

Alexia Autenne^{1,2} / Yuri Biondi^{3,4} / Georges Cavalier⁵ / Andra Cotiga-Racah^{6,7} / Peter Doralt⁸ / Colin Haslam⁹ / Hana Horak¹⁰ / Corrado Malberti^{11,12} / Denis Philippe¹³ / Konstantinos Sergakis¹⁴ / Jessica Schmidt¹⁵

The Current Challenges for EU Company and Financial Law and Regulation

¹ Business and Financial Law SIG, Green Paper, European Law Institute (ELI), Vienna, Austria, E-mail: alexia.autenne@uclouvain.be

² Catholic University of Louvain, Louvain-la-Neuve, Belgium, E-mail: alexia.autenne@uclouvain.be

³ IRISSE, Cnrs, UMR7170, University Paris Dauphine PSL, Paris, France, E-mail: yuri.biondi@gmail.com

⁴ Business and Financial Law SIG, coordinator, European Law Institute (ELI), Vienna, Austria, E-mail: yuri.biondi@gmail.com

⁵ University of Lyon, Lyon, France

⁶ Catholic University of Lille, Lille, France

⁷ Business and Financial Law SIG, coordinator, European Law Institute (ELI), Vienna, Austria

⁸ WU – Wirtschaftsuniversität Wien, Wien, Austria

⁹ Queen Mary University of London, London, UK

¹⁰ Faculty of Economics, University of Zagreb, Zagreb, Croatia

¹¹ Trento University, Trento, Italy

¹² Business and Financial Law SIG, coordinator, European Law Institute (ELI), Vienna, Austria

¹³ Catholic University of Louvain, Louvain, Belgium

¹⁴ University of Glasgow School of Law, Glasgow, UK

¹⁵ Bayreuth University, Bayreuth, Germany

Abstract:

European company and financial law and regulation have been evolving over time along with business and financial practices. The resulting 'social licence' established by company and financial law and regulation aimed to balance the granted privileges of limited liability and share transferability with the corporate social contribution to economic development and employment. Recent transformations driven by shareholder value and financialisation have been challenging this balance of interests between stakeholders (including employees and shareholders) and society. The EU institutional framework may respond to these challenges by reaffirming the centrality of the enterprise as a going concern. On this basis, corporate accountability and responsibility may be enforced to make ongoing corporate affairs accountable and responsible for their contribution to economy and society. Ongoing corporate capacity to cope with social and environmental responsibilities may be assured along with the fair and sustainable remuneration of stakeholders, including shareholding investors, and a fair tax contribution. The EU institutional design and policy mix may be organised to respond to this comprehensive set of corporate dimensions. Here the most relevant fields to be reconsidered include: enterprise groups and corporate social responsibility; financial reporting and transparency; financial investment and asset management.

DOI: 10.1515/acl-2017-0064

Table of Contents

1. Introduction
2. The historical root of EU company and financial law
3. The current challenges to EU company and financial law
4. The future of EU company and financial law and regulation
 - 4.1. Enterprise groups and corporate social responsibility
 - 4.2. Financial reporting and transparency

Yuri Biondi is the corresponding author.

© 2018 Walter de Gruyter GmbH, Berlin/Boston.

This content is free.

4.3. Financial investment and asset management

5. Concluding remarks

6. Endorsement

References

Appendix

1 Introduction

This document adopts a comprehensive definition of EU company and financial law and regulation. The EU institutional framework on these matters is based upon company law but includes inter alia corporate governance, financial reporting and transparency, financial investment and asset management.

Between the seventies and the nineties, the corporate environment has been confronted with financialisation and shareholder value. Financialisation refers to the increasing importance of financial markets, financial motives, financial institutions, and financial elites in the working of economy and its governing institutions, at national and international levels (Epstein, 2001). Consequently, financial practices and mind-sets have acquired an increasingly pervasive role in economy and society, across countries and jurisdictions (Carruthers, 2015; Livne & Yonay, 2015; Van Der Zwan, 2014). Shareholder value refers to a corporate governance model where the enterprise is expected to prioritize interests of shareholding investors with a view to maximising financial investment return and inflate current share market prices. Both management and governance bodies are therefore organised to reinforce this shareholder value orientation.

These decades of rapid and material transformations have been confronted with scandals, crises and shortcomings throughout the 2000s. The shareholder value doctrine with its reliance on shareholder empowerment and financial market discipline was associated with issues of stability and fairness (CONVIVIMUM, 2012; Sjøfjell, Johnston, Anker-Sørensen, Millon, & Richardson, 2015). The global financial crisis of 2007–08 revealed the limits and hazards (including moral hazard) that can arise from active global financial markets (CONVIVIMUM, 2013; Stout, 2011). Concerns for sustainability, human rights enforcement and environmental protection have emerged, prompting renewed and reinforced claims for corporate social accountability and responsibility towards a broader set of stakeholders (including shareholders), society and nature. New arguments for sustainable companies have been developed (Vitols & Heuschmid, 2012; Vitols & Kluge, 2011).

This document aims to address these emergent challenges that the current context raises for the EU institutional framework in corporate and financial affairs. EU company and financial law and regulation may respond to claims for sustainability and accountability by reaffirming the centrality of the enterprise as a going concern. On this basis, corporate accountability and responsibility may be enforced to make corporate affairs accountable and responsible for their contribution to economy and society. Ongoing corporate capacity to respond to social and environmental responsibilities may then be assured along with the fair and sustainable remuneration of stakeholders, including shareholding investors, and a fair tax contribution. EU institutional design and policy mix may be organised to cope with this comprehensive set of corporate missions. The most relevant fields to be reconsidered include: enterprise groups and corporate social responsibility; financial reporting and transparency; financial investment and asset management.

