



# European Company Law

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# The course

**Wednesday 9 - 11 AM (9:15 – 10:45 AM) + 1 - 3 PM (1:30 – 3 PM)**

**BUT, N.B.:**

- today, Sep. 21, the second slot is from 1 to 2:30 PM, sharp!
- Next week, Sep. 28, no in-class lecture: commented slides available in **TEAMS**

**In general: always on-site; if I can, online too, and recorded, BUT attending students are those in presence, ONLY**

**Approximatively (subject to change) from Sep 21<sup>st</sup> to Nov 23<sup>rd</sup>**



# The course and the exam (1)

## Goal of the course

- The course aims at providing students with an in-depth knowledge of the **basic features of European Company Law** and with the **application of comparative method** to the field of Company Law. At the end of the course, students are expected to be able to understand the **current trends in European Company Law**, the ways **the national transposition** of European rules can take place, and to handle the main legal instruments currently available in order to **assure a company's sustainability pursuant to European Law**.
- **Part 1: (all the students) European and Comparative Company Law**
  - Companies in general
  - Legal Basis for European Company Law;
  - Harmonization in European Company Law (in particular: Codified Directive EU 2017/1132);
  - EUCJ Decisions Regarding Freedom of Establishment (Segers, Daily Mail, Centros, Uberseering, Inspire Art, Cadbury Schweppes, Sevic, Cartesio, National Grid Indus, Polbud);
  - Supranational Business Organization Forms (EEIG, SE, SCE; SPE and SUP Drafts).



# The course and the exam (2)

- **Part 2: (only for 8 CFU ECTS students – IECOLS + Giurisprudenza) Sustainability in European Company and Financial Markets Law**
  - Sustainability in general, and theories on the purpose of a company;
  - European policies on sustainability: EU Commission Action Plans on Company Law and Corporate Governance for sustainability (2012), on Green Action Plan for SMEs (2014), and on Sustainable Finance (2018);
  - Corporate governance and disclosure rules on sustainability (Non-Financial Reporting Directive);
  - Models of social entrepreneurship;
  - European markets and social economy ;
  - Multinational groups and CSR;

## In addition: international guests

**Teresa Scassa**, University of Ottawa, October 19<sup>th</sup> – Introduction to IP and International IP Law

**Florian Möslein**, Universität Marburg, November 2<sup>nd</sup> – Digitalisation in Company Law

**International Conference on sustainability March 30<sup>th</sup> - 31<sup>st</sup>,**



# The course and the exam (3)

## Textbook and readings

### *For Part 1*

- Attending students:
  - Students' personal notes from lectures and additional material provided by the module convenor,
  - Andrea Vicari, European Company Law, De Gruyter, Berlin, 2021, Chapters 1, 2, 3, 4, 5, 6, 7, 8, 9, 11), **and**
  - Nicola de Luca, European Company Law, Cambridge University Press, Cambridge, 2nd edition, 2021 (Pages 54-136)
  
- Non-attending students:
  - Readings made available by the module convenor in the course's website
  - Andrea Vicari, European Company Law, De Gruyter, Berlin, 2021, Chapters 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14), **and**
  - Nicola de Luca, European Company Law, Cambridge University Press, Cambridge, 2nd edition, 2021 (Pages 22-136)



# The course and the exam (4)

*For Part 2*

For BOTH attending AND non-attending students

- - Beate Sjøfjell, Christopher M. Bruner (eds), The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability, Cambridge University Press, 2019, Chapters 1, 6, 14, 37, 43, 46, 47
- - Janet Dine, The abuse of Company Groups, in Hanne S. Birkmose, Mette Neville & Karsten Engsig Sørensen (eds.), Abuse of Companies, Kluwer Law International, 2019, 35-58
- - Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Building an economy that works for people: and action plan for social economy (COM(2021) 778 final), available online: <https://ec.europa.eu/info/law/better-regulation/>

PLUS: European and international documents that the instructor will make available on the course's website.



# The course and the exam (5)

- Regarding some specific subjects, attending students shall be required to read a few short readings suggested by the teacher, and to refer about them, aiming at provoking an exchange of views on the most relevant topics

## The examination

- Actively attending students** will be assessed:
  - based on their involvement in the course's activities (quality and quantity; 50%), and a multiple-choice test (50%) on Part I (both 6 and 8 CFU/ECTS students; for 6 CFU/ECTS students the examination ends with the multiple-choice test); and
  - on a short paper to be written on a subject assigned on topics included in Part II (8 CFU/ECTS students only).
- Non-actively attending students** shall sit a multiple-choice written examination on Part I; students taking at least 15/30 in the examination on Part I are admitted to the oral examination on Part 2.

**N.B.: 6 CFU/ECTS non-actively attending students shall sit for an oral examination on their syllabus**



# European Company Law

- Words are meaningful
  - European...
  - Company...
  - Law!

Each word is a key issue. Let's start with a basic lexicon.





# Basic Lexicon (1)

- Company... and Corporation, Partnership and Firm
- Shareholders... and members
- Shares and Stocks
- Directors and Officers
- Branches and Subsidiaries
- Mergers and Divisions
- Capital (Share Capital, Legal Capital, Authorised Capital, Paid-up Capital...)
- Articles of Association, Articles of Incorporation, Articles (or Deed) of Partnership, Instrument of constitution, Charters, Bylaws and Company Statutes
- Nullity



## Basic Lexicon (2)

- Agency
- Disclosure
- Bond and Debenture
- ...
- Not a single English, but many English(es)
  - UK English
  - American (US) English
  - «Commonwealth» English (Canada, India, Australia, South Africa...)
  - [- European/“Brussels” English]



# European **Company** Law

Thus, **Company**

- What's a company?
- Key elements (Hansmann *et al.*):
  - a) Legal personality
  - b) Limited liability
  - c) Transferable shares
  - d) Delegated management
  - e) Investor ownership



# Companies & co.

First of all: company or corporation?

