Thèmes & Commentaires

LE DROIT FRANÇAIS DES SOCIÉTÉS

Sous la direction de Caroline Coupet

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Là où des chantiers ambitieux ont été lancés dans le but affiché de faire de certains pans du droit les instruments modernes et sûrs d'une économie compétitive, le droit des sociétés n'a pas fait l'objet de réforme d'ensemble depuis la loi du 24 juillet 1966. À l'heure où des appels de plus en plus nombreux s'élèvent pour repenser le rôle de la société, où les initiatives législatives se multiplient à l'étranger et à l'échelon européen, et où le Brexit bouleverse les jeux d'influence, il est important que la France soit dotée d'une vision claire et d'un droit adapté, pour soutenir une économie prospère et défendre le modèle qu'elle s'est choisi. Dans ce contexte, le groupe de travail RÉPONDS (Réflexions pour un nouveau droit des sociétés) s'est constitué au sein de l'Institut de recherche en droit des affaires de Paris (IRDA Paris) et s'est engagé dans une réflexion sur l'avenir du droit des sociétés.

Cet ouvrage, issu du colloque du 16 janvier 2024, réunissant des universitaires et des praticiens français et étrangers, a pour objet de lancer les travaux du groupe et de poser les fondations de la réflexion.

ISBN 978-2-247-23780-7

48 €

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Actes

LE DROIT FRANÇAIS DES SOCIÉTÉS

BILAN ET PERSPECTIVES

Sous la direction de Caroline Coupet

PANTHÉON-ASSAS UNIVERSITÉ PARIS

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DALLOZ

52. Là est la grande nouveauté et l'extension maximum des obligations RSE, précisément des obligations de vigilance. On sait quel en a été le déclencheur : le sinistre de l'immeuble Razza Plana à Dacca au Bangladesh en 2013 qui a provoqué plus de mille morts et plusieurs milliers de blessés, immeuble inadapté et en très mauvais état dans lequel travaillaient des milliers de petites mains pour des sous-traitants de grandes enseignes internationales, en particulier européennes et françaises.

53. *Conclusion* – Ce panorama est évidemment teinté de subjectivité. Il est également très incomplet : j'aurais pu, par exemple, évoquer l'évolution du régime des nullités, devenu illisible, et, plus globalement, l'évolution de la nature des sanctions avec la préférence montante pour les remèdes sur les sanctions proprement dites avec la généralisation de l'injonction judiciaire. Je dirai simplement que, pour toute une génération, la doctrine dite de l'entreprise a été un révélateur : elle a donné chair à un concept jusque-là désincarné, celui de société. Et, au fond, elle n'est pas vraiment dépassée, du moins dans son principe, par les évolutions les plus récentes du droit des sociétés car ce sont de nouveaux rôles que l'on assigne à l'entreprise au cœur de la société.

Les forces créatrices évoquées précédemment, bien qu'apparues les unes après les autres, ne constituent pas une évolution continue et encore moins linéaire ni cohérente, et ne se sont pas substituées l'une à l'autre mais additionnées et imbriquées. Aussi, le droit français des sociétés est-il devenu illisible et se fond-il même en partie dans un autre ensemble, que l'on pourrait appeler le droit de la durabilité. Alors, peut-on le reconstruire pour lui redonner clarté et cohérence? C'est ce qu'avaient réussi les inspirateurs de la loi de 1966, ce qui n'avait pourtant rien d'évident à l'époque face au fatras de textes intervenus depuis 1867 et aux nombreuses évolutions jurisprudentielles, défi difficile que confirmait l'échec des nombreuses tentatives doctrinales de révision depuis l'entre-deux-guerres. Ils y étaient pourtant parvenus en réunissant un groupe de spécialistes, non pour raisonner en chambre mais pour écouter les parties concernées puis définir des lignes de force, rechercher une cohérence globale et redonner une unité de rédaction. Une même méthode pourrait permettre d'y parvenir à nouveau; c'est ce qu'a entrepris l'Institut de la recherche en droit des affaires de l'Université Paris Panthéon-Assas, sous la direction des professeurs France Drummond et Caroline Coupet, ce qui justifie tous les espoirs.

The Development of European Company Law: Assessment and Prospects

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I. INTRODUCTION

From the beginning of the European Economic Union in 1958 onwards, one can distinguish six phases of the development of European Company Law:

(1.) The 1960s and 1970s may be characterised as the phase of harmonisation.

(2.) From the mid-1980s to the mid-1990s was the time of stagnation and « Euro-sclerosis ».

(3.) After the fall of the iron curtain, after the introduction of the free movement of capital by the Maastricht Treaty (1992) and after the famous 1999 judgment of the European Court of Justice in *Centros*, the company law regimes of EU Member States became less protective, hence the « open societies » phase began. Within Europe, there was a shift from the seat theory to the incorporation theory, allowing shareholders to opt for any type of foreign legal entity for their domestic entrepreneurial activities. Furthermore, substantive company law regimes of Member States were deregulated. In France and Germany, there were reforms in the law governing limited liability companies.

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(4.) However, the failure of the New Market, a segment of the German Stock Exchange, in 2003 and the financial and economic crisis of 2008 led to a backswing. In the following, interests of a variety of stakeholders (such as interests of creditors, employees, and the public as large) were once again taken more seriously. The EU tried to tackle that challenge with improvements of Corporate Governance.

(5.) In 2015, a new era began: Corporate Social Responsibility (CSR). CSR shifted in the following to Environment Social Governance (ESG), as the climate challenge became more and more imminent.

(6.) The latest novelties in the developing European Company Law are two sustainability directives, the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD).

II. AWAKENING AND HARMONISATION (1960s/70s)

The European Economic Community (EEC) was founded in 1958. It was the time of the economic miracle after the Second World War. The first twenty years of the EEC were characterised by new beginnings and a great deal of dynamism.

