EUROPEAN COMPARATIVE COMPANY LAW

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creditors are protected, and that there is a balance of burdens and advantages over time for the shareholders. This proposal may owe something to French law, but it may be of too general a character to have much influence on the conduct of groups. Although they have certain defects the provision of German *Konzernrecht* have been thought to merit detailed discussion in this chapter. They have had a considerable influence outside Germany, for example in Portugal, Brazil, Slovenia and Croatia.

The penultimate chapter deals with takeovers and mergers. As well as examining the Thirteenth Directive on takeovers, it examines in outline the rules of law of certain of the relevant Member States concerning mandatory bids and defences to takeovers. The impact of the Cross-Border Mergers Directive is considered in this chapter.[14] A more comprehensive examination of the law governing takeovers would exceed the limits of the present work. This chapter also briefly, considers mergers, and the rules of competition law which applies to them.

The work concludes with an account of the Market Abuse Directive (covering insider dealing and market manipulation),[15] which has the effect of repealing the Insider Dealing Directive of 1989, which was implemented in rather different ways in all the Member States. This is the first Directive under which the Commission submitted comitology proposals for secondary legislation under the Lamfalussy procedure. The creation of a satisfactory legal framework for dealing with market manipulation has taken some time and has now moved on to the national level of transposing the EU directive and secondary legislation. Much comparative material is available on the transposition of the Insider Dealing Directive, which has been repealed but where the legislation that implemented it in some countries remains in place (such as with the UK insider dealing legislation). The transposition in Germany has required amendment of the law relating to market manipulation which is contained in the Fourth Financial Market Promotion Act of 2002.

[14] Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies OJ 2005 L310/1.

[15] Directive 2003/6/EC on insider dealing and market abuse OJ 2003 L96/16.

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European and comparative company law

I. Harmonisation and free movement

A. Treaty provisions

It is now recognised generally that although there is no question of the total approximation or harmonisation of the company laws of the Member States, a considerable body of European company law has been brought into existence.[1] This has come about mainly through the enactment of directives under Articles 44(2)(g) and 95 EC (former Articles 54(3)(g), 100a EC). The first mentioned Article is set out in Chapter 2, 'Right of establishment of Title II EC, "free movement of persons, services and capital"'. It provides:

> The Council and the Commission shall carry out the duties devolving on them under the preceding provisions,[2] in particular (g) by coordinating to the necessary extent the safeguards which for the protection of the interests of members and others, are required by Member States of companies within the meaning of Article 48(2)[3] with a view to making such safeguards equivalent throughout the community.

[1] See for instance E. Werlauff, *EU Company Law. Common Business Law for 28 States*, 2nd edn (Copenhagen: DJØF Publishing, 2003) who argues in his introduction that 'the company law of these many states is not uniform – nor it is required to be so – but all the main company rules will, or shall, be reflected in the company law of each individual state.' He continues: 'In the "old" days European law accounts of company law necessarily had to be comparative ... the emphasis was on the differences in the company law of the states. Now the emphasis will be on the common, cross border features of company law.' He sets out a systematic treatment of EU company law with less emphasis on transposition of directives or national law concepts. See the very important book by S. Grundmann, *Europäisches Gesellschaftsrecht* (Heidelberg: C. F. Müller, 2003) and also V. Edwards, *EC Company Law* (Oxford: Clarendon Press, 1999), whose treatment generally follows the directives in their order of adoption.

[2] These provisions are those of Art. 43 EC, which prohibits restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State in the territory of another Member State. This prohibition is applicable to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State in the territory of any Member State.

[3] This provision stipulates that 'companies or firms' means companies or firms constituted under civil or commercial law including cooperative societies and other legal persons governed by private or public law, save for those which are not profit making.

Article 44(2)(g) EC is the basis for nearly all enacted directives in European company law. Despite its position in Chapter 2 of the Treaty, the Community institutions pursue a broad interpretation which is orientated towards the aims of the Treaty.[4] In that view also measures with the purpose of approximating the prevailing conditions of company law can be based on it as long as they have beneficial effect on cross-border transactions.[5] A broad construction of Article 44(2)(g) EC may now be justified, but there must be a link between the legislation adopted under this provision and the fostering of a company's right of establishment.[6] Previously, there was considerable support for an interpretation according to which Article 44(2)(g) EC is restricted to rules which promote the right of establishment.[7] Article 44(2)(g) EC merely gives the competence to issue directives, not regulations.

Article 95(1) EC provides for a different procedure for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market. Such measures must be adopted by means of the rather long and complex co-decision procedure set out in Article 251 EC, which gives the European parliament the ultimate power of vetoing the relevant draft legislation. In European company law Article 95(1) EC has in practice only been significant as the basis for directives on capital market law.[8] It has been regarded as *lex generalis* in relation to Article 44(2)(g) EC.[9] The Community legislator regularly uses both. Article 44(2)(g) and Article 95(1) EC as legal bases to enact these directives.[10] Article 95(1) EC also

[4] See Case C-97/96, *Daihatsu* [1997] ECR I-6843, 6864.

[5] R. Houin, 'Le régime juridique des sociétés dans la Communauté Economique Européenne' [1965] RTDE 11, 16; see also Edwards, *EC Company Law*, pp. 5–9 and M. Habersack, *Europäisches Gesellschaftsrecht* (Munich: Beck, 1999), para. 20.

[6] See Case C-122/96, *Saldanna and MTS Securities Corporation* v. *Hiross Holdings* [1977] ECR I-5325.

[7] See e.g. Rodière, 'L'harmonisation des legislations européennes dans le cadre de la C.E.E.' [1965] RTDE 336, 342–50; Y. Scholten, 'Company Law in Europe' [1967] 4 CMLR 377, 382; see for the discussion also: P. van Ommeslaghe, 'La première directive du Conseil du 9 mars 1968 en matière de sociétés' [1969] CDE 495, 502–16; P. Sanders, 'Review of Recent Literature on Corporation Law' [1967] 4 CMLR 113, 119 ff; E. Stein, Harmonization of European Company Laws (1971) 174–182.

[8] S. Heinze, *Europäisches Kapitalmarktrecht* (Munich: Beck, 1999), p. 12; E. Wymeersch, 'Company Law in Europe and European Company Law' [2001] 6 *Working Paper Series*, Universiteit Gent 3.

[9] Following the broad interpretation of Art. 44(2)(g) EC.

[10] But other articles have also been invoked, for instance Art. 47(2) EC for the UCITS Directive, the former Art. 54(2) EC for the Directive on Mutual Recognition of Listing Particulars.

entitles the Community legislator to enact regulations.[11] Nevertheless, Community regulations in Company Law have not yet been based upon Article 95(1) EC. Both the Council Regulation 2137/85 on the European Economic Interest Grouping (EEIG)[12] as well as the Council Regulation 2157/2001 on the Statute for a European company (SE)[13] were based on Article 308 EC.[14] Article 308 EC provides that the Council may, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the necessary measures, if action by the Community should prove necessary to attain in the course of the operations of the common market one of the objectives of the Community, and the Treaty has not provided the necessary powers. The European Economic Interest Grouping is a fiscally transparent entity having some of the characteristics of a company and some of an unincorporated body. The European Company is able to operate across borders. It is subject to a rather complex legal regime, consisting partly of rules of European law. The European Company is described more fully in the succeeding chapter.

Article 293 EC is another source for Community measures in European company law. It provides that the Member States shall enter into negotiations with each other with a view to securing for the benefit of their nationals: the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries. On this basis, in 1968 the six original Member States signed the Convention on Mutual

[11] Article 249(3) EC provides that 'a directive shall be binding as to the result to be achieved, upon each Member States to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Article 249(2) EC provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

[12] Council Regulation 2137/85 EEC of 25 July 1985 on the European Economic Interest grouping, OJ L199 of 31 July 1985, 1.

[13] Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L294/1.

[14] The Commission and the European Parliament preferred Art. 95. See the draft proposal of 16 October 1989, OJ C263/41 and OJ 1991 C176/1 and for the discussion: H. W. Neye, 'Kein neuer Stolperstein für die Europäische Aktiengesellschaft' [2002] *Zeitschrift für Gesellschaftsrecht* 377 f; Wiesner [2001] GmbH-Rundschau, R 461; G. F. Thoma and D. Leuering, 'Die Europäische Aktiengesellschaft – Societas Europaea' [2000] *Neue Juristische Wochenschrift* 1449; M. Lutter, 'Europäische Aktiengesellschaft – Rechtfigur mit Zukunft?' [2002] *Betriebsberater* 1, 3.

Recognition of Companies and Legal Persons.[15] It however never came into force as it was not ratified by the Netherlands.[16] The implementation of this provision would have required an international treaty, and the unanimous consent of the Member States and of their parliaments would have been necessary. Also negotiations for a Convention on cross-border mergers failed.[17] The issue is now governed by the Tenth Directive.[18] Treaties between the Member States did not develop to a useful instrument for the approximation of national company laws.

B. Free movement and the fundamental freedoms: the right of establishment

The Treaty provisions mentioned above concern the application of the right of establishment to companies and the harmonisation of the laws of the Member States. The four freedoms, especially the right of establishment (Articles 43–48 EC) and the free movement of capital (Articles 56–69 EC) provide the foundations of European company law. They also generate the precondition for a free and economical choice of location. For instance, the application of the right of establishment and to provide services has ended certain discriminatory taxation laws.[19]

The right of establishment can be regarded as the cornerstone of European company law. Articles 43(2) and 48(1) EC provide that companies established in the EC may create secondary establishments in other Member States and thus set up agencies, branches or subsidiaries

[15] See for the text: [1968] *Revue trimestrielle de droit européen* 400; for the English version: [1969] EC Bull Supp 2 and E. Stein, *Harmonization of European Company Laws* (1971), p. 525. A Convention under Art. 293 EC is not technically a Community Act, but a Treaty between the Member States. See for more details: Edwards, *EC Company Law*, pp. 384–6; B. Goldman, 'The Convention between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons' [1968–69] 6 CMLR 104.

[16] E. Werlauff, *EC Company Law* (Copenhagen: Jurist– og Økonomforbundets, 1993), pp. 15–17.

