423–447
- Luca Enriques and Martin Gelter, 'How the old world encountered the new one: Regulatory competition and cooperation in European corporate and bankruptcy law' (2007) 81 Tul. L. Rev. 577
- Luca Enriques and Martin Gelter, 'Regulatory Competition in European Company Law and Creditor Protection' (2006) 7 European Business Organization Law Review (EBOR) 417
- Martin Gelter, 'The Structure of Regulatory Competition in European Corporate Law' (2005) 5 Journal of Corporate Law Studies 247–284
- M. Kahan & E. Kamar, 'The Myth of State Competition in Corporate Law' (2002-2003) 55 Stan. L. Rev. 679
- Christian Kirchner, Richard W. Painter, and Wulf a. Kaal, 'Regulatory Competition in EU Corporate Law After Inspire Art: Unbundling Delaware's Product for Europe' (2005) 2 European Company and Financial Law Review 159–206
- Stefano Lombardo, 'Regulatory Competition in Company Law in the European Union after Cartesio' (2010) 10 European Business Organization Law Review 627
- Roberta Romano, *The Genius of American Corporate Law*, AEI Press 1993
- V Fleischer, 'Regulatory Arbitrage' (2010) 89 Texas Law Review 227

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Discussion questions:

- Does a vibrant market for incorporations exist in the EU? If not yet, is such a market likely to emerge after the free movement rights of companies were strengthened in *Überseering*, *Inspire Art*, *SEVIC*, and most recently *VALE*?
- From a normative point of view, should companies be allowed to choose freely the law by which they are governed? What are the advantages and potential drawbacks of such regulatory competition?
- Will a company always be governed comprehensively by one legal regime, both for issues commonly classified as company law and issues of insolvency law? Which rules govern this question in company law and pursuant to the Insolvency Regulation?
- What is the international reach of company and insolvency law? Can the application of different legal systems to questions of company law and insolvency law, respectively, lead to problems?
- If a company is potentially subject to different insolvency and company laws, can Member States design their internal rules in a way that they fall within one legal area rather than the other? Why may a Member State have an incentive to shift legal strategies from company law to insolvency law, or vice versa, and which Member States are most likely to do so?

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