1. Law of the European Union as a Supra-National Legal Order of Its Own Kind

The Treaties of Rome of 1958 are agreements under Public International Law. However, the European Court of Justice developed this Public International Law into a supra-national legal order of its own kind. Today we call it the Law of the European Union. The special feature – compared to traditional Public International Law – is that the Law of the European Union, in part, has direct effect and establishes subjective rights in favour of the citizens of the EU Member States. The European Court of Justice emphasised the direct effect of the fundamental freedoms (*van Gent & Loos*)[1] and secondary law (*Costa ./. Enel*)[2] from an early stage.

2. Freedom of Establishment

Within the fundamental freedoms, the freedom of establishment plays a central role for company law. It gives the European Union the competence to issue directives to harmonise the company law of the Member States in order to realise the internal market (Artt. 49, 54 in conjunction with Art. 50 TFEU). The first directive based on the freedom of establishment, the first of many Company Law Directives to come, was the Disclosure Directive in 1968,

1. ECJ, 5 February 1963 – C-26/62.
2. ECJ, 15 July 1964 – C-6/64.

the second was the Capital Directive in 1976. As a result, traditional company law concepts from France and Germany were « exported » to Europe.

3. Disclosure Directive (1968)

At the time, the principle of unlimited and unlimitable power of representation of the managing directors applied in Germany (Sec. 37(2) GmbHG[3], Sec. 82(1) AktG[4]). This became the pan-European standard via Art. 9 of the Disclosure Directive[5].[6] As a result, the distinction between internal management authority and external power of representation has become established throughout Europe.[7] The consequences of this harmonisation were groundbreaking:[8] The Romanic legal systems had to give up their « *spécialité statutaire* », *i.e.* the limitation of the power of representation by the object of the company as defined in the articles of association. The UK (after joining the EEC) abandoned its centuries-old « *ultra vires* doctrine ».[9]

4. Capital Directive (1976)

The creditor protection dogma of fixed (minimum) capital with effective capital raising and capital maintenance traditionally stems from French law[10].[11] This became established throughout Europe for public companies as a result of the Capital Directive[12] in 1976.[13] It meant – according to Paul Davies – « the most fundamental adoption so far by English company law of civil law practices ».[14]

3. The German Act on Limited Liability Companies.
4. The German Stock Corporation Act.
5. Directive 68/151/EEC of 9 March 1968.
6. In detail M. Habersack et D. Verse, *Europäisches Gesellschaftsrecht*, 5th ed. 2019, § 5 para. 33 et seqq.; M. Lutter, W. Bayer et J. Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht*, 6th ed. 2018, § 8 para. 1 et seq. and § 18 para. 1 et seqq., 73 et seqq.
7. The reasons for the export of German company law to Europe probably lie in the economic miracle of the 1950s and 1960s, the small number of EEC member states at the time, within which Germany played a significant role, and the still great appeal of 19th century civil and commercial law doctrine at the time, M.-P. Weller, « Deutsche Gesellschaften unter europäischem Einfluss », *Anwaltsblatt* 2007, 320 (321). Cf. also W. Bayer et J. Schmidt, « Überlagerungen des deutschen Aktienrechts durch das Europäische Unternehmensrecht. Eine Bilanz von 1968 bis zur Gegenwart », in W. Bayer et M. Habersack, *Aktienrecht im Wandel*, 2007, chapter 18 para. 5, 6 and 117; Habersack et Verse (fn. 6), § 4 para. 9: The Disclosure Directive and to a large extent also the Capital Directive « breathe the spirit of German commercial and stock corporation law ».
8. Similarly Habersack et Verse (fn. 6), § 4 para. 9.
9. S. Grundmann, *Europäisches Gesellschaftsrecht*, 2nd ed. 2011, para. 213 et seq.
10. The « *intangibilité du capital social* » was developed in France in the 19th century, Lutter, Bayer et Schmidt (fn. 6), § 9 para. 12, 15, 19.
11. Fundamental M. Lutter, *Kapital, Sicherung der Kapitalaufbringung und Kapitalerhaltung in den Aktien- und GmbH-Rechten der EWG*, 1964.
12. Directive 77/91/EEC of 13 December 1976.
13. Grundmann (fn. 9), para. 314; Habersack et Verse (fn. 6), § 6 para. 18 et seqq.
14. P. Davies, *Gower's Principles of Company Law*, 6th ed. 1997, 239 (analogously in 8th edition: P. Davies, *Gower's Company Law*, 8th ed. 2008, 259 et seqq.).

III. STAGNATION AND SCLEROSIS (1980s)

The 1980s were characterised by stagnation and Euro-sclerosis under the impact of the Cold War and the UK's less pro-European stance under Margaret Thatcher's government.

1. Stagnation in the Process of Company Law Harmonisation

The process of European company law harmonisation stagnated.[15] There were irreconcilable differences between the Member States regarding the content of numerous « prestige projects » in company law:[16] To this day, there is no agreement on European group law.[17] The bodies of a corporation are also not uniformly regulated (*i.e.* formation, competence, and liability of the bodies, including the general meeting).[18] At that time, there was also no agreement on legal form mobility and employee co-determination.[19] Company law, once *the* driving force behind the development of European private law,[20] was threatened with petrification.

2. National Compartmentalisation via the Seat Theory

In addition, company law in Germany and France insulated itself from external influences via the seat theory.[21] The shielding of the domestic market from foreign companies has its theoretical foundation in the conflict of laws principle of territoriality.[22] This goes back, in particular, to the Dutch jurist Ulricus Huber (1636-1694) and his famous work « *De conflictu legum* » from 1689. According to this, domestic law must always be applied within a specific territory.[23]