[17] See for the preliminary draft of the Convention of 1967: *Comité des experts de l'article 220 alinéa 3 du Traité CEE, 'Droit des sociétés – Fusions internationales, Avant-projet de convention relatif à la fusion internationale des sociétés anonymes', Document de travail* no. 4, 16.082/IV/67-F. See for the draft convention of 1972 EC Bull Supp 13/73 and B. Goldman '*La fusion des sociétés et le projet de convention sur la fusion internationale des sociétés anonymes*' [1981] 17 CDE 4.

[18] The Tenth Council Directive on cross-border mergers, [2005] OJ L310/1. See for the legislative history and background, P. Farmer 'Removing legal obstacles to cross-border mergers: EEC proposal for a tenth directive' [1987] *Business Law Review* 35 f., 53.

[19] See case C-62/00 *Marks & Spencer* [2002] ECR I-6325.

there. There is a considerable body of decisions of the ECJ in which the non-discriminatory exercise of this right of secondary establishment has been emphasised[20] and elaborated. This has contributed to the considerable body of European company law, which otherwise owes its existence to the recognition of certain general principles of law, secondary legislation, and decisions of the ECJ concerning such legislation, provisions of which have sometimes been held to be directly effective.

It is a matter of debate whether following the decisions of the ECJ in *Centros*[21] and *Überseering* line of cases,[22] it is now the case that a company is given the right of primary establishment under Community law (as opposed to national law) to transfer its statutory seat from one Member State to another.[23] This problem with its link to the question of mutual recognition of companies will be discussed more fully in the succeeding chapter.

The ECJ held in *Sevic*,[24] decided a few weeks after the enactment of the Tenth Directive on Cross-Border Mergers, that a Luxembourg company had the right to merge with a German company, despite contrary rules of German law. Refusal to permit a merger would be a restriction in the

[20] Note the account of certain of these cases in J. Usher, *The Law of Money and Financial Services in the European Community* (Oxford: EC Law Library, 2000), pp. 91–6. In Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and others* v. *IRC and Another* and *Hoechst AG and Another* v. *Same*, [2001] ECR I-1727; Case 19/92 *Kraus* [1993] ECR I-1689, 1697 para. 32; Case 55/94, *Gebhardt* [1995] ECR I-4165, 4197 para. 37; Case C-212/97, *Centros* [1999] ECR I-1459, 1491 para. 20 ff.; Case C-255/97 *Pfeiffer* [1999] ECR I-2835, 2860, para. 19. First, the ECJ held that Art. 43 only prohibits discriminatory restrictions. See, e.g.: Case 2/74 *Reyners* v. *Belgium* [1974] ECR 631, 651 para. 16/20; Case 71/76 *Thieffry* [1977] Case 765, 777 f.

[21] Case C-212/97, *Centros* [1999] ECR I-1459. See for more details: J. P. Hansen, 'A new look at Centros – from a Danish point of view' [2002] 13 EBLR 85.

[22] Case C-208/00, *Überseering* [2002] ECR I-9919; F. Wooldridge 'Überseering: Freedom of Establishment of Companies Affirmed' [2003] 14 EBLR 227; W. Roth, 'From Centros to Überseering: Free Movement of Companies Private International Law and Community Law' [2003] 52 ICLQ 192; E. Wymeersch, 'The Transfer of the Companies Seat in European Company Law' [2003] 40 CMLR 661; M. Andenas, 'Free Movement of Companies' [2003] 119 LQR 221.

[23] It does not seem that the Court recognised such a right of primary establishment in *Centros*: see the discussion of the case in St Rammeloo, *Corporations in Private International Law – a European perspective* (Oxford University Press: 2001), pp. 72–85: note especially the literature mentioned in footnote 233 on p. 72. In *Überseering*, which is discussed in the chapter on the formation of companies, the court has at least recognised the right to transfer the actual centre of administration from one Member State to another: note in particular para. 64 of its judgment. See also M. Andenas, 'Free Movement of Companies' [2003] 119 LQR 221.

[24] Case C-411/03 *Sevic Systems AG* [2005] ECR I-10805.

meaning of Articles 43 and 48 EC and could only be justified if it pursued a legitimate objective under the Treaty and justified by imperative grounds in the public interest. The ECJ regarded the treatment of the Luxembourg company as an instance of discrimination. In para. 22 of the judgment it stated that:

> In so far as, under national rules, recourse to such a means of company transformation is not possible where one of the companies is established in a Member State other than the Federal Republic of Germany, German law establishes a difference in treatment between companies according to the internal or cross-border nature of the merger, which is likely to deter the exercise of the freedom of establishment laid down by the Treaty.

It follows from *Centros*[25] that non-discriminatory measures which form obstacles or hindrances to access to market also requires justification on public interest grounds. One reading of this and the line of cases discussed here is that anything which makes cross-border establishment less attractive constitutes a restriction under Articles 43 and 48 EC. Such a wide restrictions concept goes much beyond the discrimination found in the present cases, and its consequences for company legislation in Member States are potentially far-reaching.

The ECJ addresses justifications in para. 23 of *Sevic*:

> Such a difference in treatment constitutes a restriction within the meaning of Articles 43 EC and 48 EC, which is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it (see Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 49; Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 49).

The intensity of the review of the proportionality of national company law constituting a restriction under the wide test now developed becomes of great importance.

[25] Case C-212/97 *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459. See also Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37; Case C-108/96 *Mac Quen* [2001] ECR I-837, para. 26; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, para. 11. In the latter case the ECJ gave 'market access' a wide scope. The ECJ extended the *Gebhard* formula to measures which prohibit, impede or make less attractive the freedom of establishment.

One remaining question is the application of the *Centros* line of cases to companies leaving a jurisdiction. The cases have dealt with discrimination by host state authorities against a company from another Member State. The question is if the same wide restrictions concept can be applied to regulation by the country of incorporation or seat when the company wants to leave the jurisdiction. Here the case of *Daily Mail*[26] still casts its shadow over the area. The well known distinction between export and import restrictions has been used to limit the recent ECJ case law on free movement of companies. The cases can be cast as dealing with discrimination against foreign companies. But restrictions on the exit of companies from one jurisdiction, entering another, either remaining a foreign company there or as a company incorporated in the new jurisdiction, constitutes a major obstacle to free movement and the functioning of the Internal Market. It is suggested that the *Daily Mail* case has no clear *ratio*, and the approach to exit restrictions is inconsistent with that taken to such restrictions in the case law on free movement. The facts of the *Daily Mail* case did not give rise to adding questions of the structure of the legal personality of the company, and the transfer of its residence to Netherlands for tax purposes was not relevant as a company law matter. Both the United Kingdom and the Netherlands accept the incorporation doctrine.

In the cases where the ECJ has had to refer to *Daily Mail*, it has done so in a manner that perhaps could leave the impression that it is still good law, supporting exit restrictions. However, the ECJ has not had any opportunity to reconsider and overturn *Daily Mail*, and the references made to the case does not develop a new *ratio* for the case or support that the ECJ would treat entry of companies ('export restrictions') any differently from exit ('import restrictions'). However, the ECJ may soon have to address the exit issues directly. A Hungarian Court of Appeal has referred several questions[27] to the European Court (ECJ) in the case of *Cartesio*.[28] The Hungarian court asks the following questions on the free movement of companies:

> May a Hungarian company request transfer of its registered office to another Member State of the European Union relying directly on community law (Articles 43 and 48 of the Treaty of Rome)? If the answer is affirmative, may the transfer of the registered office be made subject to any

[26] Case 81/87 *R* v. *Treasury ex p Daily Mail* [1988] ECR 5483.
[27] Under the Art. 234 EC Treaty procedure.
[28] (Case C-210/06). OJ C165, of 15 July 2006, 17.

kind of condition or authorisation by the Member State of origin or the host Member State?

May Articles 43 and 48 of the Treaty of Rome be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their registered office is situated, is incompatible with Community law?

The important part of the questions to the ECJ is the reference to conditions imposed on the company leaving the jurisdiction. In its ruling on the questions in *Cartesio* the ECJ has an opportunity to overrule *Daily Mail*, or make very clear that *Daily Mail* is limited to its facts in a legal and factual context which is very different today.

C. *Free movement of capital*

The free movement of capital has in a number of cases provided the grounds for review of national company legislation and practice. The free movement of capital has become an important precondition for the establishment of companies and the European company law. The internal market can only be established if capital transactions can be made without any non-discriminatory restrictions.[29] Article 56(1) EC provides that all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.[30] The ECJ held in its *Elf Aquitaine* decision 2002[31] that any restriction on investment or on the exercise of control in European companies, like 'Golden Shares',[32] is in breach of the principle of the free movement of capital The ECJ held that:

[29] Case C-483/99 *Commission* v. *France (Elf-Aquitaine)* [2002] ECR I-4781; Case C-302/97 *Konle* [1999] I-3099, para. 44.

[30] For a closer look see Moloney, *EC Securities Regulation*, 45.

[31] Cases C-367/98 *Commission* v. *Portugal* [2002] ECR I-4731; C-483/99 *Commission* v. *France (Elf-Aquitaine)* [2002] ECR I-4781 and C-503/99 *Commission* v. *Belgium* [2002] ECR I-4809.

[32] So-called 'Golden Shares' guarantee certain voting rights or blocking power. They could for instance confer the right to outvote other shareholders at general meetings, or to veto certain decisions of the company, such as the sale of core assets. Other rights of Golden Shares could follow from provisions in the company's articles or shareholder agreements intended to ensure that no shareholder is beneficially entitled to an interest in more than a fixed proportion of voting shares. A third variant enables the government to nominate some of the directors. In some jurisdictions, golden shares have been created under existing company legislation, in others new legislation has been required to introduce State prerogatives in privatised companies.

> the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 58 of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality.

In the *Golden Share* cases the restrictions primarily originated with Member State authorities wishing to influence the decision making process within a privatised company or its shareholder structure. There are other cases where the restriction follows primarily from a decision of the company, its management or its shareholders.

In the first round, the European Commission brought three actions for infringement of Articles 56 EC Treaty (free movement of capital) and 43 EC Treaty (freedom of establishment) against Belgium, France and Portugal.[33] The 2002 cases concerned control procedures such as the rules on prior authorisation and rights of veto in companies that had been privatised. This was a way of securing a certain level of state control after privatisation. The case against Portugal concerned limitations on participation by non-nationals and a procedure for the grant of prior authorisation by the Minister of Finance once the interest of a person acquiring shares in a privatised company exceeds a ceiling of 10 per cent. The companies concerned were undertakings in the banking, insurance, energy and transport sectors.