Second: companies and partnerships  
But also sole entrepreneur

Third: companies and cooperatives

Fourth: companies and no-profit sector



# The idea of a company...

- More parties (not valid any longer)
- Starting from the limited liability as a mean to make investments easier
  - Commenda in the Middle Ages
  - East India Companies (Dutch, French and British) – 17<sup>th</sup> Century
- Exception to a general rule: no limited liability (seizure and sale of debtor's personal assets)
  - Who is entitled to limit a debtor's liability?
  - Are there conditions to do so (public protection purpose)?
    - Capital
    - Form
    - ...



# Legal personality (1)

- *Entity shielding* for a **separate patrimony**

It operates two ways

1. Protect company's asset from shareholders' personal creditors; &
2. Protect company's asset from unjustified shareholder's withdrawal (much stronger in Companies than in Partnerships)



## Legal personality (2)

- As it is a separate entity, company needs individuals who have authority to buy & sell assets in the name of the company (*agency and direction*)
  - Pay attention: each party is likely to have its own interest to pursue...
- Third parties are to have the possibility to know who these individuals are (disclosure)
  - Why? They need to know who has the power to make business lawfully *on behalf of the company*

# Liability limitation (1)

- **Universal** feature of company law
- «*Owner shielding*»...
  - Together with «entity shielding»...
  - ...a complete asset partitioning is created
- **Asset partitioning** enables a better allocation of risks in a company's different businesses
  - i.e.: I can decide to pursue a risky activity, without risking directly all my personal belongings
- [contractual limited liability, but NOT *tort* limited liability: e.g. directors' liability]





## Liability limitation (2)

- Possible fraud to creditors
  - See 1-euro companies all over the EU
- A basic problem: **piercing (or lifting) the veil**
  - Hard definition: who must pay?
    - Shareholders/members/owners?
    - Directors?
    - ... or just the creditors?
  - Different approaches in the US/UK and civil law systems



# Transferable shares

- Transferable  $\neq$  *freely* transferable
- Very much depending on the single actual case (closely held/closed or widely held/open); and
- The nature of the company (public or private – see below)
- The underlying idea: the transfer of the company shares' ownership (and therefore of the company's itself) should be made possible by law and makes the transfer of investment easier



# Delegated management

- Shareholders (commonly) *are not* who manages the company, but **they appoint the directors**
- As **directors** are  $\neq$  shareholders, they can **serve also interests other than those of appointing shareholders** (e.g. employees, minority shareholders...)
  - I am not discussing if this is good or bad... that's not a matter of morality...
- «The board is separated from the operational managers» of the company
  - Sub-delegation
- The board has usually more members (mutual monitoring)



# Investor ownership

- Who is the Owner?
  - a) Who has the **right to control the company** (decision); and
  - b) Who **benefits of company's earnings** (subjective profit) (and who risks...)

This means that there is a **direct link**, at least as a default rule between the **investment** and the **power** in/**gain** from the company. A company's structure is less flexible than a partnership's one for preserving the investor ownership.



## More about companies

- Publicly/widely held companies vs. Privately/closely held companies (*de facto*)
- Open vs. Closed companies (agreements)
- Public vs. Private companies (company forms)
- Key element is always the so-called **corporative structure**



# European Company Law

What **purpose** for Company Law?

- **Common reliance** on **common rules** (for both mandatory and default rules) ► from a **substantive** and **judicial** point of view
- Foundation for **contractual provisions** (for both mandatory – limits – and **default** – options – rules)



# Company Law(s)?

- **Regulatory competition**
  - In particular in the field of **private companies** (less harmonisation)
- Where is the **best law** for my purposes?
- Race to...
  - the **top**?
  - the **bottom**?
  - the **diversity**?



# The function of Company Law

- **Maximise profit?** At which cost?
  - The entire topic of sustainability in Company Law, and therefore...
- **Serve whose interest?** Shareholders? Employees? Environment? The «society» as a whole?...
- The «**enlightened shareholders' value**»
  - See, e.g., Section 172 UK Companies Act 2006: "Duty to promote the success of the company"  
(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
    - a) the likely consequences of any decision in the long term,
    - b) the interests of the company's employees,





# The function of Company Law

- c) the need to foster the company's business relationships with suppliers, customers and others,
- d) the impact of the company's operations on the community and the environment,
- e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

- In any case: the intermediate goal is to **minimise conflicts** and **agency costs**



# Agency costs?

- Yes: **agency costs** between the constituencies (different stakeholders) of the company:
  - Majority/minority shareholders
  - Shareholders/directors
  - Company/employees
  - ...

**Company law's purpose** is (should be?) – among the others – to **lower them**, in order to gain more **efficiency**



# Company Law: its borders

- No-profit – Social enterprise Law (?)
  - Well, insofar it is enterprise...
- Association (private) Law (?)
- Cooperatives' Law (?)
- Capital Markets Law (?)
- Banking Law (?)
- Bankruptcy Law (?)
- Competition & IP Law (?)