15. It was only in the so-called « miracle of Nice » (2001) that Germany finally succeeded in implementing parity-based co-determination as a fallback solution for the Societas Europaea (SE), the « flagship of European company law », see Lutter, Bayer et Schmidt (fn. 6), § 5 para. 37, § 10 para. 4 et seqq. and § 45 para. 1 et seqq.
16. Bayer et Schmidt (fn. 7), chapter 18 para. 12.
17. The group law directive originally planned as the 9th Company Law Directive did not even reach the stage of an official Commission proposal, Bayer et Schmidt (fn. 7), chapter 18 para. 12.
18. A total of four drafts of a so-called 5th Company Law Directive (« Structural Directive ») were discussed; none was ultimately adopted, Bayer et Schmidt (fn. 7), chapter 18 para. 12.
19. The differing attitudes of the Member States to co-determination were the biggest obstacle to harmonisation, Habersack et Verse (fn. 6), § 4 para. 11.
20. M.-P. Weller, « Zukunftsfragen des Europäischen Unternehmensrechts », *ZEuP* 2012, 681 et seqq.
21. Cf. J. Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws*, 2015, para. 57: « national cocoon » as an image for the closed society.
22. As a meta-order, private international law forms the essential part of the competition order for institutional competition between private law systems. Whether and to what extent there is competition therefore depends on how it is organised, see E.-M. Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 2002, 93 et seqq., 97 et seqq.
23. U. Huber, « De conflictu legum », in *Praeelectiones juris*, reprinted in Meili, *ZIR* 8 (1898), 192 (*Zeitschrift Interne Revision*).

The courts have applied the principle of territoriality also to company law. According to the domicile theory, the company statute is determined by the respective effective administrative centre of a company.[24] The territoriality effect of the domicile theory manifests itself in its draconian consequences: foreign companies are denied entry into Germany by treating them as legally irrelevant.[25] The domicile theory thus « protected » domestic legal forms from foreign competition for a century.[26] As Jürgen Basedow aptly put it: « [...] the main purpose was to protect the system of domestic norms and values against intrusions from outside. »[27] And Holger Fleischer points out that the English limited company was hardly noticed for 100 years.[28]

IV. MARKET LIBERALISATION AND DEREGULATION (1990s)

Jacques Delors brought about the first turning point. As President of the European Commission (1985-1995), he pushed through the completion of the single market with the Single European Act and the Maastricht Treaty (1992).

1. Freedom of Movement of Capital

It was not until the Maastricht Treaty that the free movement of capital was fully developed as the fourth fundamental freedom (now Art. 63 TFEU).[29] Since then, it also applies to direct investments from third countries.[30] In consequence, from that time onwards, investors, particularly from the US, have increasingly invested in companies in France and Germany.[31] The free movement of capital thus fueled the globalisation of the economy in the 1990s.[32]

24. M.-P. Weller, « Unternehmensmobilität im Binnenmarkt », in *Einheit und Vielheit im Unternehmensrecht*, FS Blaurock, 2013, 497 (501).
25. BGH, 30 January 1970 – V ZR 139/68, BGHZ 53, 181 – Liechtensteiner Interfinanz. In 2002, the BGH further developed its case law. Now, corporations from third countries that relocate their administrative headquarters to Germany are reclassified as domestic partnerships (GbR/OHG), BGH, 27 October 2008 – II ZR 158/06, BGHZ 178, 192 – Trabrennbahn; M.-P. Weller, « Die Wechselbalgtheorie », in FS Goette, 2011, 583 et seqq.
26. It still applies to third-country companies, L. Hübner, *Die kollisionsrechtliche Behandlung von Gesellschaften aus nicht-privilegierten Drittstaaten*, 2011.
27. Basedow (fn. 21), para. 594.
28. H. Fleischer, in *Münchener Kommentar zum GmbHG*, 4th ed. 2022, introduction para. 229.
29. S. Korte, in Calliess/Ruffert, *EUV/AEUV*, 6th ed. 2022, Art. 63 TFEU para. 3 et seq.
30. Prior to 1994, the free movement of capital had no direct effect in favour of citizens, Korte (fn. 29), Art. 63 TFEU para. 3.
31. Through the investment and divestment decisions, the equity providers also indirectly vote on the efficiency of the legal form design, Kieninger (fn. 22), 268.
32. The globalisation of the economy is primarily due to the globalisation of capital flows and thus the free movement of capital, Basedow (fn. 21), 68 (77 et seqq.); Kieninger (fn. 22), 264 et seqq.

The ECJ provided a further important impetus in 1999 with its *Centros case law* on the recognition of foreign companies.[33] At the turn of the millennium, the ECJ's patience with politics was exhausted. Politicians were unable to harmonise the rules regarding the mobility of companies within Europe. The ECJ responded to this inability with the three « landmark decisions » in *Centros*, *Überseering*, and *Inspire Art*, which were based on the freedom of establishment (Art. 49, 54 TFEU). These not only had « downright revolutionary consequences for the mobility of companies »[34] (under 2.), but also triggered horizontal competition between company law systems (under 3.). The Member States, in turn, used this competition as an opportunity to fundamentally reform their traditional company laws (under 4.).

2. Mobility of Companies

In the case of legal form mobility, a distinction can be made between the freedom to choose the legal form at the time of formation and the subsequent freedom to change the legal form by transferring the registered office.[35]

a) *Freedom for the* Company Founders *to Choose the Legal Form* (Centros, Überseering, *and* Inspire Art)

In *Centros*[36], the ECJ considered it permissible for market players to circumvent stricter domestic rules – specifically in the form of the minimum capital requirements under Danish law – by choosing a foreign legal system.[37] It, thus, transferred the country-of-origin-principle originally developed for the free movement of goods[38] to company law. Legal forms became « products »[39] supplied by the Member States and demanded by EU citizens.[40] Company law arbitrage has been possible since then.[41]

In *Überseering*[42], the ECJ demanded that foreign companies be recognised as such in the host state. In many Member States that previously followed the seat theory, the incorporation theory was derived from this

