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Our European Company Law Developments and challenges

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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 be prepared for the scrutiny of the European system

EU Treaty Law and the EEA link

- EU Treaty Law: Treaty on the European Union and Treaty on the Functioning of the European Union; Charter, general principles
- 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

Significant secondary legislation 1:2

- The [Company Law Directive 2017](#)
 - Disclosure, capital, merger and demerger, cross-border mergers, branches
- Important 2019 amendments:
 - [Directive 2019/1151](#) on digital tools and processes
 - [Directive 2019/2121](#) on on cross-border conversions, merger and divisions

Significant secondary legislation 2:2

- Accounting directive and regulation
- Auditing directive and regulation
- Single shareholder company directive
- Takeover directive
- Shareholder rights directive
- Directive on interconnection of business registers

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
- [EU Sustainable Finance Initiative](#)
- 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

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)
- Towards sustainable corporate governance – perhaps time for a serious company law reform?

Harmonisation through EU legal entities

- European Economic Interest Groupings (Reg. 1985)
- European Company (SE) (Reg. 2001 & Dir. 2001)
- European Cooperative Society (Reg. 2003)

- Proposal for European Private Company (SPE)
withdrawn, replaced by 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
- **Polbud**: confirms and develops Vale

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
- Reforming EU company law
- Grand challenge requires systemic change

Selected SMART reports

- **Obstacles to Sustainable Global Business. Towards EU Policy Coherence for Sustainable Development:**
<https://ssrn.com/abstract=3354401>
- **Supporting the Transition to Sustainability: SMART Reform Proposals:** <https://ssrn.com/abstract=3503310> (introductory report)
- The detailed reform proposals:
 - **Securing the Future of European Business: SMART Reform Proposals:** <https://ssrn.com/abstract=3595048>
 - **Financing the Transition to Sustainability: SMART Reform Proposals** SSRN: <https://ssrn.com/abstract=3594433>
 - **Towards a Sustainable Circular Economy: SMART reform proposals:** <https://papers.ssrn.com/abstract=3596076>
- **Facilitating Interdisciplinary Corporate Sustainability Research: The SMART Research Guide:** <https://ssrn.com/abstract=3626903>
- **The Financial Risks of Unsustainability: A Research Agenda,**
<https://ssrn.com/abstract=3637969>

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