In the case against France, the Commission complained that a Decree of 1993 vested in the State a 'golden share' in Société Nationale Elf-Aquitaine. The Minister for Economic Affairs is required, first, to approve in advance any acquisition of shares or rights which exceeds established limits on the holding of capital and, second, may oppose decisions to transfer shares or use them as security.

The case against Belgium concerned two Royal Decrees from 1994 vesting in the State 'golden shares' in Société Nationale de Transport par

[33] Cases C-367/98 *Commission* v. *Portugal* [2002] ECR I-4731; C-483/99 *Commission* v. *France* [2002] ECR I-4781 and C-503/99 *Commission* v. *Belgium* [2002] ECR I-4809. It did not follow the opinion of its Advocate General, but basically agreed with the Commission's complaint that 'golden shares' can, depending on the circumstances, infringe the free movement of capital and the freedom of establishment. Dismissing the complaint against Belgium, it upheld the applications against France and Portugal.

Canalisations and in Distrigaz. The Minister for Energy might oppose any transfer of technical installations and any specific management decisions taken from time to time concerning the companies' shares which may jeopardise national supplies of natural gas.

The Court considered that the 'golden shares' held by each of these three countries were restrictions. The legislation was liable to impede the acquisition of shares in the undertakings concerned. It could dissuade investors in other Member States from investing in those undertakings. The Court focused:

(1) on the prohibition (in Portugal) on the acquisition by nationals of another Member State of more than a given number of shares;
(2) the requirement (in France and Portugal) that prior authorisation or notification is to be given where a limit on the number of shares or voting rights held is exceeded; and
(3) the right (in France and Belgium) to oppose, *ex post facto*, decisions concerning transfers of shares.

The Court then considered the grounds put forward by way of justification for the restrictions. They were based on the need to maintain a controlling interest in undertakings operating in areas involving matters of general or strategic interest. The Court first held that, concerning the objective pursued by France (to guarantee supplies of petroleum products in the event of a crisis), it fell within the ambit of a legitimate general interest. But the Court considered the measures went beyond what is necessary in order to attain the objective indicated. The provisions did not indicate the specific, objective circumstances in which prior authorisation or a right of opposition ex post facto will be granted or refused, and were contrary to the principle of legal certainty. The Court was unable to accept such a lack of precision and such a wide discretionary power, which constitutes a serious impairment of the fundamental principle of the free movement of capital.

The Court did however accept the justification put forward by Belgium (to maintain minimum supplies of gas in the event of a real and serious threat). Here, no prior approval is required. Intervention by the Belgian public authorities in the context of a transfer of installations and the pursuit of management policy was subject to strict time limits, in accordance with a specific procedure involving a formal statement of reasons and subject to an effective review by the courts.

The need to safeguard the financial interests of the Portuguese Republic did not pass the test. The Court referred to the settled case

law to the effect that such economic grounds, which were put forward in support of a prior authorisation procedure, can never serve as justification for restrictions on freedom of movement.

In 2003, the ECJ handed down decisions in two further actions by the European Commission, this time against Spain and the UK.[34]

The UK case followed the privatisation of the British Airport Authority (BAA) in the late 1980s. The articles of association of this company made provision for a special share to be held by the Secretary of State allowing a veto of winding up or a disposal of one of the UK airports. In addition to that, the articles prohibited any shareholder from holding more than 15 per cent of the BAA shares. Concerning the veto, the judgment endorsed the broad scope of capital movement and establishment as in the 2002 cases: the EC Treaty prohibits all restrictions on the movement of capital between Member States and between Member States and third countries and direct investments in the form of participation in an undertaking by means of shareholding or the acquisition of securities on the capital market constitute capital movements. Regarding the 15 per cent restriction, the UK had argued in essence that the alleged 'restrictions' were in fact rules defining the company itself and applicable by mechanisms of private company law only. The Court held that the restrictions at issue do not arise as the result of the normal operation of company law. The articles of association were to be approved by the Secretary of State pursuant to the Airports Act 1986 and that was what actually occurred. In those circumstances, the Member State acted in this instance in its capacity as a public authority.

Finally, the Court also rejected the UK argument that the BAA provisions were to be considered as 'selling arrangements' under the *Keck* case law on Article 28 EC.[35] The UK argued that its case did not entail a restriction on the free movement of capital as access to the market was not affected. This could be an important ruling, closing the door for

[34] Case C-463/00 *Commission* v. *Spain* [2003] ECR I-4581, and Case C-98/01 *Commission* v. *United Kingdom* [2003] ECR I-4641.

[35] Case C-267/268/91 *Keck and Mithouard* [1993] ECR I-6097. As long as they are not discriminatory, 'selling arrangements' (distinguished from 'product requirements'), are not considered to be restrictions under Art. 28 EC on the free movement of goods. *Keck* is one outcome of the Sunday trading litigation of the early 1990s where the argument was that regulation of the opening hours of shops (such as a ban on Sunday trading) could constitute a restriction on the free movement of goods. After *Keck*, a ban on Sunday trading would typically be a 'selling restriction' and Art. 28 EC would not be engaged.

holding that a broad category of potential restrictions should go clear of the free movement of capital as long as they are not discriminatory.

The Spanish provisions that were challenged constituted a system of prior administrative approval in several privatised companies[36] introduced by the Spanish legislation extending to major decisions relating to the winding up, demerger, merger, or change of corporate object of certain undertakings, or to the disposal of certain assets of those undertakings.[37] The ECJ[38] held this system to constitute a restriction on the free movement of capital and also addressed possible justifications for a restriction. A justification could not be excluded for reasons of public interest, but the Court quickly rejected the justification offered in the Spanish case, mainly on grounds that the concerned undertakings could not qualify as undertakings whose objective was to provide public services. 'Public security' could be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society which was not present in this case.[39]

[36] The undertakings were Repsol, Telefónica, Argentaria, Tabacalera and Endesa, dealing with a wide range of business activities.

The Spanish Law 5/1995 on 'the legal arrangements for disposal of public shareholdings in certain undertakings' which governs the conditions on which several Spanish public-sector undertakings were privatised introduced a system of prior administrative approval. Major decisions relating to the winding-up, demerger, merger or change of corporate object of certain undertakings or to the disposal of certain assets of, or shareholdings in, those undertakings needed to be approved.

[37] The Spanish Law 5/1995 on 'the legal arrangements for disposal of public shareholdings in certain undertakings' which governs the conditions on which several Spanish public-sector undertakings were privatised.

[38] The Spanish rules had been held to be justified by Advocate General Colomer in his Opinion and the court did not follow the Advocate General.

[39] The ECJ did not accept that, in the case of *Tabacalera* (tobacco) and *Argentaria* (commercial banking group operating in the traditional banking sector), that the legislation could be justified by general interest reasons linked to strategic requirements and the need to ensure continuity in public services. Those undertakings are not undertakings whose objective is to provide public services. In the case of *Repsol* (petroleum), *Endesa* (electricity) and *Telefónica* (telecommunications), the Court acknowledged that obstacles to the free movement of capital could be justified by a public-security reason. However, the Court held that the proportionality requirements were not satisfied for the following reasons:

(1) the administration had too broad discretion, exercise of which is not subject to any condition;
(2) investors were not appraised of the specific, objective circumstances in which prior approval will be granted or withheld;
(3) the system incorporates a requirement of prior approval;

A further judgment from 2005 reaffirms the principles developed in the previous cases.[40] The case concerned an Italian rule providing for an automatic suspension of the voting rights attached to shareholdings exceeding 2 per cent of the capital of companies in the electricity and gas sectors, where those holdings are acquired by public undertakings not quoted on regulated financial markets and enjoying a dominant position in their own domestic markets. The ECJ ruled that the suspension of voting rights prevents effective participation by investors in the management and control of undertakings operating in the electricity and gas markets. That the provision only affects public undertakings holding a dominant position in their domestic markets does not detract from that finding. A general strengthening of the competitive structure of the market in question did not constitute a valid justification for restricting the free movement of capital.[41]

In 2006, the ECJ again ruled on 'golden shares', this time in two Dutch telecommunications companies Koninklijke KPN NV (KPN) and TNT Post Groep NV (TPG).[42] When these companies were partly privatised in the 1990s, the statutes of KPN and TPG contained a special share held by the Netherlands State, conferring special rights to approve certain management decisions of the organs of those companies. The ECJ held that these special rights were not limited to cases where the intervention of that state was necessary for overriding reasons in the general interest recognised in the case law. The ECJ considered that the special rights in the Dutch case discouraged not only direct investors but also portfolio investors.

In 2007, the ECJ ruled on the Commission action against Germany over the 1960 Volkswagen-Gesetz (VW Act).[43] This legislation is based on a 1959 agreement between the Federal Republic (Bund) and the Federal State (Land)

(4) the operations contemplated are decisions fundamental to the life of an undertaking; and finally, although it appears possible to bring legal proceedings, the Spanish legislation did not provide the national courts with sufficiently precise criteria to review the way in which the administrative authority exercises its discretion.

[40] Case C-174/04 *Commission* v. *Italian Republic* [2005] ECR I-4933.

[41] Italy adopted a provision after the judgment, which amended the law in question. However, the Commission did not consider that the changes introduced fully implemented the ruling of the Court and consequently on 13 October 2005 reminded Italy of its obligation to comply.

[42] Cases C-282/04 and 283/04 *Commission* v. *Kingdom of the Netherlands* [2006] ECR I-9141.

[43] Case C-112/05 *Commission* v. *Germany* [2007] ECR I-8995.

of Lower Saxony, and reserves some special rights to the Land of Lower Saxony which has been the biggest single shareholder of the German carmaker. The special rights include that of the ten members representing shareholders in the supervisory board, four will represent public authorities. The maximum limit on the voting rights of a single shareholder to 20 per cent coincides with shareholding of the federal and state governments at the time the law was adopted. The ECJ held that the law dissuades those wishing to acquire a larger shareholding, and constitutes a restriction on the free movement of capital.

The free movement of capital judgments discussed here are in cases brought by the European Commission in cases against Member States. The case law is extending an intense review of state practice relating to the exercise of rights as a shareholder, and it is clear that the state cannot operate with the same freedom as a private shareholder.

At the same time, there is the question of the consequences of this case law on restrictions imposed in company articles and in agreements between private shareholders. The direct effect of the fundamental freedoms where both parties are private (not Member States or emanations of Member States), is much discussed. The free movement of capital is generally considered to be capable of direct effect not only where one of the parties is the state ('vertical direct effect) but also where there are only private parties involved ('horizontal direct effect').