The rest of the document is organised as follows. The second section recalls the historical root of the EU company and financial law organisation. The third section deals with the current transformations of the corporate environment. The fourth section addresses emergent concerns and implications for EU company and financial law and regulation. A summary concludes.

2 The historical root of EU company and financial law

Over time, company law has been evolving along with business and financial practices. The law frames and shapes these practices in interaction with their never-ending transformations. In this context, company law aims to reaffirm legal rules and procedures that are consistent with the general principles of the law¹ and applicable through various enforcement modes, including the recourse to justice. In this evolving context, company law has to deal with the ways actors interpret and instrumentalise legal rules to obtain specific results.

The traditional organisation of company law and regulation finds its roots in medieval times and adopts its current shape in the nineteenth century, when various jurisdictions in Europe and abroad started introducing,

facilitating and fostering limited liability companies whose shares were transferable at will. The institutional framework was responding to the evolving needs of business and finance of those times. Limited liability on corporate affairs and liquidity of financial stakes in those affairs facilitated the raise of financial funds that were required to finance industrial investments fostering mass production and employment. The 'social licence' established by company law and regulation balanced the privileges granted to shareholding investors with the social benefits generated by financial investments into enterprise development. Private and public interests were accommodated by a renewed institutional framework under the law.

At the beginning of the twenty century, Walther Rathenau (29 September 1867 – 24 June 1922), a prominent German statesman and business leader, addressed this corporate evolution by pointing to the functional and institutional separation between the enterprise and its investors. He stressed a fundamental disconnection between the old-fashioned notion of ownership and the modern organisation of corporate affairs:

The claims to ownership are subdivided in such a fashion, and are so mobile, that the enterprise assumes an independent life, as if it belonged to no one; it takes on an objective existence, such as in earlier days was embodied only in state and church, in a municipal corporation, in the life of a guild or a religious order. (Rathenau, 1921 *In Days to Come*, p. 121)

At the same time, European business economists were developing an accounting model of reference to make this autonomous economic entity accountable to its stakeholders (including shareholders) and society. This model was based upon the principle of enterprise as a going concern and a prudent historical cost approach to accounting (Biondi & Zambon, 2012).

In the common law tradition, the principle of independent existence of companies separated from that of their incorporators was reaffirmed by the House of Lords in the UK case *Salomon vs. A Salomon and Co Ltd* [1897]:

It is to this delicate balance of interests that the company owes its resilience, its ability to co-opt and amplify diverse inputs, and its record of distributing its benefits widely.

Through the legal form of the company, the enterprise acquires therefore an autonomous space in the institutional framework that overarches economy and society, establishing a specific balance between public and private interests in business and financial affairs.

3 The current challenges to EU company and financial law

Recent transformations have challenged the received balance between private and public ordering in corporate and financial affairs (Haslam, 2017). Since the seventies, new practices of corporate governance have advocated the empowerment of shareholders over corporate management and governing bodies. Shareholder value has been affirmed as the main objective of corporate groups, generally linked to increase in current share market prices and justified by the efficient financial market hypothesis. This shareholder primacy has reshaped the balance of interests within the enterprise and between the enterprise and society. Within the enterprise, executive management has become increasingly concerned with enhancing shareholder remuneration through strategies that foster dividend distribution, share buyback, and current share market price increase. Executive remuneration has been linked to these objectives through mechanisms such as stock options and bonus arrangements. The economic organisation of the enterprise has been reshaped to favour shareholder interests, often at the expense and neglect of other stakeholder interests and the specific needs of the enterprise as a going concern. The enterprise was viewed from a 'liquidation' rather than an 'ongoing activity' perspective.

This transformation did not affect EU company law directly, but its use and its margins. New corporate practices and new modes of regulation were adopted and implemented concerning the organisation of corporate groups, corporate governance, financial reporting, and financial investment (including pension funds and asset management). This transformation has been driven by 'financialisation', a complex socio-economic phenomenon that favours financial mind-sets, financial interests and financial actors in economy and society.

In this context, corporate groups have been reorganised to exploit parent-subsidiary relationships in ways that may facilitate financial rent extraction while limiting corporate risk-bearing. Such a group reorganisation may then undermine corporate social responsibility by enabling aggressive corporate strategies aimed to avoid taxation, environmental and social liabilities.

These transformations challenge the EU institutional framework in company and financial affairs, threatening corporate social responsibility and sustainability. The EU action plans were focusing on listed companies with a view to fostering and protecting financial investors by enhancing shareholder rights, transparency and

liquidity. The past balance of interests was lost, while the new one appears to be one of empowering shareholding investors and relinquishing a duty of care to other stakeholders, nature and society as a whole. The overall corporate impact on economy and society should therefore be reconsidered with a view to rebalancing interests. Confronted with this new context, EU company and financial law has to reaffirm its role to assure that the EU principles of the law are protected and the social balance of interests is assured.

4 The future of EU company and financial law and regulation

EU company and financial law and regulation may respond to these challenges by reinstating its core social license. The recent transformations have displaced its original intention which is a focus on the enterprise as a going concern; instead, the focus is now on financial investment and the facilitation of active financial markets for corporate securities. Both orientations promote short-term incentives and behaviours that are proving to be hazardous for continued corporate sustainability and social responsibility over time and circumstances.

