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Our European Company Law Trends and challenges

Professor Beate Sjøfjell
University of Oslo, Faculty of Law

b.k.sjafjell@jus.uio.no
 **@BeateSjafjell**
ssrn.com/author=375947



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

- 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

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*](#), Sjøfjell & 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*](#), Sjøfjell & Richardson (eds), Cambridge University Press, 2015
- Recent papers at ssrn.com/author=375947

E-mail: b.k.sjafjell@jus.uio.no

LinkedIn: Beate Sjøfjell; Facebook: Beate Sjøfjell

 @BeateSjafjell