National company laws and practice will be subject to a gradual review through the case law, and the ECJ's jurisprudence on the free movement of capital will give new impetus to the harmonisation effort in EU legislation. The basic foundation is now laid in the cases discussed above but the actual impact and speed of this process is another matter.

D. The harmonising directives in the field of company law

The Company Law Directives cover a number of disparate areas of law and with the exception of the Sixth Directive[44] (which only had to be implemented in Member States where divisions as defined in the Directive, were permitted) have all required implementation by Member States. The impact of the company law directives, together with that of certain other directives in the field of securities law, has been extensive in

[44] Sixth Council Directive of 17 December 1982 based on Art. 54(3)(g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC), OJ 1982 L378/47.

all the Member States. These directives have had considerable influence on the United Kingdom Companies Acts 1980, 1981, 1989, and 2006 as well as on certain other United Kingdom primary and secondary legislation.[45]

Although Article 48 EC is applicable to all forms of companies or firms, the secondary European company law covers primarily companies limited by shares or otherwise having limited liability. According to the considerations of these directives the coordination of these provisions was especially important since the activities of such companies often extend beyond the frontiers of national territories.[46] It has also been argued that these entities in contrast to partnerships and their equivalents in other Member States share more similarities and can therefore be harmonized more easily.[47]

Amongst the companies limited by shares the law of public companies is regulated more intensively. While the First, the Fourth, the Seventh and the Eleventh directives are applicable both to public and private companies, the Second, Third, Sixth directives apply only to the public limited company.[48] In the view of the European legislator the distinction is made because their activities predominate in the economy of the Member States.[49] This concept has often been criticised because the use of the different company forms is divergent between the Member States.[50] For that reason the distinction between companies of different size and economic importance is more significant.[51] In addition to that, some Member States who only had a single form of limited company

[45] E.g., Council Directive (EEC) 89/592 of 13 December 1989, OJ 1989, L334/30 on insider dealing was implemented in the UK by Part V of the Criminal Justice Act 1993.

[46] Recital 1 of the First and Second Directive.

[47] G. C. Schwarz, *Europäisches Gesellschaftsrecht* (Baden-Baden: Nomos, 2000), para. 14, 293.

[48] E. Wymeersch, 'Company Law in Europe and European Company Law' [2001] 6 *Working Paper Series, Universiteit Gent* 6.

[49] See consideration 1 of the Second Directive and consideration 3 of the draft Fifth Directive.

[50] See also E. Wymeersch, 'Company Law in Europe and European Company Law' [2001] 6 *Working Paper Series, Universiteit Gent* 5; See for a comparative overview: G. C. Schwarz, *Europäisches Gesellschaftsrecht* (Baden-Baden: Nomos, 2000), para. 15, 530 ff.; E. Wymeersch, 'A Status Report in Corporate Governance Rules and Practices in Some Continental European States', in K. Hopt, H. Kanda, M. Roe, E. Wymeersch and St Prigge (eds), *Comparative Corporate Governance* (Oxford: Clarendon Press, 1998), pp. 1045, 1049.

[51] E. Wymeersch, 'Company Law in Europe and European Company Law' [2001] 6 Working Paper Series Universiteit Gent, 6; K. Hopt 'Europäisches Gesellschaftsrecht – Krise und neue Anläufe' [1988] *Zeitschrift für Wirtschaftsrecht* (ZIP) 96, 103.

introduced a private company form for smaller companies, a more useful form, in the process of the implementation of the Directives.[52]

The First Directive[53] is concerned with the disclosure and publicity requirements of companies, the validity of pre-incorporation and *ultra vires* transactions entered into by companies, and the nullity of companies.

The Second Directive[54] provides for minimum requirements for the formation of public companies and the maintenance, increase and reduction of their capital.[55]

Both the First and the Second Directive have been subject to proposals for revisions undergoing a process of simplification. In 1999 the Company Law SLIM Working Group issued a Report on the simplification of the First and Second Company Law Directive.[56] The Commission supported these recommendations relating to the First Directive and issued a proposal for its amendment.[57] The main object of the proposal

[52] M. Lutter, '*Die Entwicklung der GmbH in Europa und in der Welt*', in M. Lutter (ed), *Festschrift 100 Jahre GmbH-Gesetz* (Baden-Baden: Nomos, 1992), pp. 49–55 (Denmark, the Netherlands).

[53] First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC), OJ 1968 L65/8.

[54] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC), OJ 1977 L26/1, on which see C. M. Schmitthoff, 'The Second Directive on Company Law' (1978) 15 CMLR 43; G. Morse, 'The Second Directive – raising and maintenance of capital' [1977] *European Law Review* 126.

[55] See for the implementation in the different Member States: F. Wooldridge, *Company Law in the United Kingdom and the European Community* (London: Athlone Press, 1991), pp. 25 ff.

[56] See Report from the Commission to the European Parliament and the Council – Results of the fourth phase of SLIM, 4 February 2000, COM (2000) 56 final; E. Wymeersch, 'Company Law in the Twenty-First Century' [2000] 1 *International and Comparative Corporate Law Journal* 331, 332–5; E. Wymeersch, 'European Company Law: The Simpler Legislation for the Internal Market (SLIM) Initiative of the EU Commission' [2000] 9 *Working Paper Series, Universiteit Gent.*

[57] Proposal for a Directive of the European Parliament and the Council amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, 3 June 2002, COM (2002) 279 final. The Directive was amended by Directive 2003/58/EC [2003] OJ L220/13.

was to accelerate the filing and disclosure of company documents and particulars by the use of modern technology, and to improve the cross-border access to company information by allowing voluntary registration of company documents and particulars in additional languages. It was also decided to update the First Directive where necessary, namely with regard to the types of companies covered and the references to the Accounting Directives. In respect of the Second Directive the High Level Group of Company Experts suggested in its Report of 2002 a two-step approach a short-term reform of the Directive and a creation of an alternative capital regime in the long run.[58] Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 has since been enacted, amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital.[59] This instrument permits the relaxation of the valuation requirement for contributors in kind in some circumstances. It also contains new provisions governing the giving of financial assistance for acquisition of shares. The relevant provisions are very detailed.

The Third[60] and Sixth Directives are respectively concerned with mergers and divisions of public companies; the former instrument has no application to takeover bids, but to the type of operation known in the United Kingdom as reconstructions.

[58] See Report of the High Level Group of Company Law Experts of 4 November 2002, 78–93 http://europa.eu.int/comm/internal_market/en/company/company/index.htm. Some of the main governance reforms proposed were as follows:

(1) the minimum capital requirement should not be removed, nor increased;
(2) the introduction of no par value shares is widely demanded;
(3) the valuation requirement for contributions in kind should be relaxed in certain cases;
(4) the conditions under which listed companies can restrict or withdraw preemption rights when they issue new shares should be simplified;
(5) more flexible requirements should be established at least for unlisted companies for the acquisition of own shares;
(6) the prohibition of financial assistance should be relaxed; and
(7) squeeze-out and sell-out rights should be introduced generally.

[59] Directive 2006/68/EC of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, [2006] OJ 264/32.

[60] Third Council Directive of 9 October 1978 based on Art. 54(3)(g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC), OJ 1978 L295/36.

The Fourth Directive[61] is concerned with the accounts of public and private limited liability companies, whilst the Seventh Directive[62] is concerned with the consolidated accounts of such companies. Both these directives make provision for a number of options and are influenced by Anglo-Dutch as well as by French and German accounting principles. The Fourth and Seventh Directive were frequently amended.[63] They were modified by two directives of 8 November 1990 which dealt respectively with exemptions for small and medium-sized companies (SMEs) and the publication of accounts in ECUs, and the scope of these two accounts Directives.[64] Recently, the European Council adopted a Directive of 13 May 2003 which amends the Fourth Directive in respect to the possible exemptions of small and medium-sized enterprises (SMEs) from certain accounting requirements.[65] In addition to that, the Directive of 18 June 2003 brings existing accounting rules into line with current best practice.[66] It complements the International Accounting Standards (IAS) Regulation as the amendments allow Member States which do

[61] Fourth Council Directive of 25 July 1978 based on Art. (3)(g) of the Treaty on annual accounts of certain types of companies (78/660/EEC), OJ 1978 L221/11.

[62] Seventh Council Directive of 13 June 1983 based on Art. 54(3)(g) of the Treaty on consolidated accounts (83/349/EEC), OJ L193/1: see F. Wooldridge, 'The EEC Council Directive on Consolidated Accounts' [1988] 37 ICLQ 714. Amendments were made to the Fourth and Seventh Directives by Directive 2006/46 of 14 June 2006 OJ 2006 L224/1.

[63] See, e.g. Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001 amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions, OJ 2001 L283/28 or Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings, OJ 1991 L374/7.

[64] Council Directive of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as concerns the exemptions for small and medium sized companies and the publication of accounts in ecus (90/604/EEC), OJ 1990 L317/57 and Council Directive of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those directives (90/605/EEC), OJ 1990 L317/60.

[65] Council Directive 2003/38/EC of 13 May 2003 amending Directive 78/660/EEC on the annual accounts of certain types of companies as regards amounts expressed in euro, OJ 2003 L120/22. The Directive raises the thresholds for turnover and balance sheet total under which Member States can apply the exemptions. The Council's move follows a Commission proposal in January 2003. See the Proposal for a Council Directive amending Directive 78/660/EEC as regards amounts expressed in euro of 24 January 2003, COM (2003) 29 final.

[66] Directive 2003/51/EC of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ 2003 L178/16.

not apply IAS to all companies to move towards similar, high quality financial reporting. Besides, it provides for appropriate accounting for special purpose vehicles, improves the disclosure of risks and uncertainties and increases the consistency of audit reports across the EU.