The EU institutional framework needs to reinstate the social balance of interests by considering the enterprise as an autonomous entity that is accountable and responsible to economy and society. Relevant fields of interest for law and regulation may be reconsidered by pointing to the specific needs of maintaining the enterprise entity as a going concern so as to reconcile the joint interest for stakeholders (including shareholders) and society. These fields include:

- Enterprise groups and corporate social responsibility
- Financial reporting and transparency
- Financial investment and asset management

4.1 Enterprise groups and corporate social responsibility

Generally speaking, all enterprises are nowadays organised as enterprise groups (Strasser & Blumberg, 2011). A typical organisation consists of a parent company that holds several layers of daughter and granddaughter companies, all of them being established as legally-independent companies. This organisation implies that group companies are embedded into complex networks of enterprise group relationships, which generally involve several tiers of intra-group investment chains. This legal-economic structure enables corporate liability risk partitioning and division of managerial responsibility across various business units. At the same time, corporate scandals and litigations reveal that this structuring may involve opportunities avoiding and abuse of the law. This is especially critical in a transnational environment such as the EU.

In this intra-group context, sources of parent responsibility for subsidiaries may occur due to: (i) undercapitalisation of the daughter company, including acts whereby the latter is deprived of its assets; (ii) permanent and extensive involvement in the management of the daughter company; (iii) abuse of parent shareholder majority, whereby the daughter company becomes an instrument of the parent; (iv) conflicts of interest in the management of the daughter company; (v) comingling of assets within the group; (vi) operations performed without fair consideration within group entities; and (vii) intragroup fraud.

For instance, a parent company may utilise its corporate structure to insulate some environmental risk exposure in a low-capitalised subsidiary that may therefore happen to be unable to bear that risk. That parent company may even manage to undermine the subsidiary capacity to bear that risk, with a view to enhance financial return extraction, including when that risk is timed to materialise. A similar legal hazard applies for social liabilities such as employer-sponsored pension obligations which can be decanted into exposed daughter company.

Moreover, a parent company may utilise its corporate structure to hide and shift taxable incomes and gains in ways that do effectively avoid taxation, including in a transnational environment such as the EU (CONVIVIMUM, 2017a). Since 2016, the European Commission has been renewing efforts to develop its Common Consolidated Corporate Tax Base (CCCTB) project (Cavalier, 2017), with a view to tackle tax base erosion and profit shifting across Member States, involving issues of Europe's tax justice, unfair competition and state aid.

In this context, EU law and regulation concerning cross-border mobility of companies – such as merger, division, and transfer of seat – is relevant and raises specific concerns with respect to the limited scope of EU law *lex lata*, employee protection, creditor protection, and accounting and disclosure rules (Schmidt, 2016). This matter may be reconsidered to respond to broader socio-economic concerns of instrumentalising, avoiding and abuse of the law. Cross-border activities shall remain compliant with the overarching spirit and all the principles

of the European Union, along with being respectful of social responsibility and accountability of business and finance. The EU institutional framework may therefore respond to market limits and failures, for which the EU common market makes no exception.

4.2 Financial reporting and transparency

EU company and financial law and regulation highlights the importance of transparency to enable accountability and responsibility of business and finance in economy and society. Corporate affairs are complex and evolve over time. Reporting and disclosure of relevant and reliable information are then fundamental to enable stakeholders (including employees and shareholders) and society to know the current state of corporate affairs and take informed decisions on them. Not only management and stakeholders, but governance and regulatory bodies are confronted with this information need to govern and regulate corporate affairs.

In the past, European regulation on these matters has tended to prioritise the provision of financial information that is decision-useful to existing and potential investors, with a view to facilitating an efficient financial market. In line with this objective, the EU legislative delegation to the International Accounting Standards Board – IASB (since 2002) reframed and reshaped the EU accounting model of reference to include systematic references to current values of assets and liabilities, in line with their market evaluation, that is, the price at which they are exchanged and traded at a reporting date or estimates as to what that current price might be (CONVIVIAM, 2017b).

This market-based accounting model substitutes a ‘liquidation’ approach to net worth evaluation rather than accounting for the ongoing use of corporate resources and the continuity of the enterprise as a going concern (Biondi, 2011). Therefore, the maintenance of corporate financial capital is being undermined, and so does the corporate accountability to a broader set of stakeholders, including but not limited to financial market investors. At the same time, this leaves enterprise groups exposed to a process of shareholder value extraction through dividends and share buybacks, thus vulnerable to economic risks – including asset impairments – because reserve provisions can be hollowed out (Haslam, Tsitsianis, & Hoinaru, 2016). Moreover, the financial investor logic undermines the accountability over the whole enterprise group, facilitating the opacity of intra-group relations. Therefore, reporting and control on corporate capital maintenance and intra-group relationships should be reinforced, making business entities responsible and accountable for social and environmental liabilities (Biondi, 2014). Transactions with shareholders should be better reported and controlled (Biondi & Graeff, 2017), including dividend distribution, own share active management, and own securities use for payments (executive remuneration; business combinations). Distributions to shareholders should be balanced against the needs to maintain reserves that are buffers available to absorb economic risks, including risks arising from both trading losses and asset impairments (Haslam, Tsitsianis, & Hoinaru, 2016).