33. Cf. on the « motives for the reform zeal » (translated) of the close corporations, H. Fleischer, *NZG* 2014, 1081 (1084 et seq.).
34. Lutter, Bayer et Schmidt (fn. 6), § 7 para. 2.
35. Kieninger (fn. 22), 106 et seqq.
36. ECJ, 9 March 1999 – C-212/97 – *Centros Ltd / Erhvervs- og Selskabsstyrelsen*.
37. Detailed analysis e.g. in Kieninger (fn. 22), 127-147.
38. C. Thomale et M.-P. Weller, « Country of Origin Rule », in Basedow et al., *Encylopedia of European Private International Law*, 2017.
39. Fundamental R. Romano, « Law as a product », *Journal of Law, Economics and Organisation* 1 (1985), 225 et seqq.; also H. Eidenmüller, « Recht als Produkt », *JZ* 2009, 641 et seqq. (*Juristenzeitung*).
40. Kieninger (fn. 22), 175 et seqq.
41. Fleischer (fn. 28), introduction para. 237.
42. ECJ, 5 November 2002 – C-208/00 para. 59 – *Überseering BV / Nordic Construction Company Baumanagement GmbH (NCC)*.

recognition obligation.[43] The Austrian Supreme Court was the first to switch to the incorporation theory, and the German Federal Court of Justice followed shortly afterwards for foreign EU companies.[44] In Belgium[45] and France[46], the literature now also advocates in favour of the incorporation theory.

b) *Freedom for the* Companies *to Change the Legal Form* (Cartesio, Vale, *and* Polbud)

Following the freedom of choice of legal form for company founders, the ECJ's decisions in *Cartesio*[47], *Vale*[48], and *Polbud*[49] shortly afterwards also cleared the way for *companies* to transfer their registered office across borders. A transfer of the registered office is accompanied by a change of the legal form – for example from a German GmbH to a French SARL – and is therefore also referred to as a cross-border change of legal form (conversion).[50] This ensures the mobility of legal forms not only at the time of formation, but also in the subsequent course of a company's activities.

c) *Interim Result*

With its rulings on freedom of establishment, the ECJ has « advanced corporate mobility in the internal market by light years »[51]: Entrepreneurs are now able to choose a *foreign* legal form for their *domestic* business

43. C. Thomale, « Die Gründungstheorie als versteckte Kollisionsnorm », *NZG* 2011, 1290 et seq.
44. BGH, 29 January 2003 – VII ZR 155/02, BGHZ 152, 353 – Schlussentscheidung Überseering. However, the BGH continues to apply the domicile theory to third country companies, see M.-P. Weller, « Das Internationale Gesellschaftsrecht in der neuesten BGH-Rechtsprechung », *IPRax* 2003, 324 et seqq. (*Praxis des Internationalen Privat- und Verfahrensrechts*).
45. A. Autenne et E.-J. Navez, « Cartesio – Les contour incertains de la mobilité transfrontalière des sociétés revisité », *RTD com.* 2009, 91 (119 et seq.) *(Revue trimestrielle de droit commercial)*; P. Wautelet, « Quelques réflexions sur la *lex societatis* dans le Code de droit international privé », *Rev. prat. soc.* 2006, 5 (22 et seqq.) *(Revue pratique des sociétés)*.
46. P. Lagarde, comment on ECJ, 5 November 2002 – C-208/00 – *Überseering*, *Rev. crit. DIP* 2003. 524 (528 et seq.) *(Revue critique du droit international public)*; M. Menjucq, « Towards the supremacy of the criterion of incorporation in French Law », in *Unternehmen, Markt und Verantwortung*, FS Hopt, 2010, 3167 (3172 et seq.); H. Muir Watt, comment on ECJ, 30 September 2003 – C-167/01 – *Inspire Art*, *Rev. crit. DIP* 2004. 173 (177).
47. ECJ, 16 December 2008 – C-210/06.
48. ECJ, 12 July 2012 – C-378/10; see M.-P. Weller et B. Rentsch, « Die Kombinationslehre beim grenzüberschreitenden Rechtsformwechsel », *IPRax* 2013, 530 et seqq.
49. ECJ, 25 October 2017 – C-106/16.
50. In more detail L. Hübner, « Der grenzüberschreitende Formwechsel nach Vale », *IPRax* 2015, 134 et seqq.; W. Schön, « Das System der gesellschaftsrechtlichen Niederlassungsfreiheit nach VALE », *ZGR* 2013, 333 et seqq.; D. Verse, « Niederlassungsfreiheit und grenzüberschreitende Sitzverlegung », *ZEuP* 2013, 458 et seqq.
51. Lutter, Bayer et Schmidt (fn. 6), § 7 para. 108.

operations. Domestic freedom of choice of legal form is complemented by cross-border freedom. Holger Fleischer speaks of an « *embarras de richesse* » in company law.[52]

3. Horizontal Competition Between Legal Systems: Law as an Infrastructure Service

The freedom to choose a legal form and to change the legal form turned the company law systems into « open societies ».[53] The arbitration of company law by the shareholders also triggered horizontal[54] competition between the company laws[55] of the EU Member States[56] in favour of market players.[57] In view of the high degree of harmonisation within the EU in the area of public companies, competition focused primarily on the market segment of closed companies, which is important for small and medium-sized enterprises (SMEs).[58]

The understanding of the meaning and purpose of company law began to change: Legal forms have since been seen less as behaviour-regulating entities and more as vehicles of economic facilitation.[59] They are now seen as « legal infrastructure services for the promotion of efficient and competitive companies ».[60] The traditional *regulatory* function of company law is therefore taking a back seat to its *enabling* function.[61]

