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Perspectives in Company Law and Financial Regulation

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CAMBRIDGE

3

Ius Audacibus. The future of EU company law[1]

JAAP WINTER

An Elf shall go
Where a Dwarf dare not?
Oooh, I will never hear the end of it.
Gimli in *Lord of the Rings,* Tolkein

I. Introduction

The European Union originally was conceived as creating an economic community between Member States. A key pillar of the European Community is the principle of free movement as expressed in the free movement of persons, goods, services and capital. Together with the EU rules on competition they form the European Community's economic constitutional law.[2] Part of the free movement of persons is the freedom of establishment. This freedom includes 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms…under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter on capital' (Article 43 Treaty of Rome). In order to attain freedom of establishment the Council and the Commission are required to 'co-ordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms…with a view to making such safeguards equivalent throughout the Community' (art. 44 (2) (g)). This Treaty provision is the basis for the harmonization of company law in the European Union. It is a rather

[1] This contribution is an adaptation of my inaugural lecture at the University of Amsterdam held on 14 April 2007.
[2] J. Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Community* (Oxford: Hart Publishing, 2002).

peculiar basis. It takes a specific angle to the harmonization process: the protection of shareholders and others which is required by Member States' company laws. The protection of shareholders and others, in particular creditors, was very much in the minds of the original authors of the Treaty. There was a concern among Member States in those days, we speak of 1957, that shareholders and creditors would not invest in companies from other Member States or do business with them, as they would not be familiar with the company laws to which such companies would be subject and particularly with the protections afforded to them under these company laws. In addition, Member States feared that without a rigorous harmonization programme, Member States would race to the bottom by creating company laws with ever-reducing protection for shareholders and creditors in order to compete with other Member States for the incorporation or registration of companies in their jurisdictions. The Netherlands were seen as Europe's bottom in those days, not only geographically but also in terms of company law. Dutch company law was very flexible in those days, with a minimum of mandatory rules. Regulatory arbitrage that would lead other Member States to race to that same bottom was to be avoided. I will not go into the question whether such a race to the bottom would have ever occurred without article 44 (2) (g) and the harmonization programme. For now I just note that approaching company law legislation with the primary objective to make protections for shareholders and creditors equivalent across the EU is indeed a peculiar approach to company law. I will come back to this at the end of this chapter.

On the basis of article 44 (2) (g) in the meantime eleven directives have been adopted. They primarily deal with formalities of company law such as incorporation, publicity, capital formation and protection, (cross-border) legal mergers and split-ups, accounting, branches etc. Some call the resulting EU company law trivial.[3] Member States have discovered fundamental differences of opinion on such core issues as the organization of the board, the role and rights of shareholders, group relationships, employee co-determination and corporate control. In these areas nothing of substance has been agreed by Member States, projects were either abandoned (the fifth Directive on the structure of the company dealing with board structures and the rights of shareholders,

[3] L. Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?', in J. Armour and J. McCahery (eds.), *After Enron, Improving Corporate Law and Modernising Securities Regulation in Europe and the US*, (Oxford: Hart Publishing, 2006), 641–700.

and the ninth Directive on group law) or Member States have agreed to disagree and to leave it to Member States individually (e.g. the Statute for the Societas Europea on board structures and the thirteenth Directive on takeover bids).

II. Political process

In light of the political decision making in the EU process we should perhaps be surprised that so many directives have actually made it to their adoption. The right of initiative lies with the Commission which has a primarily, but maybe not exclusively European agenda. But the key decisions are made by the Council of Ministers. The Council consists of representatives of the current twenty-seven Member States' governments. Decisions in the Council are often, perhaps more often than not, driven by each Member State's government negotiating to preserve and further national Member State interests. They are doing this on a number of files which are discussed simultaneously and which should all lead to some form of regulation or action at EU level. Member States find it difficult to suppress the inclination to make deals across files, to agree to certain other Member States' wishes, say on an agricultural issue, in order to get their agreement on a company law issue. The compromises that follow often have little to do with the merits of the issues dealt with. Directives then require approval from the European Parliament. The Parliament functions mainly along party lines, but MEPs sometimes are sensitive to national issues and particular concerns of the Member States they are representing. In some cases all MEPs from a particular Member State vote in a certain direction to protect perceived national interests, as is said did the German MEPs from left to right when voting down the Takeover Bids Directive in June 2001.

A complicating factor in this political process is that on many files the question is raised whether it is really for the EU to regulate or whether regulation should be left to Member States. Member States have become sensitive to this question when after some decades they witnessed that many of their powers had effectively been transferred to the EU and would need to be shared with other Member States. In the Maastricht Treaty of 1992 article 5 was introduced, providing that in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of *subsidiarity*, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The words 'cannot be sufficiently achieved' and 'be better achieved' leave ample opportunity to challenge EU interference in almost any area. Subsidiarity is an argument often heard and used when Member States do not like the possible outcome of an EU regulatory process.

Linked to these factors troubling the political decision-making process is the fact that Member States' governments also make up the key decision maker at EU level, the Council of Ministers. This has the effect that these governments, but also everybody else who has a role or an interest in the subject matter to be regulated, can and often needs to play chess on two chess boards: national level and EU level. If for example a certain national legislative development is not desired by a Member State government, or by those who lobby that government, it or they can argue that this is a matter for the EU to regulate and not for any single Member State. This often serves as an efficient delaying tactic as agreement at EU level is difficult to achieve. Or, vice versa, a deadlock at national level can sometimes be broken by forging an agreement with other Member States at EU level. Playing simultaneous chess on two boards is what the vast lobbying industry in Brussels is all about.