The International Accounting Standards (IAS) or International Reporting Standards Regulation, adopted in June 2002 requires all EU companies listed on a regulated market to use IAS from 2005 onwards and allows Member States to extend this requirement to all companies.[67] It is the aim of the IAS Regulation to help eliminate barriers to cross-border trading in securities by ensuring that company accounts throughout the EU are more reliable and transparent and that they can be more easily compared.[68]

The Eighth Directive[69] deals with the approval of the auditors of the annual and consolidated accounts of public and private limited liability companies. Differences between accounts and auditing regimes and rules concerning the independence of auditors make it difficult to make meaningful comparisons of financial statements audited in different countries.[70] Important alterations were made to the Eight Directive by Directive 15 May 2006 on statutory audit of annual accounts and consolidated accounts amending Council Directives 78/660 (the Fourth Company Law Directive) and Directive 83/349 (the Seventh Directive) and repealing Directive 84/253.[71]

The Eleventh Directive[72] governs the coordination of Company Law concerning disclosure requirements in respect of branches opened in a Member State by specified kinds of companies governed by the law of

[67] Regulation (EC) 1606/2002 of 19 July 2002 on the application of international accounting standards, OJ 2002 L243/1.

[68] See also the Proposal for a Regulation on the application of international accounting standards, Brussels of 13 February 2001, COM (2001) 80 final.

[69] Eighth Council Directive of 10 April 1984 based on Art. 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, (84/253/EEC), OJ 1984 L126/20.

[70] The Eighth Directive contains no guidance on the independence of auditors, which has been the subject matter of a consultation by the Commission. See the Commissions Recommendation of 15 November 2000 on quality assurance for the statutory audit in the European Union: minimum requirements, OJ 2001 L91/91. The new Statutory Audit Directive 2006/43/EC supplements the Fourth and Seventh Directives by laying down requirements of professional qualifications and independence of persons entrusted with the task of auditing accounts. It also supplements the IAS Regulation.

[71] OJ 2006, L257/87.

[72] Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State (89/666/EEC), OJ 1989 L395/36.

another Member State. Single member private limited liability companies are governed by the Twelfth Directive.[73]

The Tenth Directive[74] on Cross-Border Mergers of public limited companies supplements the Third Directive on national mergers of such companies. Germany feared that international mergers may be used for the purpose of circumventing codetermination laws, and this long delayed the adoption of this proposal.[75] The High Level Group of Company Experts recommended that the Commission should urgently bring forward this proposal.[76] It was argued that the Directive supplementing the Statute for a European company[77] could be a model for resolving the difficulties relating to the board structure and employee participation. The SE Statute has also had an impact as a means of effecting cross-border mergers and of the ECJ ruling in *Sevic*[78] will have an impact in this field.

The Proposal for a Thirteenth Directive on the coordination of company law concerning take-over bids of 1997 was rejected by the European Parliament on 4 July 2001 (273 votes for and 273 votes against).[79] The European Parliament's decision was motivated by three main political considerations:

(1) rejection of the principle whereby, in order to take defensive measures in the face of a bid, the board of the offeree company must first obtain the approval of shareholders once the bid has been made, until such time as a level playing field was created for European companies facing a takeover bid;
(2) regret that the protection which the directive would afford employees of companies involved in a takeover bid was insufficient;
(3) the failure of the proposal to achieve a level playing field with the United States.

[73] Twelfth Company Law Directive of 21 December 1989 on single-member private limitedliability companies (89/667/EEC), OJ 1989 L395/4082.

[74] Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, OJ 2005 L310/1. This generally adopted the mechanisms of the original Proposal of 14 January 1985 for a Tenth Council Directive based on Art. 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies (COM (84) 727 final), OJ 1985 C23/11.

[75] V. Edwards, *EC Company Law*, pp. 391–3.

[76] See Report of the High Level Group of Company Law Experts of 4 November 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm, 101.

[77] Council Directive 2001/86/EC of October 2001 supplementing the Statute of the European Company with regard to the involvement of employees, OJ 2001 L294/22.

[78] Case C-411/03 *SEVIC Systems* [2005] ECR I-10805.

[79] For the Commission's amended proposal, see COM(97) 565 final, 10 November 1997, 1997 OJ C378/10. The text rejected had – after long negotiations – previously been agreed by the delegations of the Parliament and the European Council in a Conciliation Committee meeting on 6 June 2001. See for the text the Report of the High Level Group of Company Experts on Issues related to Takeover Bids of 10 January 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm. See for the discussion, especially for the influence of the Directive on the self-regulation of takeovers in the UK: B. Pettet, 'Private versus Public Regulation in the fields of Takeovers: The Future under the Directive' [2000] 11 *European Business Law Review* 381; M. Andenas, 'European take-over regulation and the City Code' [1996] 17 Co Law 150; M. Andenas, 'European Takeover Directive and the City' [1997] 18 Co Law 101.

The Commission therefore set up a High-Level Group of Company Law Experts under the chairmanship of Professor Jaap Winter with the task of presenting suggestions for resolving the matters raised by the European Parliament.[80] Taking into account the recommendations made by the Group the Commission presented a new Proposal for a Thirteenth Directive in 2002.[81] The new proposal pursued the same objectives as its predecessor. First, it set out to strengthen the legal certainty of cross-border takeover bids in the interests of all concerned and to ensure protection for minority shareholders in the course of such transactions. It furthermore tried to establish a framework for action by Member States by laying down certain principles and a limited number of general requirements. Nevertheless, the Commission tried to supplement it in such a way as to incorporate the amendments adopted by the European Parliament to the previous proposals and to follow the recommendations of the Winter Report as regards a common definition of 'equitable price' (Article 5) and the introduction of a squeeze-out right (Article 14) and a sell-out right (Article 15) following a takeover bid.[82] In line with the recommendations of the Winter Report, the new proposal retained the principle (in Article 9) that it is for shareholders to decide on defensive measures once a bid has been made public and proposed greater transparency of the defensive structures and mechanisms in the companies affected by the proposal (Article 10). Furthermore, the Proposal stipulated that restrictions on transfers of securities and restrictions on voting rights should be rendered unenforceable against the offeror or cease to have effect once a bid has been made public (Article 11). However, Article 12 of the Takeover Directive permits Member States not to apply this break-through mechanism, or the provisions of Article 9(2) and (3) of the Directive.

[80] Report of the High Level Group of Company Experts on Issues related to Takeover Bids of 10 January 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm.

[81] Proposal for a Directive on takeover bids, 2 October 2002, COM (2002) 534 final.

[82] In the finalised version of the Directive, the squeeze-out right was included in Art. 15 and the sell out right in Art. 16. Otherwise, the numbering contained in the proposal remained unaltered.

Other directives govern the information which must be published when major shareholdings in a listed company are acquired and disposed of,[83] the protection of investors by supervising investment firms,[84] and the establishment of a European Works Council.[85] Important is also the new Directive on insider dealing and market abuse.[86] The amendments were necessary to ensure consistency with legislation against market manipulation. A new Directive was also needed to avoid loopholes in Community legislation which could be used for wrongful conduct and which would undermine public confidence and therefore prejudice the smooth functioning of the markets.

E. Draft legislation

There are several company law instruments which have not been adopted yet. The proposed Fifth Directive[87] on the structure and functioning of the organs of public limited companies[88] has not yet been enacted and seems unlikely to be, at least in its present form, even though it is one of the first projects in European company law.[89] Its initial

[83] Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, OJ 1988, L348/62 which has been integrated into Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, OJ 2001 L184/1.

[84] Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ 1993 L141/27. See also the new Proposal for a Directive on Investment Services and Regulated Markets and amending Council Directives 85/611/EEC, Council Directive 93/6/EEC and Directive 2000/12/EC, COM (2002) 625.

[85] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ 1994 L254/64.

[86] Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ 2003 L96/16 which replaced the Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ 1989 L334/30.

[87] Amended Proposal of 20 November 1991 for a Fifth Directive based on Art. 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, COM (91) 372 final).

[88] For a useful account of this proposal, see Edwards, *EC Company Law*, pp. 387–90.

[89] See for more details Boyle, 'Draft Fifth Directive – Implications for Directors' Duties, Board Structure and Employee Participation' [1992] 13 *The Company Lawyer* 6; Conlon, 'Industrial Democracy and EEC Company Law – a Review of the Draft Fifth Directive' [1975] 24 ICLQ 348; Du Plessis/Dine, 'The Fate of the Draft Fifth Directive on Company Law – Accomodation Instead of Harmonisation' [1997] *Journal of Business Law* 23; Keutgen, 'La proposition de directive européenne sur la structure des sociétés anonymes', [1973] 72 *Revue pratique des*

proposals on board structure and employee participation which were stigmatised as being too rigid, were subsequently made more flexible, but have still remained unacceptable, although they may have some influence on further work on corporate governance. The Report of the High Level Group of Company Experts of 4 November 2002 focuses on several issues the Fifth Directive was meant to deal with.[90] The recommendations cover in particular shareholder rights relating to the participation in general meetings, cross-border voting, board structure (choice between one-tier/two-tier) and the role of non-executive and supervisory directors. In a Communication on shareholder rights[91] the Commission set out its ideas for a Directive on shareholder rights. The principal issue appears to be the exercise of shareholders' voting rights, especially where shareholders invest in shares through shares held by intermediaries. There may well be a consensus in the Council of the proposed directive in the near future, and also on one share – one vote initiatives which remain controversial.

Finally, a proposal exists for a Fourteenth Directive on the transfer of the registered office or the de facto head office of companies[92] from one Member State to another.[93] Certain countries use the place of incorporation theory to govern the affairs of companies where a foreign element is involved, whilst others employ the real seat theory (*siège réel* doctrine) for this purpose.[94] The real seat is the place where a company's head

Sociétés 1; Kolvenbach 'Die Fünfte EG-Richtlinie über die Struktur der Aktiengesellschaft (Strukturrichtlinie)' [1983] *Der Betrieb* 2235; Temple Lang, 'The Fifth EEC Directive on the Harmonization of Company Law – Some Comments from the Viewpoint of Irish and British Law on the EEC Draft for a Fifth Directive Concerning Management Structure and Worker Participation' [1975] 12 CMLR 155 and 345; Welch, 'The Fifth Draft Directive – a False Dawn?' [1983] 8 ELR 83.

[90] See Report of the High Level Group of Company Law Experts of 4 November 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm.

[91] Commission proposal for a directive on the exercise of shareholders' voting rights (COM (2005) 685).

[92] The Directive is applicable to all companies or firms. This is in accordance with Arts. 43, 48 EC. See in detail, S. Grundmann, *Europäisches Gesellschaftsrecht* (Heidelberg: C. F. Müller, 2003), para. 895; Others request the restriction of the scope of the Fourteenth Directive to companies limited by share because this would more appropriate in respect to the scope of other company law directives. See, for instance, G. di Marco, 'Der Vorschlag der Kommission für eine 14. Richtlinie – *Stand und Perspektiven*' [1999] *Zeitschrift für Gesellschaftsrecht* 3, 7.

