

International and European Business Law
by Schulze / Lehmann

European Corporate Law

Article-by-Article Commentary

Kindler / Lieder



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edited by

Peter Kindler
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Company Law

National company laws have been increasingly shaped by European Union (EU) acts in the past. European regulations and directives aim to provide a level playing field for corporations established in the EU member states. More specifically, they aim to reduce the competition among member states for companies to choose their legal framework, to effectively protect shareholders and other competitors, and to facilitate and safeguard internal and external trade. However, by-products of these measures are that directives have become more complex and voluminous in the past, resulting in challenges for companies and legal practitioners to interpret and apply these legal instruments.

Against this background, we have structured the content and analysed all relevant issues relating to EU company law in depth. This volume assembles the most important EU acts in the area of company law. The major part of this volume deals with the Company Law Directive (Directive 2017/1132/EU). It includes provisions on incorporation, nullity of the company and validity of its obligations, online procedures (formation, registration and filing), disclosure, registers, capital maintenance and alteration. Besides, the directive covers structural changes, such as cross-border conversions, internal and cross-border mergers and divisions. Furthermore, the volumes comprises the important directives on financial statements (2013/34/EU), the single-membered company (2009/102/EC), shareholders' rights (2007/36/EC) and takeover bids (2004/25/EC).

This book is structured like a commentary following a civil law approach. The directives are analysed article by article, primarily on an abstract level. Examples and cases support the understanding wherever relevant and helpful. From that abstract level, lawyers can apply the rationales to the case at hand. The analysis always comes from the wording of the provision. References to the recitals are drawn, the history, background and debate of the provision are displayed and other general tools for interpreting the provision are used. This is aimed to provide assistance to regulators, attorneys, counsels, judges, and academics. Additionally, we would like to contribute to a well-informed debate on EU legislation, which matches the sophistication of the existing texts.

Finalizing this volume would not have been possible without the help of others. Our first thanks go to the authors. Without them, this volume would not have been possible at all. Furthermore, we would like to thank our assistants that were involved in that project, namely Felix Karpp (Freiburg) and Dr Simon Jobst as well as Helene Evers (Munich). We would also like to thank Matthias Knopik from Nomos publishing house for his tireless efforts in completing this book.

Munich/Freiburg, June 2021

Peter Kindler / Jan Lieder

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Abbreviations

AG	Die Aktiengesellschaft
AGB	Allgemeine Geschäftsbedingungen
AktG	Aktengesetz (German Stock Corporation Act)
B2B	Business-to-Business
B2C	Business-to-Consumer
BayObLGZ	Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen
BB	Der Betriebs-Berater
BeckOGK HGB	Beck Online Großkommentar zum Handels- und Gesellschaftsrecht
BeckRS	Beck online Rechtsprechung
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt (German Law Gazette)
BGH	Bundesgerichtshof
BKR	Zeitschrift für Bank und Kapitalmarktrecht
BR-Drs.	Bundesrats-Drucksache
BRIS	Business Registers Interconnection System
BRRD	Bank Recovery and Resolution Directive (2014/59/EU)
BT-Drs.	Bundestags-Drucksache
CDE	Cahiers de Droit Européen
cf.	confer
CFILR	Company Financial and Insolvency Law Review
Chap.	Chapter
Cia	Compania Colektiva
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
Co.	Company
COM	Communication
Corp.	Corporation
CUP	Cambridge University Press
CV	Commanditaire Vennootschap
CYELS	Cambridge Yearbook of European Legal Studies
DB	Der Betrieb
DNotZ	Deutsche Notar-Zeitschrift
Doc	Document
DrittelbG	Drittmittelbeteiligungsgesetz (Employee Representation Act)
DStR	Das deutsche Steuerrecht
e.g.	for example
E.L.Rev.	European Law Review
EAFRD	European Agricultural Fund for Rural Development
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
ECFR	European Company and Financial Law Review
ECL	European Company Law
ECLI	European Case Law Identifier