A market basis of accounting for enterprise groups raises a theoretical and practical debate as to the determination of the corporate tax base (Biondi, 2017; Sikka & Murphy, 2015). This accounting approach understands the enterprise group as a set of separate entities related to each other by arm’s length transactions at current market prices that are assumed to be identifiable. This approach has been criticized for enabling structuring opportunities to avoid tax. Alternative approaches of unitary taxation are based upon the principle of the enterprise as a whole, involving intragroup non-market transactions and operations.

4.3 Financial investment and asset management

Information provision is not limited to corporate financial reporting and disclosure. Capital market law and regulation impose disclosure duties to issuers (Horak, Dumančić, & Poljanec, 2016; Sergakis, 2018), before the initial public offering (prospectus), periodically (transparency directive) and episodically (market abuse regulation).

Recent EU reforms seek to establish long-term shareholder engagement through the various financial intermediaries involved in financial investment chains. Institutional investors and asset managers are asked to disclose their engagement policies with companies, including monitoring and dialogue with investee companies, the exercise of voting rights, the use of proxy advisory services and the cooperation with other shareholders. Actual and potential conflicts of interest should be described, as well as monitoring policies of social and environmental performances.

These reforms appear to shift the regulatory agenda from a purely private order focused on the relationship between shareholders and the company toward a more balanced approach that involves taking into account public interests. EU law-making is no longer concerned only with shareholder rights, but increasingly includes shareholder duties toward investee companies and society (Birkmose, 2017; Birkmose & Sergakis, 2018). Among

other initiatives, it is relevant to highlight the disclosure on remuneration policies (say on executive pay) and the identification of shareholders exceeding a certain threshold (share-blockholders).

Among institutional investors, occupational pension schemes deserve specific attention (Autenne, 2017). Following previous US and UK reforms, the EU past reform (IORP I) sought to foster occupational pension funds involvement in the EU common financial market. Full funding, freedom to invest according to the Anglo-American standard of the prudent person, and portfolio extension to corporate securities and foreign currencies were fostered. Nowadays, the ongoing EU reform debate is concerned with the promotion of long-term investment for Europe's economy and society. The limits of current value measurements and of a market basis of accounting were acknowledged because they impact on pension funds solvency and capital requirements (see also Biondi & Boisseau-Sierra, 2017).

In this context, it may be relevant to reconsider the governance of occupational pension funds in the context of corporate relations between the sponsoring corporate employer and the beneficial employees in ways that may enhance employee representation and participation in corporate governance.

5 Concluding remarks

The development of EU company law was originally concerned with abolishing impediments to cross-border activities of companies while assuring a harmonised legal framework throughout the European community. New challenges have been emerging for EU company and financial law regulation in recent decades. They arose because shareholder value and financialisation have transformed corporate and financial affairs at a time when there are also new demands for corporate social responsibility and accountability. A societal claim for sustainable companies has been raised in both business and finance.

EU company and financial law may reconsider its institutional framework to assure that EU principles of the law are protected and corporate sustainability is effectively enforced. A better balance between shareholder interest, stakeholder interests and the general public interest appears to be required.

This document suggests that the historically-rooted principle of the enterprise as a going concern may drive this renewal of the EU institutional framework for business and financial affairs. The most relevant fields to be reconsidered include: enterprise groups and corporate social responsibility; financial reporting and transparency; financial investment and asset management.

The EU institutional framework may pursue a better balance between transnational activities and protection of social and environmental rights, as well as between shareholder, stakeholder and public interests in corporate and financial affairs.

6 Endorsement

This document draws upon the ELI SIG workshop on business and financial law held in Vienna, on 23 June 2017, following the ELI SIG strategic plan (Appendix B). It was jointly prepared by the workshop participants and eventually endorsed by (in alphabetical order):

Alexia Autenne (Catholic University of Louvain)
Yuri Biondi (Cnrs, IRISSO and Labex ReFi) – SIG Coordinator
Georges Cavalier (University of Lyon)
Andra Cotiga-Racah (Catholic University of Lille) – SIG Coordinator
Peter Doralt (WU - Wirtschaftsuniversität Wien)
Colin Haslam (Queen Mary University of London)
Hana Horak (Faculty of Economics, University of Zagreb)
Corrado Malberti (Trento University) – SIG Coordinator
Denis Philippe (Catholic University of Louvain)
Konstantinos Sergakis (University of Glasgow School of Law)
Jessica Schmidt (Bayreuth University)

The document was open to comments by the ELI SIG members and eventually endorsed by (in alphabetical order):

Linn Anker-Sørensen (PhD Candidate, University of Oslo)
Reuven Avi-Yonah (Irwin I Cohn Professor of Law, University of Michigan Law School)
Hanne S. Birkmose (Professor of Law, Aarhus BSS, Aarhus University)
Mihaela Braut Filipović (Assistant Professor, Faculty of Law, University of Rijeka)
Edita Čulinović-Herc (Professor of Law, University of Rijeka)
Rolf Dotevall (Professor of Law, University of Gothenburg)
Marco Greggi (Professor of Law, University of Ferrara)
Robby Houben (Professor of Law, University of Antwerp)
Iain MacNeil (Professor of Law, Head of School, Alexander Stone Chair of Commercial Law School of Law, University of Glasgow)
Mathias Siems (Professor of Law, Durham University)

The ELI SIG will follow closely the evolution of EU initiatives in the domain of company and financial law with special regard (but not limited) to those initiatives concerning the topics discussed in this green paper.

Acknowledgment

This green paper was authored by the Business and Financial Law SIG of the European Law Institute (ELI). The statements and recommendations contained in this green paper have not been approved or endorsed by any statutory body of the ELI and thus should not be taken to represent an official Statement, Instrument or position of the ELI.