[93] DOCXV/6002/97-EN of 20 April 1997. See for the German text [1999] *Zeitschrift für Gesellschaftsrecht*, 157.

[94] This, of course, is a very imprecise differentiation. See in detail, S. Grundmann, *Europäisches Gesellschaftsrecht*, para. 295 ff; for a comparative overview, see Edwards, *EC Company Law*, p. 335; H. Merkt, 'Das Europäische Gesellschaftsrecht und die Idee des

office, or central management or control is located.[95] The transfer of the registered office (place of incorporation) from one Member State which recognises the place of incorporation theory to another such state does not seem possible at present. Furthermore, the transfer of the real seat of a company from one Member State which recognises the real seat doctrine to another such state may be impossible or difficult. Thus the transfer of the real seat of a company out of Germany has been held to entail the dissolution of that company in Germany, and hence its liquidation. If this view were to be upheld, it would have burdensome tax consequences,[96] but it is doubtful whether the European Court of Justice would uphold the German approach, despite its controversial decision in *Daily Mail*[97] which was distinguished in *Überseering*.[98]

The draft Fourteenth Directive attempts to circumvent the above difficulties, but still awaits adoption. A revised proposal, based on the Commission's consultation on the transfer of a company's registered office from one Member State to another may be anticipated. Further measures governing the matter of the de facto head office are unlikely in the immediate future. However, it is anticipated that a future such proposal would aim to facilitate the freedom of companies to forum shop within the EU Member States whose domestic legislation best suits the company. Furthermore, the freedom of establishment of companies seems to assume a right of transfer of the seat. For that

"Wettbewerbs der Gesetzgeber"' [1995] 59 RabelsZ, 545; 560; J. Wouters 'European Company Law: Quo vadis?' [2000] 37 CMLR 257, 284 and also Lutter, 'The Cross-Border Transfer of a Company's Seat in Europe' [2000] *Europarättslig Tidskrift* 60; J. Wouters and H. Schneider (eds), *Current Issues of Cross-Border Establishment of Companies in the European Union* (Antwerp: Apeldoorn, 1995); J. P. Hansen 'A new look at Centros – from a Danish point of view' [2002] 13 *European Business Law Review* 85, 86.

[95] For the German law: *Bundesgerichtshof* in BGHZ 97, 269; 272; even after the *Überseering* decision of the ECJ: *Bundesgerichtshof* [2002], *Recht der Internationalen Wirtschaft*, 877; See for the different definitions of the real seat: Drury, 'Migrating Companies' [1999] ELR 354, 362.

[96] For the positon in the UK: F. Wooldridge, *Company Law in the United Kingdom and the European Community* (London: Athlone Press, 1991), p. 8; for Germany: J. Thiel, 'Die grenzüberschreitende Umstrukturierung von Kapitalgesellschaften im Ertragssteuerrecht' [1994] *GmbH Rundschau* 277, 278; H. F. Hügel, 'Steuerrechtliche Hindernisse bei der internationalen Sitzverlegung' [1999] ZGR 71, 98; for France: M. Menjucq, *Droit européen des sociétés* (Paris: Montchrestien, 2001) pp. 301 f., 309 f.: and for Italy: H. Bruhn, *Niederlassungsfreundliche Sitzverlegung und Verschmelzung über die Grenze nach italienischem Recht – eine rechtsvergleichende Untersuchung unter Berücksichtigung der europäischen Niederlassungsfreiheit* (Bonn: Diss, 2002) pp. 142–97 and 197–234.

[97] Case 81/87 *R* v. *Treasury ex p Daily Mail* [1988] ECR, 5483.

[98] Case C-208/00 *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH* [2002] ECR, I-9919.

reason the High Level Group of Company Experts recommended that the Commission should move forwards with this directive.[99] In *Überseering*, the ECJ held that when a company transferred its seat from the United Kingdom to Germany, the latter country could not deny it legal capacity and the capacity to bring legal proceedings. It is unclear whether the ECJ would now adopt the same approach as in the *Daily Mail* case to the situation where the home state restricts the transfer of the central administration of a company incorporated under its laws to another Member State. *Überseering*, which is discussed further in the following chapter leaves certain matters unsettled.[100] The differentiation made between exit and entry restrictions undertaken by some through an interpretation of this case, finds no base in the relevant law on the right of establishment and to provide services and the free movement of capital. The differentiation was not mentioned in the ECJ's judgment in the *Daily Mail* case. However, in particular some German writers and courts have used this decision to permit exit restrictions upon German companies.

The draft Fourteenth Directive has seemed to be of importance because the concept of a 'common market for companies' would appear to involve the possibility of the alteration of a company's head office or primary establishment from one Member State to another. The implementation of the draft Directive may give rise to certain tax problems which require resolution before it is enacted.[101] It is thought that the transfer should be tax neutral, and should produce the same effect as a cross-border merger. This would require amendments of Directive 9/434/EC. It may also give rise to prejudice for creditors situated in the state from which the company has migrated, who discover that the security given to them in accordance with the proposed directive is

[99] See Report of the High Level Group of Company Law Experts of 4 November 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm 101. For the difficulties relating to the board structure and employee participation the Directive supplementing the Statute for a European company could be a model.

[100] See also F. Wooldridge, 'Freedom of Establishment of Companies Affirmed' [2003] 14 EBLR 227, 234; M. Andenas, 'Free Movement of Companies' [2003] 119 LQR 221.

[101] R. A. Deininger, *Grenzüberschreitende Verlegung des Hauptverwaltungssitzes und der Geschäftsleitung von Kapitalgesellschaften – eine Betrachtung unter europarechtlichen, gesellschaftsrechtlichen und steuerrechtlichen Gesichtspunkten* (Herdecke: GCA, 2001); C. Ebenroth and T. Auer, 'Die Vereinbarkeit der Sitztheorie mit europäischem Recht – Zivil- und steuerrechtliche Aspekte im deutschen Recht' [1994] *GmbH Rundschau* 16.

inadequate. It was also contended that the provisions of the proposed Coordinating Directive on employee participation are unsatisfactory. It has been proposed that employee participation rights should be governed by legislation of the host Member States, but where they are more firmly enshrined in the home Member State, they should be maintained or registered.

Although drafts of a proposed Ninth Directive on Groups of Undertakings have been circulated in the past,[102] no further work on this proposed instrument, which would have applied to subsidiaries taking the form of a public company (the form of the parent undertaking would have been immaterial) since 1984. The apparent abandonment of work on groups of undertakings seems regrettable. As is contended in the section which follows, the proposal was probably too much influenced by German law to prove widely acceptable. However, recent proposals on a Corporate Law Group for Europe have been made by a private body consisting of academics, the *Forum Europaeum Konzernrecht*.[103] These proposals were published in Stockholm by the Corporate Governance Forum. The Group of Company Law Experts set up by the Commission failed to recommend the enactment of a coherent body of law dealing with groups of companies.[104] Nevertheless, it made suggestions for a better financial disclosure of group structure in respect to the Seventh

[102] See for the proposal of 1984 Doc III/1639/84-E. The German text can be found in [1985] *Zeitschrift für Gesellschaftsrecht* 444, the French text in Commission Droit et Vie d'Affaires, [1986] *Modes de rapprochement structurel des enterprises*. See also: V. Edwards, *EC Company Law*, p. 390 f.; U. Immenga, *'L'harmonisation de droit de groupes de sociétés – La proposition d'une directive de la Commission de la C.E.E.'* [1986] 14 *Giurisprudenza Commerciale* 846 and Hommelhoff, 'Zum revidierten Vorschlag für eine EG-Konzernrichtlinie', in Reinhard Goedeler (ed), *Festschrift Fleck* (Berlin: de Gruyter, 1988), p. 125.

[103] This was funded by a German Foundation, the Fritz Thyssen Stiftung. See the publication of their proposals in Forum Europaeum Konzernrecht Konzernrecht für Europa [1998] *Zeitschrift für Gesellschaftsrecht*, 672; Manóvil, *Forum Europaeum sobre derecho de grupos – algunas de sus propuestas vistas desde la perspective sudamericana* in: J. Basedow (ed), *Aufbruch nach Europa, Festschrift 75 Jahre Max-Planck-Institut für Privatrecht* (Tübingen: Mohr Siebeck, 2001), p. 215; J. Lübking, *Ein einheitliches Konzernrecht für Europa* (Baden-Baden: Nomos, 2000); D. Sugarman and G. Teubner (eds), *Regulating Corporate Groups in Europe* (Baden-Baden: Nomos, 1990); C. Windbichler, '"Corporate Group Law for Europe" – Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law' [2000] 1 EBOR 265; E. Wymeersch, *'Harmoniser le droit des groupes de sociétés en Europe?'*, in O. Due (ed), *Festschrift Everling* (Baden-Baden: Nomos, 1995), p. 1699.

[104] See Report of the High Level Group of Company Law Experts of 4 November 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm, 94.

Company Law Directive and consistency with International Accounting Standards. Another recommendation is to require national authorities, responsible for the admission to trading on regulated markets, not to admit holding companies whose sole or main assets are their shareholding in another listed company, unless the economic value of such admission is clearly demonstrated.

Finally, in 1987 the Commission introduced a preliminary draft for a directive on the liquidation of companies[105] which has not been developed further in the following years. The EU Bankruptcy Regulation was adopted as Regulation 1346/2000; its provisions represent a compromise between the universal and territorial principles. The main insolvency proceedings must take place in the state of domicile of the debtors while insolvency proceedings may be commenced in states in which the debtor has a place of business.

F. Methodological problems concerning company law harmonisation

It is sometimes contended that there is no need for such an extensive programme of company law harmonisation. It is thus argued that better results might be obtained by means of regulatory competition.[106] According to this idea legislators can be compared with producers of other goods and therefore regulated by the market.[107] Another aspect is that competition can be used as a discovery process which leads to more efficient solutions.[108] Many point to the fifty state legal orders available

[105] See for the text: draft Proposal DOC XV/43/87-EN; and for comments: E. Werlauff, *EC Company Law* (Copenhagen: Jurist– og Økonomforbundets Forlag, 1993), 408 ff. E. Werlauff, *EU Company Law*, 2nd edn (Copenhagen: Jurist– og Økonomforbundets Forlag, 2003).

[106] Basis for this theory were the ideas of Tiebout, 'A Pure Theory of Local Expenditures' [1956] 64 *Journal of Political Economy* 416 ff. (Exit-Option).