Abbreviations

ECU	European Currency Unit
ed(s)	editor(s)
edn	edition
EEC	European Economic Community
EFTA	European Free Trade Association
EIRL	establecimiento individual de responsabilidad de limitada
EP	European Parliament
et al	and others
et seq.	and the following
etc.	et cetera
EU	European Union
EUA	European Units of Account
EUAccD	EU-Accounting Directive (2013/34/EU)
EuInsVO	Verordnung (EU) 2015/848 über Insolvenzverfahren (Regulation on insolvency proceedings)
EuR	Europarecht
EUR	euro(s)
Eur.J.Law&Econ.	European Journal of Law and Economics
EURATOM	European Atomic Energy Community
EURL	Entreprise unipersonnelle à responsabilité limitée
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWiR	Entscheidungen zum Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
FS	Festschrift
GbR	Gesellschaft bürgerlichen Rechts
GesbnR	Gesellschaft nach bürgerlichem Recht
GmbH	Gesellschaft mit beschränkter Haftung
GmbHR	GmbH-Rundschau
GPR	Zeitschrift für das Privatrecht der Europäischen Union
GVG	Gerichtsverfassungsgesetz (German Judicature Act)
Harv. L. Rev.	Harvard Law Review
HGB	Handelsgesetzbuch (German Commercial Code)
IAS	International Accounting Standards
ICC	International Chamber of Commerce
IFAC	International Federation of Accountants
IFRS	International Financial Reporting Standards Foundation
Inc.	Incorporated
IntCompLQ	International and Comparative Law Quarterly
Intro	Introduction
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IStR	Internationales Steuerrecht
JBl.	Juristische Blätter
JCL	Journal of Comparative Law
JIBFL	Journal of International Banking and Financial Law
JZ	JuristenZeitung
KG	Kommanditgesellschaft
KMU	kleine und mittlere Unternehmen (small and medium-sized enterprises)
KTS	KTS – Zeitschrift für Insolvenzrecht
KWG	Kreditwesengesetz

Abbreviations

LLC	Limited Liability Company
LSK	Beck-Leitsatzkartei
Ltd.	Limited
MiFID II	Markets in Financial Instruments Directive (2014/65/EU)
MoU	Memorandum of Understanding
MüKoAktG	Münchener Kommentar zum Aktiengesetz
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift-Rechtsprechungsreport Zivilrecht
No.	Number
NZ	Österreichische Notariatszeitung
NZG	Neue Zeitschrift für Gesellschaftsrecht
OG	Offene Gesellschaft
OGH	Oberster Gerichtshof der Republik Österreich
oHG	offene Handelsgesellschaft
OJ	Official Journal
OLG	Oberlandesgericht
OR	Official Records
OUP	Oxford University Press
p./pp.	Page(s)
PICC	UNIDROIT Principles of International Commercial Con- tracts
PIE	Public interest entities
Pub	Publication
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. Soc.	Revue des sociétés
RIW	Recht der internationalen Wirtschaft
RNotZ	Rheinische Notarzeitschrift
SAD	Statutory Audit Directive (2006/43/EC)
SAR	Statutory Audit Regulation ((EU) No. 537/2014)
SCP	Société civile professionnelle
SLIM	Simpler Legislation for the Internal Market
SME	Small and medium-sized enterprises
SPE	Societas Privata Europaea
SpruchG	Spruchverfahrensgesetz (German Award Proceedings Act)
SRD II	Shareholders Rights Directive II (2017/828/EU)
SUP	Societas Unius Personae
Supp.	Supplement
TEC	Treaty on the Foundation of the European Community of Maastricht
UCITS	Undertakings for Collective Investments in Transferable Securities
UG	Unternehmergeellschaft
UK	United Kingdom
UmwG	Umwandlungsgesetz (German Transformation Act)
US	United States of America
v	versus
VOF	Vennootschap Onder Firma
Vol	Volume

Abbreviations

WM	Zeitschrift für Wirtschafts- und Bankrecht
WPg	Die Wirtschaftsprüfung
Yale L.J.	Yale Law Journal
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

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A. The Spirit of European Corporate Law¹