Appendices

A ELI – Business and Financial Law SIG Inaugural Workshop, Vienna, 23 June 2017

European Law Institute (ELI) - Business and Financial Law SIG, Inaugural Workshop, University of Vienna, Faculty of Law, Vienna, 23 June 2017

Organisation Committee

Yuri Biondi, Cnrs - IRISSE, Research Director at the Financial Regulation Research Lab (Labex ReFi).
 Andra Cottiga-Raccach, Associate Professor, Catholic University of Lille, France.
 Corrado Malberti, Professor, University of Trento, Italy.
 Ala Sabanovic and Amy Blessing (European Law Institute, Vienna).

Workshop Program

As inaugural event of the SIG on Business and Financial Law of the European Law Institute (ELI), the SIG coordinators aim to organise an international workshop comprising a series of three plenary panels on the following main SIG topics:

- Financial transparency and accountability of corporate groups and financial intermediaries
- Groups of companies, shareholder rights and obligations, and related responsibilities and liabilities
- Cross border mobility of companies

The workshop aims to generate an open discussion with all the participants, developing review and constructive critique of existing laws and regulations, while setting plans for the SIG future work in view to contribute to the European law-making on these matters.

Opening Remarks

- Workshop organisers
- Peter Doralt (WU - Wirtschaftsuniversität Wien)
- Georges Cavalier (University of Lyon 3, ELI Tax Law Project)

Panel 1 – Financial transparency and accountability of corporate groups and financial intermediaries – Moderator and lead organiser: Yuri Biondi

Panel Presentation (retrieved from the SIG program)

The SIG plans to organize a working group dealing with the adaptation of European and national company law and related laws and regulations concerning compliance, reporting, disclosure and transparency, with a view to foster accountability of corporate groups and financial intermediaries. The focus of the working group will be on the current reporting, disclosure and transparency regime within the EU concerning corporate groups and their investors. In this context, national rules should be assessed in order to (i) better understand the chain of intermediaries facilitating cross-border establishments, (ii) identify corporate structures and their ultimate investors, (iii) speed up procedures and communication between companies and national authorities, (iv) assess the capability to submit electronic demand of cross border transfers of seat and other major company law operations, (v) allow the harmonization of investments standards in the EU in order to facilitate long-term engagements, (vi) assessing laws and regulations concerned with reporting and disclosure of financial and non-financial information.

Invited speakers:

- Colin Haslam (Queen Mary University of London) - <http://www.busman.qmul.ac.uk/staff/hhaslamc.html>
- Kostantinos Sergakis (University of Glasgow School of Law) - <http://www.gla.ac.uk/schools/law/staff/konstantinossergakis/>

General Debate and further ELI SIG plans on the matter

Panel 2 - Groups of companies, shareholder rights and obligations, and related responsibilities and liabilities – Moderator and lead organiser: Corrado Malberti

Panel Presentation (retrieved from the SIG program)

The SIG believes it may be important to investigate how the measures enhance the position of shareholders and stakeholders in European companies, while facilitating their long-term commitments to those companies and enhancing the wider framework for sustainable finance (Shareholders' Rights Directive revision, employee ownership and supervision, corporate governance reporting, and environmental, social and governance (ESG) issues which combine with the previous topics). The SIG intends to deal in particular with aspects regarding the power to give instructions and the responsibility sharing and joint liability among parent and affiliated companies. The concerns related to corporate group liabilities will be scrutinized both in relation to creditor protection in insolvency situations, and involuntary creditors in e. g. environmental hazardous activity caused by a subsidiary. Further attention may be paid to the intersection between company and financial law on topics such as banking company groups, financial engineering and design of complex financial derivatives and conduits, consolidation and disclosure of off-balance sheet financial activities.

Invited Speakers:

- Hana Horak (Faculty of Economics, University of Zagreb) - http://www.ecgi.org/members_directory/member.php?member_id=803
- Denis Philippe (Catholic University of Louvain) - <http://www.uclouvain.be/denis.philippe> and Alexia Autenne (Catholic University of Louvain) <https://uclouvain.be/fr/repertoires/alexia.autenne>

General Debate and further SIG plans on the matter

Panel 3 - Cross border mobility of companies. Moderator and lead organiser: Andra Cotiga-Raccach

Panel Presentation (retrieved from the SIG program)

The SIG aims to consider cross-border mobility with a focus of both company, accounting and tax law issues. The topic of cross-border mobility regards also PIL aspects to which the SIG is very sensitive to. From this perspective, the SIG will focus on the interest of adopting a uniform conflict of law rule relating to the international law of companies within the EU. In particular, we will deal with the assessment of the law applicable to a company legally formed according to the law of one Member State (*Lex Incorporationis*) and the limits that should be reserved to its application. Other PIL issues relating to international company and financial law may be assessed by the SIG depending on the further evolution of EU/national law. In particular, the working group may pay attention to the ongoing revision of financial market law directives concerning the definition of home and host states in cross-border investment relation, including relevant ECJ cases related to these issues.

Invited Speakers:

- Jessica Schmidt (Bayreuth U) - http://www.zivilrecht1.uni-bayreuth.de/de/team/owner_of_chair/Lehrstuhlinhaber/index.php

General Debate and further SIG plans on the matter

ELI SIG General Meeting, open to all the workshop participants

B European Law Institute - Business and Financial Law SIG, Strategic Plan

Released on 17 February 2016

Coordinators:

Dr Yuri Biondi, Cnrs, Research Director at the Financial Regulation Research Lab (Labex ReFi).