[107] D. C. Esty and D. Geradin, 'Regulatory Co-operation' [2000] *Journal of International Economic Law* 235, 238 f; K. Gatsios and P. Holmes, 'Regulatory Competition', in P. Newman (ed.), *The New Palgrave of Economics and the Law*, vol. 1 (London, 1998), p. 271.

[108] J. A. Schumpeter, *The Theory of Economic Development – An Inquiry into Profits, Capital, Credit, Interest and the Business Cycle* (Cambridge, 1934); F. A. Hayek, 'Competition as a Discovery Procedure' in: F. A. Hayek (ed), *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago: University Press, 1985), pp. 179 ff; see also W. Kerber, 'Rechtseinheitlichkeit und Rechtsvielfalt aus ökonomischer Sicht,' in S. Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (Tübingen: Mohr Siebeck, 2000), pp. 67, 68; V. Vanberg and

to companies in the United States.[109] However, American company law may be less concerned with the protection of investors, creditors and employees than is European company law. Investors are thus protected through the medium of Federal securities regulations whilst creditors receive protection through the medium of federal bankruptcy legislation and the Uniform Commercial Code.

S. Deakin contrasts two models of regulatory competition. One based on a US pattern of 'competitive federalism', the other a European conception of reflexive harmonisation. In the European context, he contends, harmonisation of corporate and labour law, contrary to its critics, has been a force for the preservation of diversity, and of an approach to regulatory interaction based on mutual learning between nation states. It is thus paradoxical, and arguably antithetical to the goal of European integration, that this approach is in danger of being undermined by attempts, following the *Centros* case, to introduce a Delaware-type form of inter-jurisdictional competition into European company law.[110]

Further, there are several reasons why a legislative competition in the European Union cannot be as effective as in United States.[111] Traditionally, competition between the laws of Member States has not been regarded as an appropriate paradigm for the law of the European Community.[112] Further, of the 27 states which are at present members of the EU, broadly speaking, it appears that only six (the United Kingdom,

W. Kerber, 'Institutional Competition among Jurisdictions: An Evolutionary Approach' [1994] 5 *Constitutional Political Economy* 193, 198.

[109] See J. Wouters, 'European Company Law: Quo Vadis', (2000) 37 CmLRev 256, 282–9. See for the development in United States: L. A. Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' [1992] 105 *Harvard Law Review* 1435, 1444–8; Alva, 'Delaware and the Market for Corporate Charters – History and Agency' [1990] 15 *Delaware Journal of Corporate Law* 885 ff.; R. M. Buxbaum and K. Hopt, *Legal Harmonization and the Business Enterprise – Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.* (de Gruyter Berlin/New York 1988) pp. 25 ff.; Romano, *The Genius of American Corporate Law* (Washington, 1993), pp. 14 ff.; Butler, 'Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges' [1985] 14 *Journal of Legal Studies* 129 ff.; Conard, 'An Overview of the Laws of Corporations' [1973] 71 *Michigan Law Review* 623 ff.

[110] S. Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *European Law Journal* 440.

[111] H. Merkt, '*Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber"*' [1995] 59 *RabelsZ* 545, 560; Wouters, 'European Company Law: Quo vadis?' [2000] 37 CMLR 257, 284.

[112] W. Kolvenbach, 'EEC Company Law Harmonization and Worker Participation' [1990] 11 U.Pa.J.Int.Bus.L. 709; 711 ff.; expressly C. M. Schmitthoff, 'The Future of the European Company Law Scene', in C. M. Schmitthoff (ed), *The Harmonization of European Company Law* (UK: National Committee of Comparative Law, 1973) 3, 9

Ireland, Denmark, Netherlands, Finland and Sweden) accept the incorporation theory, according to which a company is governed by the law in accordance with which it is duly established.[113] The other EC countries treat the law governing the internal affairs of a company as that of the place where it has its real seat (management and control centre). There is however, some doubt as to whether France still makes the real seat the principal connecting factor.[114] The use of the real seat theory makes it difficult for competition to occur between jurisdictions in the field of company law: according to this theory companies have to be incorporated, or reincorporated in the country in which they have their real seat. In addition to that, there are several tax barriers which may make a legislative competition more difficult.[115] The more pluralistic orientation of many European company laws (for instance towards employee representation) does not permit a simple choice between the different national laws which would be necessary for an effective competition.[116] Finally, there is no comparable incentive for European legislators to compete since incorporation fees have not much importance for the budget of the different Member States.[117] It may of course ultimately prove possible to simplify the exercise of the right of primary establishment of companies through the enactment of the proposed Fourteenth Directive, which has been mentioned above,[118] or possibly through the decisions of the European Court of Justice.

('the Community cannot tolerate the establishment of a Delaware in its territory. This would lead to a distortion of the market by artificial legal technicalities').

[113] See the account of the incorporation theory in S. Rammeloo, *Corporations in Private International Law* (Oxford: Oxford University Press, 2001), pp. 116–20.

[114] Note in this context, M. Menjucq, *Droit international et européen des sociétés* (Paris: Montchrestien, 2001). pp. 90–95.

[115] W. F. Ebke, '*Unternehmensrecht und Binnenmarkt – E pluribus unum?*' [1998] 62 RabelsZ 195, 208; R. Romano, 'Explaining the American Exceptionalism in Corporate Law', in W. Bratton, J. McCahery, S. Piccioto and C. Scott (eds), *International Regulatory Competition and Coordination – Perspectives on Economic Regulation in Europe and the United States* (Oxford: Clarendon Press, 1996), pp. 127, 141.

[116] H. Merkt, '*Das Europäische Gesellschaftsrecht*', 59 RabelsZ 545, 554–560; K. Gatsios and P. Holmes, 'Regulatory Competition', 271, 274.

[117] R. Romano, *The Genius of American Corporate Law* (Washington, 1993), p. 133; D. Carney, 'Competition among Jurisdictions in Formulating Corporate law rules: An American Perspective on the "Race to the Bottom" in the European Communities' [1991] 32 *Harvard International Law Journal* 423, 447.

[118] Furthermore, Article 65(b) EC enables measures in the field of judicial cooperation in civil matters having cross-border implications to be taken insofar as necessary for the proper functioning of the internal market.

After the decisions *Centros* and *Überseering* one might take a more positive view. They can be understood as decisions towards more freedom of choice.[119] The principle of mutual recognition as a foundation for the Free Movement in the EU might be a functional instrument.[120] Even if the Freedom of Establishment can be restricted by national law for reasons of general interest the national law of the host Member State cannot be applied if the home Member State delivers equivalent protection. This gives a certain room for competition between the different national legislators.

The concepts of subsidiarity and proportionality, which are contained in a Protocol annexed to the Amsterdam Treaty,[121] may have some inhibiting effect on further harmonisation of company law, although the existence of these concepts does not seem to have had an inhibiting effect in the fields of consumer and environmental law.[122] Harmonisation through the medium of model laws, as in the United States, would seem to have the disadvantage that considerable delays may occur in taking any action, and there may well be significant disparities in the extent to which particular features of the relevant model are adopted in particular states.

It will be remembered that according to Article 249(3) EC directives leave Member States a choice of form and method and may be compared in this respect to model laws. However, certain of the provisions of the

[119] S. Grundmann, 'Wettbewerb der Regelgeber im Europäischen Gesellschaftsrecht – jedes Marktsegment hat seine Struktur' [2001] *Zeitschrift für Gesellschaftsrecht* 783; E. Wymeersch, 'Company Law in the Twenty-First Century' [2000] 1 *International and Comparative Corporate Law Journal* 331, 339.

[120] S. Grundmann, 'Das Thema Systembildung und Systemlücken', in S. Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (Tübingen: Mohr Siebeck, 2000), pp. 1, 16. See for more details: E. Lomnicka, 'The Home Country Control Principle in the Financial Service Directives and the Case Law', in M. Andenas and W-H. Roth, *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2002), pp. 295, 315.

[121] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, OJ 1997 C340. See also J. P. Gonzalez, 'The Principle of Subsidiarity (a Guide for Lawyers with a Particular Community Orientation' [1995] *European Law Review* 355; A. K. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' [1992] 29 CMLR 1079.

[122] Not only as a consequence of the wording in Art. 44(2)(g) EC ('coordinating to the necessary extent') it has been doubted if the principle of subsidiarity can have a further restricting effect. See summary: K. J. Hopt, 'Company Law in the European Union: Harmonization and/or Subsidiarity' [1999] 1 *International and Comparative Corporate Law Journal* 41, 48.

company law Directives contain detailed and highly specific rules: this is true, for example, of certain provisions of the Second Directive. On the other hand, certain directives, in particular the Fourth and Seventh Directive, contain a considerable number of options and alternatives. This is necessary given differences in accountancy practice in the Member States.[123]

It is sometimes suggested that legislation by directives gives rise to the risk of petrification of the laws as directives cannot be amended very easily. The risk seems to be exaggerated: certain of the directives provide for the establishment of Contact Committees to make recommendations for their amendment: this is true of the Fourth, Seventh and the Eighth Directives. Certain directives have been amended. Thus quite frequent amendments have been made to the Fourth Directive on Company Accounts. Articles 18–24 of the Second Directive on the formation of public companies and the maintenance and alteration of their capital, which are concerned with the subscription and acquisition by a company of its own shares was extended to transactions of this kind through the medium of controlled companies by Article 24a of the Directive which was incorporated by Council Directive (EEC) 92/10 of 23 November 1992.[124]

However, it has been contended that certain of the provisions of the Second Directive, for example those of Article 23 prohibiting (with certain exceptions) a company advancing funds, making loans or providing security with a view to acquisition of its own shares by a third party, and those of Article 29(1) concerning pre-emptive rights on an increase of capital, may well not be entirely satisfactory.[125] The Law Society's Standing Committee on Company Law criticised Article 23 on the ground that instead of the absolute prohibition now enshrined therein, financial assistance should be prohibited unless the transaction concerned had been approved by a shareholders' resolution.[126] Article 29(1) has been criticised by Rodière on the

[123] Edwards, *EC Company Law*, p. 117.

[124] Council Directive 92/101/EEC of 23 November 1992 amending Directive 77/91/EEC on the formation of public limited companies and the maintenance and alteration of their capital, OJ 1992 L374/64.