52. Fleischer (fn. 28), introduction para. 329.
53. Cf. also Basedow (fn. 21), para. 278 et seq.
54. In addition, there is vertical competition between the member state legal forms on the one hand and the supranational European legal forms on the other, J. von Hein, *Die Rezeption des US-amerikanischen Gesellschaftsrechts in Deutschland*, 2008, 590 et seqq.; L. Klöhn, « Supranationale Rechtsformen im Europäischen Gesellschaftsrecht », *RabelsZ* 76 (2012), 276 et seqq.
55. See the government draft of the MoMiG, BT-Drucks. 16/6140, 59: « competition between company forms in Europe » (translated).
56. Kieninger (fn. 22), 175 et seqq. on the incentives that can prompt legislators to change the respective company law system.
57. R. Buxbaum, « Is there a place for a European Delaware in the Corporate Conflict of Laws? », *RabelsZ* 74 (2010), 1 et seqq.; J. Damman, « Freedom of choice in European Corporate Law », *Yale Journal of International Law* 29 (2004), 477 et seqq.; S. Grundmann, « Wettbewerb der Regelgeber im Europäischen Gesellschaftsrecht », *ZGR* 2001, 783 et seqq.; von Hein (fn. 54), 564 et seqq., 572 et seq.; Lutter, Bayer et Schmidt (fn. 6), § 7 para. 2, 69 et seqq.
58. Kieninger (fn. 22), 192, 200, 222.
59. Fleischer (fn. 28), introduction para. 122.
60. Fleischer (fn. 28), introduction para. 122; Kieninger (fn. 22), 240 et seq. is more sceptical about «company law as a location factor» (translated).
61. Fleischer (fn. 28), introduction para. 122. On the enabling function of the planned Societas Unius Personae in European group law M.-P. Weller et J. Bauer, « Europäisches Konzernrecht », *ZEuP* 2015, 7 et seq.

4. Reforms in the EU Member States: Deregulation of the Formation Procedures and Simplification of the Capital Protection Systems

The mixture of competition between legal forms and the new understanding of the enabling function has fueled the modernisation efforts of the member states.[62] The regulatory design of the various Member State legal forms is now becoming more similar across Europe.[63]

In particular, the continental European minimum capital system and the complex formation procedures associated with raising capital have come under pressure. In the first decade of the 2000s, legislators reacted by deregulating the formation procedures and reducing the minimum capital requirement.[64] This is intended to take account of the most important determinant for the choice of legal form, namely the lowest possible formation costs.[65]

In Spain, the *sociedad limitada nueva empresa* (SLNE) was introduced in 2003[66], a « fast-track limited liability company » that can be founded within 48 hours.[67] In France, the *Loi de Modernisation de l'Économie* (LME) of 2008 completely abolished the minimum capital requirement for the *société à responsabilité limitée* (SARL) of originally 50,000 francs[68].[69] The amount of share capital can now be freely determined in the articles of association.[70]

The Mario Monti government has created the *società a responsabilità limitata semplificata* (SRLS) for company founders in Italy.[71] Capital companies without share capital had previously been introduced as part of the 2003

62. G. Portale, « Gesellschaft mit beschränkter Haftung ohne Stammkapital und Einzelkaufmann mit betrieblichem Sondervermögen », in *Recht ohne Grenzen*, FS Kaissis, 2012, 777 (778 et seqq.).
63. H. Fleischer, *NZG* 2014, 1081 (1085 et seq.).
64. See H. Fleischer, *NZG* 2014, 1081 et seq.; Portale (fn. 62), 777 et seq.; on the reform debate Lutter, Bayer et Schmidt (fn. 6), § 19 para. 28 et seqq.
65. H. Fleischer, *NZG* 2014, 1081 (1086).
66. E. Irujo, « Eine spanische "Erfindung" im Gesellschaftsrecht: Die "Sociedad limitada nueva empresa" – die neue unternehmerische GmbH », *RIW* 2004, 760; F. Juan-Mateu, « The Private Company in Spain – some recent developments », *ECFR* 2004, 60 et seqq. *(European Company and Financial Law Review)*; critical in particular M. Garcia Mandaloniz, « Menos tiempo y costes en la creación de una empresa: "Proyecto de Ley del Proyecto Nueva Empresa" », *Derecho de los Negocios*, Num. 142, 2002, 1, 6.
67. Fleischer (fn. 28), introduction para. 240.
68. Art. 35 Loi n° 66-537 du 24 juillet 1966 sur les sociétés commerciales.
69. P. Le Cannu, « La loi pour l'initiative économique et le droit des sociétés », *Rev. sociétés* 2003. 409 *(Revue des sociétés)*; see also A. Fauchon et P. Merle, *Sociétés commerciales*, 16th ed. 2013, para. 18.
70. Art. L. 223-2 Code de commerce: « Le montant du capital de la société est fixé par les statuts. »
71. L. Capozucca et G. Santoni, « S.R.L. semplificata e a capitale ridotto », 2013, 1 et seq.; Fleischer (fn. 28), introduction para. 225.

company law reform.[72] The minimum capital requirement for the *besloten vennootschap* (BV) in the Netherlands was also relaxed in 2012.[73] Comprehensive company law reforms were also implemented in Belgium[74], Denmark[75], Finland, and Sweden.[76]

In 2008, the German legislator responded with the *Act on the Modernisation of the Law of Limited Liability Companies and Prevention of Misuse* (MoMiG)[77] – the biggest reform since the enactment of the GmbHG in 1892.[78]

V. CORPORATE GOVERNANCE (2000s)

1. EU Commission's Action Plans

Following the collapse of the New Market after the turn of the millennium, European company law focused on modernising corporate governance. The High Level Group of Company Law Experts (« Winter Group »[79]) presented a report in 2002.[80] Building on this, the European Commission issued an action plan in 2003 to « modernise company law and improve corporate governance in the European Union ».[81]

In its objectives, the 2003 action plan moved away from the original full harmonisation approach[82] of European company law and concentrated on individual key points, particularly in the area of corporate governance, in line with the principle of subsidiarity.[83]