Dr Andra Cottiga-Racah, Associate Professor, Catholic University of Lille, France.

Dr Corrado Malberti, Professor University of Trento, Italy.

Preliminary remarks

The ELI Business and Financial Law SIG is expected to provide a forum for the improvement of European law-making on business and financial affairs.

The ELI SIG may develop ongoing critical scrutiny, respond to relevant consultation and call for tenders; assess legislative proposals; review legal instruments; collect and disseminate proposals, ideas and studies on incumbent or potential legal matters in the legal-economic and legal-financial fields.

The ELI SIG encourages investigation methods that complete regulatory and legal analysis with institutional analysis, combining law with other social sciences such as economics and sociology.

The ELI SIG plans to organise its activity in working groups led by SIG members (including the SIG coordinators). These groups may invite experts from outside the SIG to better deal with specific topics of interest.

The coordinators acknowledge that, since this SIG is currently composed of less than 20 members, it would be important to increase the number of participants from both practice and academia. Relevant participants will be invited to join the SIG from both inside and outside the ELI existing membership.

In light of these circumstances, the coordinators are planning to promote the SIG's development undertaking initiatives in four different directions:

- Elaboration of a research agenda with focus on specific topics of interest;
- Network development;
- Possible participation of the SIG in the ELI 2018 Annual Conference to report on the activities carried out by;
- Organisation of events in the framework of ELI/SIG activities.

Elaboration of a research focus

In the last weeks of 2015, the coordinators discussed possible research focuses for the SIG activities, which will be further developed with the other members of the SIG. Also, in light of the recommendations and suggestions received by the other members of the SIG, several research focuses have been considered worthy of investigation by the coordinators during the meeting they had at the ELI in Vienna, on 11 and 12 February 2016. More precisely these research focuses are:

1. Codification and implementation of the EU company law directives
2. Gathering information to foster transparency and accountability on corporate groups and financial intermediaries within the era of new information technologies
3. The role of shareholders and shareholding in the European corporate governance debate, including long-term shareholder engagement
4. Groups of companies and related responsibilities and liabilities
5. Cross border mobility of companies, private international law and regulatory competition

1. Codification and implementation of the EU company law directives

This research focus is in line with the European Commission proposal of 3 December 2015 relating to codification and merger of some company law directives. The goal of the proposal is according to the EU Commission to render EU company law “more reader-friendly and to diminish the risk of inconsistency”. The codification proposal has currently been submitted to the accelerated procedure relating to such texts.

In order to contribute to the reduction of the future risk of inconsistency, the SIG shall establish a working group formed by the SIG members, one representative of each Member State. The working group will assess the implementation of the company law directives within the legal orders on the Member States. The main goal of the project may be to underline current inconsistencies between national company laws and the EU directives despite the implementation duty of the Member States. The interpretation of the directives made by the ECJ, if it exists, shall be naturally taken into account. In particular, directives included in the current codification process shall be assessed in priority. In particular, the working group may consider whether the codification

modifies the past implementations by Member States, which were already achieved when the single directives were incorporated in National laws and regulations.

2. Gathering information to foster transparency and accountability on corporate groups and financial intermediaries within the era of new information technologies

This topic is in line with the interest showed by the EU Commission in Company law within the digital age perspective, see e. g. http://ec.europa.eu/justice/events/company-law-2015/index_en.htm, the European Directive 2012/17/EU concerning an EU company registry, and more generally, the European framework and initiatives on corporate reporting (http://ec.europa.eu/finance/company-reporting/index_en.htm).

The SIG plans to organize a working group dealing with the adaptation of European and national company law and related laws and regulations concerning compliance, reporting, disclosure and transparency, with a view to foster accountability of corporate groups and financial intermediaries.

The focus of the working group will be on the current reporting, disclosure and transparency regime within the EU concerning corporate groups and their investors. In this context, national rules should be assessed in order to (i) better understand the chain of intermediaries facilitating cross-border establishments, (ii) identify corporate structures and their ultimate investors, (iii) speed up procedures and communication between companies and national authorities, (iv) assess the capability to submit electronic demand of cross border transfers of seat and other major company law operations, (v) allow the harmonization of investments standards in the EU in order to facilitate long-term engagements, (vi) assessing laws and regulations concerned with reporting and disclosure of financial and non-financial information.

The Business and Financial Law SIG shall coordinate the work on some aspects of this topic with the SIG relating to the Digital Market, provided the latter is interested in and willing to collaborate.

3. The role of shareholders and shareholding in the European corporate governance debate, including long-term shareholder engagement

Since 2015, an informal dialogue is ongoing between the EU Commission, the Council and the European Parliament concerning a revision of the shareholder rights directive to facilitate long-term shareholder engagement, along with the emergent focus on long-term financing (http://ec.europa.eu/finance/general-policy/financing-growth/long-term/index_en.htm#maincontentSec6), and in line with the recent proposal for directive amendment(s) relating to long-term shareholder engagement and certain elements of corporate governance (COM/2014/0213 final).

The SIG believes it may be important to investigate how the measures proposes enhance the position of shareholders and stakeholders in European companies, while facilitating their long-term commitments to those companies. The ongoing revision of the shareholder rights directive, including the amendment proposal for long-term shareholder engagement (in listed companies), refers to the issue of passive institutional investors related to traditional corporate governance concerns. In order to understand the role of shareholders in companies incorporated in EU member states there is a need for further research on the shareholding, shareholder identities, and the intermediaries facilitating the investments. This broader focus may include the current debate concerning a 'one-share/one-vote' principle in EU member states, but also the role of proxy advisors in European corporate governance context.

