Our European Company Law
Trends and challenges

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Today’s topics

- Basics of the significance of EU law
- Significance of the EEA agreement as a connecting link to EU law
- ‘Positive’ harmonisation through secondary law (including through new EU organisational forms)
- ‘Negative’ harmonisation through case law
- Current challenges for EU & EEA Member States
Significance of EU law

- Never just a matter of implementing secondary law
- Secondary law must be interpreted in light of Treaty law

- National implementation on paper and in practice must be interpreted in light of secondary law and Treaty law

- National law on books and in practice must in general stand the scrutiny of the European system: relevant secondary law; Treaty rules and general principles on Treaty level
EU Treaty Law and the EEA link

- Overarching objectives of EU Law and their significance in the teleological, dynamic, contextual EU law system
- EEA Agreement with its main part from 1992
- The homogeneity principle: one European Economic Area
- The EEA Agreement’s objective in light of EU Law
- The significance of the EEA Agreement’s objective
‘Positive’ harmonisation

• Secondary law:
  – EU legislation with EU Treaty basis
  – EEA relevance considered on a case-by-case basis

• Harmonisation with the goal of:
  – Promoting free movement of capital and freedom of establishment
  – Protect shareholders, creditors and other involved parties

• The Company Directives:
  – A number of various company law areas
  – Including accounting and auditing
  – Interface with financial market law
Overview of most significant directives

• Included in the Company Law Directive 2017
  – Disclosure directive
  – Capital directive
  – Merger and demerger directives
  – Directive on cross-border mergers
  – Directive on branches

• Accounting directive and regulation

• Auditing directive and regulation

• Single shareholder company directive; SUP proposal

• Takeover directive

• Shareholder rights directive

• Directive on interconnection of business registers
Amended Shareholder Rights Directive: 2017/828

• EU Commission Reform Proposal 2014:
  – Recognised narrow short-termism as problematic
  – Engage institutional investors & asset managers
  – Remuneration policies: long-term & sustainability

• EU Parliament amendment proposal:
  – Recognition of stakeholders espec. employees
  – Duty for institutional investors to disclose engagement policy
  – Watered down in compromise text July 2015

• Stuck in trilogue negotiations
• Finally adopted in June 2017
Shareholder Duties in the EU?

- Inspired by UK Stewardship Code & international initiatives
  - Encouraging wording on long-term sustainability
- Focus on shareholder engagement & dialogue
- Strong shareholder-orientation

- Interim report Sustainable Finance HLEG

- Corporate group issues
‘Non-financial’ reporting

• Directive 2013/34/EU: non-financial information
  – Transparency requirements for payments: extractive industries & logging in primary forests

• Directive 2014/95/EU on non-financial and diversity information
  – environmental matters
  – social and employee-related matters; respect for human rights
  – anti-corruption and bribery matters
  – due diligence – also supply & subcontracting chains
What impact of ‘non-financial’ reporting?

- EU: ‘vital to managing change towards a sustainable global economy’
  - Implementation process completed in most Member States
    (ongoing in Norway)

- EU guidelines adopted
  - Several hundred inputs in the consultation round
  - Currently consulting experts
  - Meant to clarify content
  - Unlikely to promote stronger enforcement

- Maybe hope for the future; will require industry engagement
Corporate governance for the 21st century?

• EU also promotes Corporate Governance through Codes
  – No EU Corporate Governance Code
  – Supporting European convergence (but going where?)
  – Recommendation 2014/208/EU (improve comply or explain)
  – Directive 2013/34/EU (corporate governance statement)

• Convergence of Corporate Governance & CSR?
  – CSR tentative inroads into corporate governance codes

• EU CSR paradigm shift – leading nowhere?
• But perhaps hope through Sustainable Finance initiative?
Harmonisation through EU legal entities

- European Economic Interest Groupings (Reg. 1985)
- European Company (SE) (Reg. 2001 & Dir. 2001)
- European Company Society (Reg. 2003)
- Proposal for European Private Company (SPE) withdrawn
- The SUP proposal
- Proposal for European Foundation withdrawn
‘Negative’ harmonisation through case law

• Starting point: companies are ‘creatures of national law’

• Freedom of establishment: primacy and secondary establishment

• Free movement of capital: ‘golden shares’ - the state as shareholder
Case law on primary establishment

- Primary establishment: choice of nationality for the company

- Several not so well-known cases: Segers
- Daily Mail: tax law case with company law consequences
- Überseering: prerequisite for Treaty freedom
- Cartesio: clarification 20 years after Daily Mail
- Sevic: subsequent primary establishment
- Vale: developing Daily Mail and Cartesio
Case law on secondary establishment

• Direct and indirect secondary establishment
  – Relevance for choice of law

• From Segers to Centros

• Centros:
  – Sparked an, *inter alia*, Norwegian chaos of ‘Centros’ branches
  – And regulatory competition also amongst the Nordic states

• Inspire Art: Dutch testing of the Centros limits; «formally foreign companies»
Case law: free movement of capital

- **Idryma Typou**: the nature of the company and of limited liability for shareholders

- The **Golden Shares series**:  
  - Especially relevant in case of privatisation  
  - States as shareholders must respect the rules of the game  
  - Stricter requirements for the state as shareholder? Double set of rules?

- **Impacto Azul**: an indication of the problematic issues of cross-border group liability
Current challenges for the EU

• EU after Brexit: how to keep it together?

• Towards sustainability = incremental improvements
  – Social norm of shareholder primacy a main barrier
  – Underpinned by legal myths & legal-economic postulates
  – Path-dependency of policy-makers
  – Vested interests of business & finance
  – Economic irrationality of breaking away from herd

• Grand challenge requires systemic change
Challenges for EU & EEA MS

• Regulatory competition (and the SUP): is a race to the bottom inevitable?
• Implementing the new accounting rules
• Regulating corporate groups:
  – Chasm between control and responsibility; law and practice
  – Identifying those in control
• Tackling financialisation and short-termism
• Stimulating value in a Europe in crisis:
  – Stimulate SMEs, innovation and entrepreneurship
  – Implement UN Guiding principles on business and human rights
  – Reform company law and corporate governance to promote transition from fossil to renewable and sustainable
• International trade agreements
Further reading & contact info

• ‘Our European Company Law’ (Vår europeiske selskapsrett), updated each autumn at selskapsrettstidsskriftet.no

• The Greening of European Business under EU Law, Sjåfjell & Wiesbrock (eds), Routledge, 2015, including the chapter The Legal Significance of Article 11 TFEU for EU Institutions and Member States (on SSRN)

• Company Law and Sustainability, Sjåfjell & Richardson (eds), Cambridge University Press, 2015

• Recent papers at ssrn.com/author=375947

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