72. G. F. *Campobasso, Diritto delle società*, 8th edition, 2012, 567; F. *Ferrara et F. Corsi, Gli imprenditori e le società*, 13th edition, 2006, 888; Portale (fn. 62), 777 et seqq.
73. G. van Solinge et M. Nieuwe Weme, « NV en BV », in C. Asser, *Rechtspersonenrecht*, 2013, 169; S. Hirschfeld, « Die niederländische "bv" nach dem Gesetz zur Vereinfachung und Flexibilisierung des bv-Rechts (flex-bv) », *RIW* 2013, 134 et seq.
74. Loi modifiant le Code des sociétés et prévoyant des modalités de la société privé à responsabilité limitée « Starter » of 12 January 2010; see Lutter, Bayer et Schmidt (fn. 6), § 6 para. 72 with fn. 227.
75. H. Fleischer, *NZG* 2014, 1081 (1084); M. *Neville*, « The Regulation of Close Corporations in Danish Company Law in an International Regulatory Context, Nordic & European Company Law », *LSN Research Paper Series*, No. 14-02, 2014, 2 et seq.
76. *Neville* (fn. 75), 2 et seq.; H. Fleischer, *NZG* 2014, 1081 (1084).
77. See W. Goette et M. Habersack, *Das MoMiG in Wissenschaft und Praxis*, 2010.
78. Fleischer (fn. 28), introduction para. 119.
79. Named after the chairman Jaap Winter from the Netherlands.
80. Lutter, Bayer et Schmidt (fn. 6), § 13 para. 3 (with further references).
81. Habersack et Verse (fn. 2), § 4 para. 17 et seqq.; Lutter, Bayer et Schmidt (fn. 6), § 13 para. 4; see also H. Merkt, « Die Pluralisierung des europäischen Gesellschaftsrechts », *RIW* 2004, 1 et seq.
82. The harmonisation authorisation in Art. 44(2)(g) EC (old version) was originally seen as preventing a race to the bottom and establishing an even level playing field, Bayer et Schmidt (fn. 7), chapter 18 para. 2.
83. Habersack et Verse (fn. 2), § 4 para. 17: « core area harmonisation instead of full harmonisation » (translated).

In terms of methodology, the Commission had increasingly opted to use the softer harmonisation instrument of the non-binding recommendation instead of the binding directive[84] (Art. 288(5) TFEU). Nevertheless, these recommendations have a considerable steering effect in company law due to their political guiding principle function.[85] The recommendations on the appropriateness of the remuneration of board members[86] and on the independence of supervisory board members in particular provided important impulses.[87]

In response to the 2008 financial and economic crisis, the Commission presented a new action plan in 2012 entitled « European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies ».[88] It calls for greater transparency, particularly in corporate governance reporting.[89] In addition, shareholders should be more actively involved in the supervision of company management in related party transactions[90] and in remuneration policy.[91]

2. Societas Europaea (SE)

In 2004, the Societas Europaea was introduced through regulations and directives – and turned out to be a great success.[92] The reasons for choosing an

84. The adoption of directives proved to be increasingly difficult politically; for example, the Takeover Directive was stuck in the legislative process for over 15 years. Political agreement failed to be reached, particularly in matters of group law and in relation to the organisation of the stock corporation due to corporate co-determination, see Bayer et Schmidt (fn. 7), chapter 18 para. 12.
85. Lutter, Bayer et Schmidt (fn. 6), § 3 para. 69 et seq.
86. See in detail Lutter, Bayer et Schmidt (fn. 6), § 13 para. 72 et seqq.
87. Recommendation 2005/162/EC of 15 February 2005 on the duties of non-executive directors/supervisory board members of listed companies and on the committees of the administrative/supervisory board; see Lutter, Bayer et Schmidt (fn. 6), § 13 para. 52 et seqq.; also M. Habersack, « Das Aktiengesetz und das Europäische Recht », *ZIP* 2006, 445 (449 et seq.) *(Zeitschrift für Wirtschaftsrecht)*; K. Hopt, « Europäisches Gesellschaftsrecht und deutsche Unternehmensverfassung – Aktionsplan und Interdependenzen », *ZIP* 2005, 461 (467 et seq.).
88. Action Plan of 12 December 2012, COM(2012) 740 final.
89. Action Plan of 12 December 2012, COM(2012) 740 final, 6 et seqq.
90. Building on the 2012 Action Plan, a proposal for a directive to amend the Shareholders' Rights Directive is currently being discussed (COM(2014) 213 final, which addresses the complex issue of related party transactions in Art. 9c; see J. Vetter, « Regelungsbedarf für Related Party Transactions? », *ZHR* 179 (2015), 273 et seqq.
91. Action Plan of 12 December 2012, COM(2012) 740 final, 9 et seqq.
92. One reason for this is the option of a monistic organisation of company management, which allows the families as company owners greater influence on company management than the dualistic system. This is because in the two-tier system, the management board manages the company independently of the supervisory board on its own responsibility. If the representatives of the family lineage – as is usually the case – do not themselves participate in the operational business as members of the Management Board, they only have a supervisory function on the Supervisory Board. In contrast, a position as a non-executive director allows the family representatives in the monistic system greater influence

SE lie, firstly, in the attractive international legal form « SE » for marketing reasons. Secondly, from a German perspective, the freedom of organisation that the SE regime offers with regard to corporate co-determination should be mentioned.[93] This allows for a « streamlining » of the supervisory board.[94]

3. Societas Privata Europaea (SPE)

In contrast, the introduction of the Societas Privata Europaea failed politically.[95] The idea for this « little sister » of the SE came from France. The idea was to create a supra-national legal form for closed corporations.[96] However, there was resistance, particularly in Germany.[97] The trade unions feared that co-determination would be circumvented due to the envisaged decoupling of the registered office and administrative headquarters. Notaries were similarly concerned about the loss of their influence. An SPE incorporated abroad would have been subject to foreign company law despite its domestic activities.

VI. CORPORATE SOCIAL RESPONSIBILITY (2010s)

Company law in the era of globalisation was driven by the idea of *shareholder value*[98], economic thinking shaped in particular by the *Chicago School*. However, since the turn of the millennium, the eternal debate[99] as to whether company law should not, instead, be based on the opposite concept of pluralistic objectives, namely *stakeholder value*, has been heating up again.[100]

The increased advocacy for the latter needs to be seen in the light of the concept of Corporate Social Responsibility[101]. At the level of the

in the form of a say in operational management decisions, B. Haider-Giangreco et M. Polte, « Die SE als Rechtsform für den Mittelstand », *BB* 2014, 2947 (2950 et seq.) *(Betriebsberater)*.