I. Protective Standards vs. ‘Shareholder Value’

1. European corporate law at a crossroads

1 **Two paths** have led to the current face of European corporate law and examples for the development of these paths have already been sketched out in the case of the corporation. One path is **harmonisation** and the creation of uniform law by having EU institutions establish protective standards; decision-making ‘from above’. The other

¹ Section A.I. and II. of this Introduction is based on Roth and Kindler, *The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe* (2013), 1 et seq.

path is the **choice between different national offerings – competition among legal systems** – in which citizens are guided by their preferences; decision-making ‘from below’. Harmonisation initially stood in the foreground. This was reflected in corporate law directives starting in 1968² which primarily addressed the public limited liability companies and, from a substantive standpoint, followed the high level of regulation and legal certainty provided by the public limited liability companies in the German legal system. A further example of this is the Second or Capital Directive of 1976³ largely inspired by French and German law.

The private limited company has served as the alternative model for free choice according to decisions of the CJEU since 1999. Its **decisions in Centros (1999), Überseering (2002) and Inspire Art (2003)**⁴ were and are primarily understood to mean that the founder of an enterprise located in a specific European Union Member State can avail itself of EU-foreign entity forms even if there is no factual relationship whatsoever to the respective country.⁵ Even if this interpretation rests since Cadbury-Schweppes (2006) and Vale (2012)⁶ on shaky ground, the practice has been to quickly act based on this interpretation, especially in Germany as well as Denmark and the Netherlands.⁷ What is clear is a **preference for legal systems with a low degree of regulation related to formation requirements**. In 2019, EU legislators have encouraged this practice by introducing a form of ‘**cross-border conversion**’ whereby a company converts the legal form under which it is registered in a departure Member State A into a legal form of the destination Member State B and **transfers ‘at least’ its registered office** to the destination Member State B (Art 86a(2) Directive 2017/1132/EU:⁸ the real seat may remain in the departure Member State A. This legal trend strikes to the core of the Continental European private limited company which had been designed as a regulatory alternative to the public limited liability companies (*Aktiengesellschaft*, *société anonyme*) as early as 1892.⁹

² First or Disclosure Directive 68/151/EEC of 9 March 1968; incorporated in Directive 2017/1132/EU Title I Chapter I, Chapter II Section 2, Chapter III Section 1.

³ Directive 77/91/EEC of 13 December 1976; incorporated in Directive 2017/1132/EU Title I Chapter IV.

⁴ Case C-212/97, 09.03.1999, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECLI:EU:C:1999:126; Case C-208/00, 05.11.2002, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECLI:EU:C:2002:632; Case C-167/01, 30.09.2003, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECLI:EU:C:2003:512.

⁵ Case C-167/01, 30.09.2003, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECLI:EU:C:2003:512 para. 95; Kurcz and Paizis, ‘Company Law, Connecting Factors and the Digital Age – A New Outlook’, 16 (2019) *ECFR* 434, 437 et seq; BGH 14.03.2005 – II ZR 5/03, *NZG* 2005 (8), 508; Austrian OGH 15.07.1999, 6 Ob 123/99 b, *Österreichisches Recht der Wirtschaft (RdW)* 1999, 719; from the German literature rather than others Behrens, ‘Introduction (B.)’ in Ulmer, Habersack, Löbke (eds), *Gesetz betreffend die Gesellschaften mit beschränkter Haftung. Großkommentar* (2nd edn, 2016), margin no 39; Bayer, ‘§ 4a’ in Lutter and Hommelhoff (eds), *Kommentar zum GmbHG*, (17th edn) margin no 9; Lutter, Bayer and Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht* (6th edn, 2017), § 7 margin nos 30, 60 et seq; Raiser and Veil, *Recht der Kapitalgesellschaften* (5th edn, 2010), § 58 margin no 5.

⁶ Case C-196/04, 12.09.2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECLI:EU:C:2006:544; Case C-378/10, 12.07.2012, *Vale Epitesi kft.* [2012] ECLI:EU:C:2012:440; Kindler, ‘“Cadbury Schweppes”: Eine Nachlese zum internationalen Gesellschaftsrecht’ *Praxis des internationalen Privat- und Verfahrensrechts (IPRax)* 2010, 272.