[125] Although Art. 23 Second Directive was modelled on existing United Kingdom legislation. See Edwards, *EC Company Law*, 51. Art. 23(1) has now been replaced by the new provisions of Art. 10b(6) incorporated in the Second Directive by Directive 2006/69/EC I, OJ 2006, L264/32.

[126] Memorandum No. 346, p. 78.

ground that it imposes only one method of protecting existing shareholders against the dilution of their holding to the exclusion of others, and may be regarded as going beyond harmonisation.[127] The High Level Group of Company Experts in its Report of 4 November 2002 took up a similar position as they suggested that acquisition of own shares should be allowed within the limits of the distributable reserves, and not of an entirely arbitrary percentage of legal capital like the 10 per cent limit of the current Directive.[128] The Company Law Slim Working Group already in 1999 considered that current prohibitions on financial assistance in Article 23 should be reduced to a practical minimum and recommended to limit financial assistance to that part of the assets to which creditors cannot assert any claim (to the amount of distributable net assets[129] and to the subscription of new shares).[130] In respect of Article 29, the High Level Group held, as the SLIM Group already had suggested, that for listed companies it would be appropriate to allow the general meeting to empower the board to restrict or withdraw pre-emption rights without having to comply with the formalities imposed by Article 29(4), but only where the issue price is at the market

[127] Rodière, '*L'harmonisation des legislations européennes dans le cadre de la CEE*' [1965] RTDE 336, 353 ff. For recent proposals for amendment of the Directive by the Group of Company Law Experts, see 24 Co Law (2003), 52. No such amendment has been made by Directive 2006/68/EC, OJ 2006 L264/32 which covers only a limited number of topics. Further amendments may be made in the future.

[128] The same should apply to the taking of own shares as security. It should be possible to establish flexible requirements at least for unlisted companies. See Report of the High Level Group of Company Law Experts of 4 November 2002 http://europa.eu.int/comm/internal_market/en/company/company/index.htm, 84.

[129] This standard is also followed in certain Member States with regard to financial assistance granted by private limited companies, which are not subject to the directive. The new provisions contained in Art. 10b(6) of Directive 2006/68/EC stipulates, inter alia, that the aggregate financial assistance granted to a third party shall at no time permit the reduction of the net assets below the amounts specified in Art. 15(1)(a) and (b) of the Second Directive. Thus, except in the cases of reduction of subscribed capital, no redistribution to shareholders may be made when on the closing date of the last financial year, the net assets as set out in the company's approved accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes. The Second Directive only applies to public listed companies.

[130] See Report from the Commission to the European Parliament and the Council – Results of the fourth phase of Slim, 4 February 2000, COM (2000) 56 final; E. Wymeersch, 'Company Law in the Twenty-First Century' [2000] 1 *International and Comparative Corporate Law Journals* 331, 332–5; E. Wymeersch, *European Company Law: The Simpler Legislation for the Internal Market (SLIM) Initiative of the EU Commission*, [2000] 9 *Working Paper Series, Universiteit Gent.*

price of the securities immediately before the issue or where a small discount to that market price is applied.[131]

The harmonisation of company law has encountered the difficulty that certain legal concepts may be familiar in one Member State, but unfamiliar and hard to understand in another. The most obvious example of this is the concept of the organs of a company, which is used in the First Directive in relation to *ultra vires* transactions. This concept is familiar in Germany and in some other Member States (such as France and the Netherlands) but is not familiar in the United Kingdom or Ireland.[132] This unfamiliarity and differences between German and other concepts of corporate representation[133] help to explain the difficulties encountered by the United Kingdom in implementing Article 9 of the First Directive.[134] A third attempt at such implementation which departs to some extent from section 35A of the Companies Act 1985,[135] which itself replaced section 9 of the European Communities Act 1972, has taken place with the enactment of section 40 of the Companies Act 2006. It appears that the concept of the "true and fair view" which is used in the

[131] The Commission in its Plan for Modernising Company Law considered these recommendations as a priority for the short term. See *Communication from the Commission to the Council and the European Parliament – Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to move forward*, 21.5.2003, COM (2003) 284 final, p. 18.

[132] See for a comparative overview: P. van Ommeslaghe, 'La première directive du Conseil du 9 mars 1968 en matière de sociétés' [1969] CDE 619, 619–27; see also Edwards, *EC Company Law*, p. 34; S. Grundmann, *Europäisches Gesellschaftsrecht* (Heidelberg: C. F. Müller, 2003), para. 248.

[133] In Germany, a company is treated as acting through its organs: restrictions on their powers have no effect against third parties unless they are aware of that the representative in exceeding them are abusing their powers, or they collude with them in such abuse. The other original Member States adopt the mandate or agency theory, according to which the authority of an agent may be limited by his principal. They may be *ultra vires* in the absence of such authority. However, the effect of the *ultra vires* doctrine (which was also familiar in the United Kingdom) is ameliorated by a variety of legal devices in all the relevant legal systems.

[134] D. Wyatt, 'The First Directive and Company Law' [1978] 94 LQR 182, 184; W. Fikentscher and B. Großfeld, 'The proposed directive on company law' [1964] 2 CMLR 259; H. C. Ficker, 'The EEC Directives on Company Law Harmonisation', in: C. M. Schmitthoff (ed), *The Harmonization of European Company Law* (UK: National Committee of Comparative Law, 1973), pp. 66, 75.

[135] This provision was intended to implement Art. 9(2) of the First Directive, but it does not do so adequately, because it fails to apply to managing directors and chief executives and does not deal with limitations arising from board resolutions: note in this sense, Edwards, *EC Company Law*, 42–4. It seems that s. 40 of the Companies Act 2006 still suffers from the mentioned defects.

Fourth and Seventh Directives, is unfamiliar in most continental countries, and its implementation has given rise to difficulties in Germany.[136] The harmonisation of company law has also suffered from the fact that the Commission has limited resources, and cannot always take action against states which fail to implement it properly.

Another criticism of the harmonisation process is levelled against the failure of the Community to enact rules governing certain important matters, such as groups of companies and to make provision for a European private company, the creation of which has been proposed by J. Boucourechliev *et al.*[137] The 'salami' process of harmonisation, which involves the harmonisation of limited topics, leaving closely related ones unaffected has also been criticised.[138] Such an approach would seem however to be inevitable given the personnel and time constraints placed on the community institutions as well as the limitations of their powers.

The process of harmonisation may well become more difficult if the size of the Community expands very considerably in the near future. This process obviously often involves practical exercises in comparative company law, and would seem to have stimulated interest in this discipline among scholars and practitioners. The final section of this chapter will consider what problems arise in the study of this subject and indicate what use has been made of comparative law techniques at the Community level and in processes of national legal reform.

[136] M. Habersack, *Europäisches Gesellschaftsrecht* (Munich: Beck, 1999), para. 283 ff. See for the German law: § 264(2) HGB [German Commercial Code] and Case C-234/94 *Tomberger* [1996] ECR I-3145; 3153 para. 17 (true and fair view as overriding principle); Edwards, *EC Company Law*, pp. 128–30; See generally, P. Bird, 'What is "A True and Fair View"?' [1984] J Bus L 480; K. van Hulle, 'The EEC Accounting Directives in Perspective: Problems of Harmonization' [1981] 18 CMLR 121.

[137] J. Boucourechliev and P. Hommelhoff (eds), *Vorschläge für eine Europäische Privatgesellschaft – Strukturelemente einer kapitalmarktfernen europäischen Gesellschaftsform nebst Entwurf für eine EPG-Verordnung der Europäischen Gemeinschaft* (Cologne: O. Schmidt, 1999); P. Hommelhoff and D. Helms (eds), *Neue Wege in die Europäische Privatgesellschaft – Rechts- und Steuerfragen in der Heidelberger Diskussion* (Cologne: O. Schmidt, 2001); H-J. de Kluiver and W. van Gerven (eds), *The European Private Company?* (Antwerp: Maklu, 1995).

[138] Some regard the outcomes of European company law harmonisation as a fragmentary and compromise solution. See Schön, 'Das Bild des Gesellschafters im Europäischen Gesellschaftsrecht' [2000] 64 RabelsZ 1, 7; G. C. Schwarz, *Europäisches Gesellschaftsrecht* (Baden-Baden: Nomos, 2000), para. 3. See the present prevailing views in, e.g. Werlauff, *EU Company Law*, in the 'Introduction' at p. XV and S. Grundmann, 'The Structure of European Company Law: From Crisis to Boom' (2004) 5 *European Business Organisation Law Review* 601, where the title indicates the author's thesis.

II. Comparative company law

A. Introductory remarks

Comparative studies in the field of company law have become of more significance in recent years, but have been actively pursued by many scholars in different traditions for a considerable period of time.[139] Studies in comparative company law may entail identifying rules of different systems which have the same functions as each other. Comparisons have generally been made on a 'micro' basis, i.e. one particular topic such as directors' duties or minority protection is studied in more than one jurisdiction. The jurisdictions chosen may have similar systems of company law (e.g. those of Germany, Austria and Switzerland) or rather different ones, as in the case of the United Kingdom, France and Germany. It will often be necessary in particular jurisdictions to consider the relationship between company law and other system of law, e.g. commercial, civil or industrial law, and to take account of particular methods of reasoning in a given system, for example the German willingness to use provisions of Codes or statutes by way of analogy in the event that other applicable rules are not available.

Drury and Xuereb[140] advocate a counterfactual approach. It is only by an investigation which takes into account the underlying concepts, policy considerations and assumptions of each system that the real nature and relative importance of particular matters within each system can be more perceptively understood. The adequate performance of such a task would demand great scholarship. Furthermore there may be considerable difficulties and room for differences of opinion, in determining what these concepts, policy considerations and assumptions are, especially as they are likely to change with the passage of time.

[139] Such studies were instituted by the Nordic Council as early as in 1925. The importance of comparative company law also received early recognition by German scholars, see, e.g. the 1929 Habilitation treatise by Walter Hallstein (the later first President of the EC Commission). See also Professor Gower's important article, 'Some Contrasts between British and American Company Law' [1956] 60 *Harvard Law Review*, 1360. In the 1960s, the Institute of Latin American Studies conducted a comparative study on corporations in the Latin American Free Trade Area. Professors Schmitthoff and Pennington, two leading British scholars, display an awareness of the importance of comparative studies in many of their extensive works in the field of company law.

[140] See Drury and Xuereb (eds), *European Company Laws: A Comparative Approach* (Aldershot: Dartmouth, 1991), p. 87.