93. Lutter, Bayer et Schmidt (fn. 6), § 45 para. 196.

94. Lutter, Bayer et Schmidt (fn. 6), § 45 para. 191, 196.

95. Cf. the EU Commission's press release of 2 October 2013, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP_13_891] (last accessed on 29.4.2024): « Therefore the Commission will consider to withdraw proposals identified in this category including [...] a proposal on the statute of a European private company [...]. »

96. See also J. Culmann, *Die SPE in der Krise*, 2011.

97. See the recommendations for overcoming this resistance by P. Hommelhoff et C. Teichmann, « Die Wiederbelebung der SPE », *GmbHR* 2014, 177 et seqq. *(GmbH-Rundschau)*.

98. The concept of « shareholder value » originally comes from capital market theory and describes the goal of maximising the company's market value. This approach differs from the interests of the company in that the share price development in stock corporation law is traditionally not the objective, but merely an *indicator* of the company's success, K. Schmidt, *Gesellschaftsrecht*, 4th ed. 2002, § 26 II 3c, § 28 II 5.

99. H. Fleischer, *JZ* 2023, 365 (368).

100. One of the most progressive recent voices is A.-C. Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, 2022.

101. As far as can be seen, the term CSR first appears in H. R. Bowen, *Social Responsibility of the Businessman*, 1953; for the historical development towards ESG, see D. S. Lund et E. Pollman, 121 *Colum. L. Rev.* (2021), 2563 (2612 et seq.). On CSR, see for example J. Simon, « Die Legitimation der CSR-RL und ihre Auswirkungen auf die Unternehmensverfassung der Aktiengesellschaft », 2019, 15 et seqq., 30 et seqq.; C. H. Seibt, in Schmidt et Lutter, *Aktiengesetz*, 4th ed. 2020, § 76 para. 40 et seqq. Cf. in detail on CSR and the debate on the common good in stock corporation law A.-C. Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, 2022, 163 et seqq., 296 et seqq.

United Nations, the importance of Corporate Responsibility was emphasised in the Ruggie Principles of 2011[102]. According to these principles, large companies should respect human rights in international supply chains. At the level of the EU, the Corporate Social Responsibility Directive was issued in 2014.[103] This obliged listed companies to provide non-financial reporting in addition to financial reporting. Companies must report on compliance with human rights in their supply relationships.[104]

VII. CORPORATE SUSTAINABILITY (2020s)

1. Environment Social Governance (ESG) and Sustainability

The Paris Climate Agreement (2015)[105], the increasing frequency of extreme weather events, and the global movements like *Fridays for Future* have created the pressure that has led to an even more far-reaching development: The environment has also become a major issue in the company law (reform) discourse.[106] The upgrading of environmental concerns in corporate practice in this regard has been reflected terminologically in the business world with the term Environment Social Governance (ESG)[107]: The environment is now explicitly on an equal footing with social concerns.[108]

The term « sustainability » dominates the Law of the European Union. It is to be understood broadly and – like ESG – refers to both social and environmental sustainability.

102. Available at: [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf] (last accessed on 29.4.2024).

103. Directive 2014/95/EU; implemented in Germany with §§ 289a et seqq. and 315a et seqq. of the German Commercial Code (HGB).

104. L. Hübner, *Unternehmenshaftung für Menschenrechtsverletzungen*, 2022; M.-P. Weller, L. Kaller et A. Schulz, « Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland », *AcP* 216 (2016), 387 et seq.; M.-P. Weller et L. Nasse, in FS Ebke, 2021, 1071 et seq.

105. Paris Agreement, *Federal Law Gazette* 2016 II 1082; UN Treaty Collection Vol. II Ch. 27, 7d.

106. In more detail M. Renner, *ZEuP* 2022, 782 et seqq.; J. Dörrwächter, *NZG* 2022, 1083 et seq.

107. ESG is an acronym that was probably first used prominently by the UN in a 2004 report, *Financial Sector Initiative*, Who Cares Wins, 2004 [https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf] (last accessed on 29.4.2024), 1: « Until now, the industry has not developed a common understanding on ways to improve the integration of environmental, social and governance (ESG) aspects in asset management, securities brokerage services and the associated buy-side and sell-side research functions. » See also Koch, « ESG – Zündstufen zum Megatrend », *AG* 2023, 553 et seqq.

108. Cf. the revised Art. 19a and the corresponding explanatory memorandum in the EU Commission proposal of 21 April 2021 for a reform of the CSR Directive towards a « Corporate Sustainability Reporting Directive », COM(2021) 189 final.

2. Climate Neutrality

Within the sector of « environment », the topic of climate stands out. Climate neutrality is the new key concept[109] which, following on from the commitments made in the Paris Climate Agreement, has recently also been set as a goal for the EU and its Member States under the Law of the European Union.[110]

« Climate neutrality » is explicitly enshrined in Article 2 of Regulation (EU) 2021/1119, which was adopted in 2021 and officially bears the name « European Climate Law ».[111] According to this, the European Union aims to achieve climate neutrality by 2050 at the latest. This makes the goal envisaged in the European Green Deal[112] of 2019 binding.[113]

Correspondingly, the European legislator would like to oblige companies in the EU above a certain size to align their respective business models with the goal of climate neutrality.[114] Two sustainability directives from 2022 and 2024 are relevant here:

3. Corporate Sustainability Reporting Directive (2022)

According to the CSRD[115], companies above a certain size have to explain in their management report how they ensure that their business model is

109. See also S. Harbarth, *ZGR* 2022, 533 (554): « Goal of climate neutrality » and (556): « Transformation to a climate-neutral economy ».

110. The recitals to the EU Climate Law (Recitals 1, 29, 30), its Art. 1 para. 2 (« This Regulation sets out the binding objective of achieving climate neutrality in the Union by 2050 in order to realise the long-term temperature objective set out in Article 2(1)(a) of the Paris Agreement [...]. ») and § 1 para. 3 KSG (« The basis is the obligation under the Paris Agreement based on the United Nations Framework Convention on Climate Change to limit the increase in the global average temperature to well below 2 degrees Celsius and, if possible, to 1.5 degrees Celsius above pre-industrial levels [...] » (translated)) make it clear that the Paris commitments are a reason for European and national framework legislation and objectives.