⁷ Lutter, Bayer and Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht* (6th edn 2017), § 7 margin no 60 et seq, with additional citations.

⁸ As amended by Directive 2019/2121/EU on cross-border conversions, mergers and divisions; see Stelmaszczyk, ‘Die neue Umwandlungsrichtlinie – harmonisierte Verfahren für grenzüberschreitende Verschmelzungen, Spaltungen und Formwechsel’ *GmbH-Rundschau (GmbHR)* 2020 (111), 61.; J. Schmidt, ‘Cross-border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package’, 16 (2019) *ECFR* 222.

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- 3 This is because **Anglo-American law** embodied and still embodies a **regulatory philosophy which is not very demanding**, at least in relation to the **requirements for formation**. The capital requirements provide a striking example of this point. For example, Austria requires minimum capital of EUR 35,000 and Germany required EUR 25,000 through 2008. By contrast, an English Limited could always be formed with one GBP. This is not only attractive to founders, but the legal policy approach as such has not missed making an impact on European institutions. This is most likely because it may be equated with deregulation in a general sense, which, for example, may be seen in the efforts to liberalise the 1976 Capital Directive (codified in Arts 44 et seq. Directive 2017/1132/EU).¹⁰
- 4 At the same time, **Anglo-American law** stands for the second path of the legal trend described at the outset (→ mn. 1): that of a **liberal fundamental philosophy regarding the choice of legal form and of the associated legal system and regarding the designing of the articles of association**. Where companies are involved, English law and closely related legal systems employ the so-called place of incorporation theory for conflict of laws purposes. In doing so they consequently leave **freedom of contract of the shareholders** a great deal of latitude in both aspects – that of substantive law as well as conflicts of law: *freedom to design the articles of association* on the one hand and *free choice of legal form* on the other. Similarly consistently, Germany, Austria, Denmark, the Netherlands, and other countries which attach importance to a high level of mandatory law in order to provide effective legal protection for minority shareholders and third parties (creditors et al.), demanded (and demand to the extent possible) of their domestic enterprises that they subject themselves to national company laws using a company form under domestic law; the so-called corporate domicile theory for conflict of laws purposes. They place *responsibility* on the parties for complying with the governmental *regulatory framework* at both levels.
- 5 In this manner, European legal policy currently finds itself faced with the decision of whether to follow one or the other regulatory philosophies or, based on various compromises, to provide more room for one or the other. This fundamental question presents itself not only along the way to further standardisation of European corporate law, with the Anglo-American tradition and the Continental European tradition struggling for substantive influence, but also with regard to the decision for or against free competition among legal systems. The latter involves impediments to competition provided by legal standards that the Continental European Member States view as essential.
- 6 The **European Commission** appears to be perfectly aware of this crossroads. In its **February 2012¹¹ consultation paper on the future of company law** it presented the question of what objectives should EU company law have¹² and, amongst others, provided the following responses to this question, combining the two paths described

⁹ Fleischer, 'Supranationale Gesellschaftsformen in der Europäischen Union' *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 2010 (174), 385, 411; on the 'invention' of the private limited liability company by the German legislator see Kindler, 'La s.r.l. tedesca (GmbH) a 125 anni dalla sua nascita' *Rivista di diritto societario* 3 (2019), 540.

¹⁰ See also alternatively Merkt, 'Schutz der Gesellschaftsgläubiger im Binnenmarkt durch gesetzliches Mindestkapital und andere Maßnahmen' in Müller-Graff and Teichmann (eds), *Europäisches Gesellschaftsrecht auf neuen Wegen* (2010), 81; Lutter, Bayer and Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht* (6th edn, 2017), § 19 margin no 6; for an example see the Amending Directive 2006/68/EC (introducing a modest deregulation primarily in Art 10 a and 19 et seq of the 1976 capital maintenance directive).

¹¹ European Commission, Internal Market and Services Directorate General, Consultation on the future of European company law.

¹² Under heading II., Objectives of European company law, question 5.