Moreover, several initiatives on long-term financing are ongoing in EU financial law, such as the capital markets union (CMU), new regulations for occupational pension funds (IORP 2), ways to make better use of public sector funding (including public procurement), and to enhance the wider framework for sustainable finance (Shareholders' Rights Directive revision, employee ownership and supervision, corporate governance reporting, and environmental, social and governance (ESG) issues which combine with the previous topics).

4. Groups of companies and related responsibilities and liabilities

Generally speaking, the SIG intends to deal in particular with aspects regarding the power to give instructions and the responsibility sharing and joint liability among parent and affiliated companies. The concerns related to corporate group liabilities will be scrutinized both in relation to creditor protection in insolvency situations, and involuntary creditors in e. g. environmental hazardous activity caused by a subsidiary. The SIG would like to establish a network of researchers from as many of the EU member states as possible in order to provide regulatory assessments of the two aspects of corporate liability in each Member State. A better understanding of bottom-up regulations can inform further regulatory proposals at EU level (e. g. corporate groups, value chains, environmental responsibility and liability, due diligence obligations).

Further attention may be paid to the intersection between company and financial law on topics such as banking company groups, financial engineering and design of complex financial derivatives and conduits, consolidation and disclosure of off-balance sheet financial activities.

The SIG will try to contact and the members of the 'Forum Europaeum on Company Groups' (FECG) in order to involve them in the work of the SIG on this aspect, including proposals for defining and monitoring cross-borders management of company groups and networks.

5. Cross border mobility of companies, private international law and regulatory competition

After consultation of the SIG members, the SIG coordinators concluded that cross border mobility of companies remains a topic of interest within the EU that shall be dealt with by the SIG.

- Matters and issues related to the transfer of the registered office of limited companies (including the proposal for a XIV Directive on them)
- The cross-border transfer of the central administration in the case of national law companies in the light of the ECJ case law making application of the freedom of establishment of companies
- The cross-border transfer of the registered office and central administration of companies organized as established European legal forms (SE, SEC, EEIG) or previously proposed one (SUP).

The SIG will take into consideration cross-border mobility with a focus of both company, accounting and tax law issues.

The topic of cross-border mobility regards also PIL aspects to which the SIG is very sensitive to. From this perspective, the group will focus on the interest of adopting a uniform conflict of law rule relating to the international law of companies within the EU. In particular, we will deal with the assessment of the law applicable to a company legally formed according to the law of one Member State (*lex incorporationis*) and the limits that should be reserved to its application. The SIG will seek to establish a contact with the research group currently working on this aspect to seek for complementarities among the two perspectives.

Other PIL issues relating to international company and financial law may be assessed by the SIG depending on the further evolution of EU/national law. In particular, the working group may pay attention to the ongoing revision of financial market law directives concerning the definition of home and host states in cross-border investment relation, including relevant ECJ cases related to these issues.

Network development

The coordinators acquired the mailing list of all the current members of the SIG. In addition, they also started contacting other members of the ELI that may be interested in the SIG's activities. They also considered the possibility of expanding, in the next months, the network development of the SIG to highly qualified scholars and practitioners, in view of their potential involvement in the ELI and SIG's activities.

On the basis of this SIG project, the coordinators shall start contacting their respective networks, providing information on the existence of the SIG and collecting information on the potential focus of the SIG's activities.

Possible participation of the SIG in the ELI 2018 Annual Conference to report on the activities carried out

The coordinators discussed the possibility of reporting the activities carried out and planned by the SIG in the context of the next Annual Meeting of the ELI. The coordinators acknowledged that an active participation to the works of the next ELI 2018 Annual Conference may certainly need to be coordinated with the ELI, the local organisers of the conference in Ferrara, and the other SIGs.

The coordinators of the SIG also considered the possibility of organising a panel discussion at the ELI Annual Meeting, on the topics on which the activities of the SIG will focus.

Organisation of events in the framework of ELI/SIG activities

To immediately start making the ELI Business and Financial Law SIG better known, the coordinators discussed the possibility of joining the ELI/SIG label over relevant events (e. g. conferences, workshops) that the members of the SIG are planning to organise. The coordinators obviously acknowledge that any use of the ELI name and logo will be subject to ELI approval.

Notes

- 1 For instance, the fundamental social and economic principles of the European Union as expressed in EU primary law (European Union Treaties and the Charter of Fundamental Rights of the EU), but also the European Convention on Human Rights and Fundamental Freedoms.