111. Art. 2 EU Climate Law: « Climate neutrality objective: Union-wide greenhouse gas emissions and removals regulated by Union law shall be balanced in the Union by 2050 at the latest, so that emissions are reduced to net zero by that date, and the Union shall aim for negative emissions thereafter. »

112. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final of 11.12.2019, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0021.02/DOC_1&format=PDF] (last accessed on 29.4.2024).

113. F. Fellenberg et A. Guckelberger, in Fellenberg et Guckelberger, *Kommentar zum KSG, TEHG, BEHG*, 2022, introduction para. 14; S. U. Pieper, in Bergmann, *Handlexikon der Europäischen Union*, 6th ed. 2022, Green Deal; S. Schlacke, *NVwZ* 2022, 905 (907); U. Stäsche, *EnWZ* 2021, 151 (159).

114. See on this topic M.-P. Weller, T. Hößl et C. Seemann, « Klimaneutralität als Zielvorgabe für Unternehmen », *ZIP* 2024, 209 et seqq.; *ibid.*, « Klimaneutrale Unternehmen – ein Definitionsversuch », *ZIP* 2024, 330 et seqq.

115. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

compatible with the goal of climate neutrality by 2050 (see the new Art. 19a(2)(a)(iii)). In addition, the obligated companies must disclose information on their greenhouse gas emissions using the European Sustainability Reporting Standards (ESRS). The European Commission adopted these standards as delegated acts for the CSRD[116] on 31 July 2023.[117]

With regard to the climate, companies will have to report on the transformation of their business model and emission reduction efforts in the future.[118] In addition, they should report on CO_2 targets for the year 2030 and beyond in five-year periods up to 2050.[119]

4. Corporate Sustainability Due Diligence Directive (2024)

Following on from the *reporting* obligations of the CSRD, the Corporate Sustainability Due Diligence Directive (CSDDD) of 13 June 2024[120] establishes additional *behavioural* obligations for companies and their management not only in the area of respecting human rights in global supply chains but also in the area of climate protection.

Art. 22(1) of the CSDDD obliges companies above a certain size to adopt a plan to ensure that their business model and strategy (1) are compatible with the transition to a sustainable economy and (2) with the 1.5 degree target of the Paris Agreement[121]. The plan has to include specific emission reduction targets.

116. Art. 290 para. 1 TFEU in conjunction with Art. 29b CSRD; for more details see A. Reuter, *ZIP* 2023, 1572 (1576).

117. Delegated Regulation of 31.7.2023 supplementing Directive 2013/34/EU with regard to sustainability reporting standards, C(2023) 5303 final, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:a17f44bd-2f9c-11ee-9e98-01aa75ed71a1.0008.02/DOC_1&format=PDF] (last accessed on 29.4.2024); see J. Schmidt, *BB* 2023, 1859 (1860) for more details.

118. Companies' CO_2 targets must be based on gross figures; this refers to genuine reduction efforts and not deductions through offsetting, see Disclosure Requirement E1-4 No. 34 lit. b Delegated Regulation of 31.7.2023 supplementing Directive 2013/34/EU with regard to sustainability reporting standards, C(2023) 5303 final Annex 1, with Annex 1, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:a17f44bd-2f9c-11ee-9e98-01aa75ed71a1.0008.02/DOC_2&format=PDF] (last accessed on 29.4.2024).

119. Disclosure Requirement E1-4 No. 34 lit. d Delegated Regulation of 31.7.2023 (fn. 117).

120. Directive (EU) 2024/1760 of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

121. Art. 2 para. 1 lit. a Paris Agreement of 12 December 2015, UN Treaty Collection Vol. II Ch. 27, 7d (Paris Agreement).

VIII. RESULT

For some years now, company law has increasingly been used to tackle socio-political concerns.[122] The inclusion of public interests and, in particular, ESG in internal corporate processes can be understood as an increasing « politicisation of the corporation ».[123] This development continues as efforts are now being made to use company law to help combat climate change (« The Law of the Corporation as Environmental Law »[124]).[125] The CSRD and CSDDD both assume that companies must align their respective business models with the goal of climate neutrality by 2050.

In Germany, the 2024 German Lawyers' Conference dealt with the topic of *greening company law*.[126] It will be interesting to see whether France will expand its forerunner role in this field, which it has established with the introduction of the *« loi de vigilance »* (2017) and the *« société à mission »* (2019).

122. A. Hellgardt et V. Jouannaud, *AcP* 222 (2022), 163 (208); C. Simons, *ZGR* 2018, 316 (330); J. Vetter, *ZGR* 2018, 338 (362 et seq.).
123. K. R. Ilmonen, *EBLR* 32 (2021), 817 (819); also M. Leydecker et S. Bahlinger, *NZG* 2020, 1212 et seqq.; A. Hellgardt et V. Jouannaud, *AcP* 222 (2022), 163 et seq.; W. Schön, *ZfPW* 2022, 207 (211); critical of the development is H. Fleischer, in « Beck-online-Großkommentar AktG », 1.2.2024, § 76 para. 42: « the use of stock corporation law for corporate policy concerns is gradually taking on worrying forms » (translated).
124. S. E. Light, *Stanford Law Review* 71 (2019), 137 et seqq.
125. On this development, see for example J. Koch, *Aktiengesetz*, 18th ed. 2024, § 76 AktG para. 79 et seqq.
126. The expert opinion that served as the basis for the consultation: M.-P. Weller, « Empfehlen sich im Kampf gegen den Klimawandel gesetzgeberische Maßnahmen auf dem Gebiet des Gesellschaftsrechts? », in *Verhandlungen des 74. Deutschen Juristentags*, Band I, Stuttgart, 2024, F 1–F 108.

DEUXIÈME PARTIE

Le contentieux