References

- Autenne, A. (2017). Occupational pension funds: Governance issues at the international and European levels. *European Journal of Social Security*, 19(2), 158–171. doi:10.1177/1388262717712152
- Biondi, Y. (2011). The pure logic of accounting: A critique of the fair value revolution. *Accounting, Economics and Law - A Convivium*, 1(1). doi:10.2202/2152-2820.1018

- Biondi, Y. (2014). Better accounting for corporate shareholding and environmental protection. *European Company Law*, 11(2). doi:10.2139/ssrn.2471519
- Biondi, Y. (2017). The firm as an enterprise entity and the tax avoidance conundrum: Perspectives from accounting theory and policy. *Accounting, Economics and Law - A Convivium*, 7(1). doi:10.1515/ael-2017-0001
- Biondi, Y., & Boisseau-Sierra, M. (2017). Pension obligations in the European union: A case study for accounting policy. *Accounting, Economics and Law - A Convivium*, 7(3). doi:10.1515/ael-2017-0027
- Biondi, Y., & Graeff, I. (2017). Rethinking bank shareholder equity: The case of Deutsche bank. *Accounting Forum*. doi:https://doi.org/10.1016/j.accfor.2017.06.003
- Biondi, Y., & Zambon, S. (Eds.). (2012). *Accounting and business economics: Insights from national traditions*. London and New York: Routledge.
- Birkmose, H. S. (Ed.). (2017). *Shareholders' duties*. Alphen aan den Rijn, The Netherlands: Wolters Kluwer.
- Birkmose, H. S., & Sergakis, K. (Eds.). (2018). *Enforcing Shareholder Duties*. Cheltenham, United Kingdom: Edward Elgar.
- Carruthers, B. G. (2015). Financialization and the institutional foundations of the new capitalism. *Socio-Economic Review*, 13, 379–398.
- Cavalier, G. (2017). *Harmonization of corporate tax in the EU – The CC(C)TB proposals*. *Revue Internationale des Services Financiers*, Bruylant, 2 (1st part) et 3 (2nd part).
- CONVIVIUM. (2012). Ownership and the business firm: Implications for corporate governance and social responsibility. *Accounting, Economics and Law - A Convivium*, 2(2). Retrieved from https://www.degruyter.com/view/j/ael.2012.2.issue-2/issue-files/ael.2012.2.issue-2.xml
- CONVIVIUM. (2013). Banking, finance, and the Minsky's financial instability hypothesis. *Accounting, Economics and Law - A Convivium*, 3(3). Retrieved from https://www.degruyter.com/view/j/ael.2013.3.issue-3/issue-files/ael.2013.3.issue-3.xml
- CONVIVIUM. (2017a). A symposium on international tax avoidance. *Accounting, Economics and Law - A Convivium*, 7(1). Retrieved from https://www.degruyter.com/view/j/ael.2017.7.issue-1/issue-files/ael.2017.7.issue-1.xml
- CONVIVIUM. (2017b). Which accounting regulation for Europe's economy and society. *Accounting, Economics and Law - A Convivium*, 7(2). Proceedings of the European Parliament Workshop 20 May 2015. Retrieved from https://www.degruyter.com/view/j/ael.2017.7.issue-1/issue-files/ael.2017.7.issue-2.xml
- Epstein, G. (2001). *Financialization, rentier interests, and central bank policy*. Manuscript. Department of Economics, Amherst (MA): University of Massachusetts.
- Haslam, C. (2017) Financial reporting & disclosures: Reinstating social licence of limited liability, Progressive Economics Group (PEG). Retrieved from https://peg.primeeconomics.org/policybriefs/financial-reporting-disclosures-reinstating-social-licence-of-limited-liability
- Haslam, C., Tsitsianis, N., & Hoinaru, R. (2016). Stress testing international financial reporting standards (IFRS): Accounting for stability and the public good in a financialized world. *Accounting, Economics and Law - A Convivium*, 6(2), 62–80. doi:10.1515/ael-2015-0006
- Horak, H., Dumančić, K., & Poljanec, K. (2016). The interconnection of company data - a way forward in development of freedom of establishment? *European Journal of Economics and Management*, 3(1), 134–152.
- Livne, R., & Yonay, Y. P. (2015). Performing neoliberal governmentality: An ethnography of financialized sovereign debt management practices. *Socio-Economic Review*, 14(2), 339–362.
- Rathenau, W. (1921). *In days to come*. English translation from German original: *Von kommenden Dingen*, 1917. New York: A. A. Knopf.
- Schmidt, J. (2016). Cross-border mergers and divisions, transfers of seat: Is there a need to legislate? Study upon request of the JURI Committee of the European Parliament, June 2016, PE 559.960. doi:10.2861/355250
- Sergakis, K. (2018). *The law of capital markets in the EU: Disclosure and enforcement*. London: Palgrave Mac Millan Education UK.
- Sikka, P., & Murphy, R. (2015) Unitary taxation: Tax base and the role of accounting, working paper 34, International Centre for Tax and Development.
- Sjåfjell, B., Johnston, A., Anker-Sørensen, L., Millon, D., & Richardson, B. (2015). Shareholder primacy: The main barrier to sustainable companies. In B. Sjåfjell & B. J. Richardson (Ed.), *Company law and sustainability: Legal barriers and opportunities*, Chapter 3 (pp. 79–147). Cambridge University Press.
- Stout, L. (2011). Risk, speculation, and OTC derivatives: An inaugural essay for convivium. *Accounting, Economics and Law - A Convivium*, 1(1). doi:10.2202/2152-2820.1004
- Strasser, K., & Blumberg, P. (2011). Legal form and economic substance of enterprise groups: Implications for legal policy. *Accounting, Economics and Law - A Convivium*, 1(1). doi:10.2202/2152-2820.1000
- Van Der Zwan, N. (2014). Making sense of financialization. *Socio-Economic Review*, 12, 99–129.
- Vitols, S., & Heuschmid, J. (2012). *European company law and the sustainable company: A stakeholder approach* (Vol. II). Brussels: ETUI.
- Vitols, S., & Kluge, N. (2011). *The sustainable Company: A new approach to corporate governance* (Vol. I). Brussels: ETUI.