All these factors contribute to the political decision-making process in the EU being highly complex and its outcomes highly unpredictable. The focus and efforts of the EU to improve its legislative process through the Better Regulation initiatives[4] are not suited to dealing with these fundamental complicating factors, which lie at the root of the political structure of the EU. They have caused three somewhat overlapping trends in EU legislation of company law in this century.

III. Three trends

The first trend is a strong emphasis on *subsidiarity*. This trend can be seen from abandoning the fifth and ninth Directives on the structure of the company and on group law, which are now no longer issues where the EU seeks a legislative role for itself. This trend is also clear from the efforts to simplify current directives, in particular the second Directive on capital maintenance. The thrust is to remove from the Directives anything which is not really necessary or clearly helpful.[5] Finally we see this

[4] See http://ec.europa.eu/enterprise/regulation/better_regulation/index_en.htm.

[5] See Directive the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability

trend from the development to not impose certain elements of legislation on Member States but to either give them options to apply or not apply certain EU rules (see the thirteenth Directive on Takeover Bids and the opt-outs that Member States have been given from the rules on defence against takeovers, provided they give opt-in rights to companies)[6] or to leave out of an EU legislative instrument core elements of regulation (see the SE Statute, leaving anything contentious to Member States to regulate themselves in their legislation implementing the SE Statute).[7]

The second trend is the *privatization of company law*. This trend is visible at national and at EU level. The SE Statute for example leaves the choice for a one-tier board structure or a two-tier board structure to those incorporating the SE themselves, see articles 39 and 42 SE Statute. Similarly, companies have the right to opt-in to application of articles 9 (board passivity) and 11 (break-through) of the thirteenth Directive on Takeover Bids, if the Member State does not impose application of these rules, see article 12. Finally, and perhaps most importantly, the regulation of corporate governance to a large extent is left to companies and their shareholders. Codes of corporate governance are to be adopted at Member State level and in most if not all Member States these codes have been drafted by committees consisting of representatives of companies, shareholders and other private entities. Furthermore, these codes are not binding upon companies, but companies must explain to what extent and for what reasons they do not comply with the code to which they are subject, see article 46a (1) (a) and (b) of the fourth Directive on annual accounts, as amended by Directive 2006/46/EC, L 224/1. The enforcement is primarily in the hands of shareholders.[8]

companies and the maintenance and alteration of their capital 2006/68/EC [2006] OJ L 264/32. See for the general thrust to simplify company law, the report on the public consultation on the future priorities of the company law action plan, http://ec.europa.eu/internal_market/company/consultation/index_en.htm.

6 G. Hertig and J. McCahery, 'An Agenda for Reform: Company and Takeover Law in Europe', in G. Ferrarini, K. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe*, (Oxford University Press: 2004), 21–49, who advocate the option-approach for EU company legislation. My concern with this approach is that the design and effects of the options to be given to Member States will be subject to the same political factors I described above and are likely to be used particularly to protect national interests.

7 See L. Enriques, 'Silence is Golden: The European Company As a Catalyst for Company Law Arbitrage', *Journal of Corporate Law Studies* (2004), 77.

8 See the Statement of the European Corporate Governance Forum on the comply-or-explain principle of 22 February 2006, see, http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.

The third trend is that where Member States do reach an agreement in spite of conflicts between national interests and perceptions, the outcome is typically an *ugly compromise* creating problems for companies that have to apply the resulting rules. The Directive accompanying the SE Statute on the involvement of employees, in particular the rules on participation of employees in a board of the company, are a fine example. The Directive is wrought with provisions whose only purpose is to avoid that by merging into an SE a German company subject to German co-determination rules could escape those rules. The rules create a complex set of provisions detailing what majorities of employees of participating companies can in different circumstances outvote German employees to not apply the German co-determination rules to the SE. If no agreement is reached a set of standard rules apply, the interpretation of which would be a tough challenge for the European Court of Justice and some of which actually are mutually conflicting.[9] Another example is offered by the opt-out and opt-in rules combined with the reciprocity rule of article 12 of the thirteenth Directive on takeover bids. These rules result in preserving the existing situations in Member States with respect to takeovers and defence instead of creating a level playing field for takeover bids, which is the stated objective of the Directive. They also create rules which are either easy to circumvent and manipulate or incredibly difficult to apply and which are possibly in breach of the Treaty itself and with the EU's obligations under the WTO as they by definition exclude non-listed and non-EU companies from obtaining as good as a position as a bidder as EU-listed companies can obtain.[10]

IV. EU's legislative remit in company law

In light of all this, I believe the remit of the EU's involvement in company law should be modest, at best. In line with the principle of subsidiarity, it should focus on those issues where individual Member States cannot provide solutions, and, in addition, on those issues where the evidence of a benefit of a solution at EU level over a solution by individual Member States is clear. These issues are most likely to arise with companies whose shares are listed on a regulated market. The securities laws to which these listed companies have become subject in Europe are to a very large extent

[9] See J. Winter, 'De Europese Vennootschap als sluis voor in- en uitvoer van vennootschapsrecht', *Nederlands Juristenblad* (2002), 2034–40.

[10] J. Winter, 'You must be joking', *Ondernemingsrecht* (2004), 367.

harmonized, if not uniform across the EU following the many far-reaching Directives and secondary regulations that have been adopted under the Financial Services Action Plan. A key aspect of the new rules is to ensure that companies in Europe have efficient access to capital markets across Europe and that their investors are offered equivalent protections on these markets. As a result, a key feature of listed companies, i.e. their relation to the capital markets, is regulated practically uniformly across the EU. It is more likely that there are issues for these companies that require EU solutions or where EU solutions are clearly preferable over Member States solutions than for non-listed companies.

Finally, the subject of corporate governance warrants EU attention. Not in the traditional way of trying to regulate the substance of corporate governance at EU level, as was intended with the fifth Directive, but in a more distanced way. The substance of corporate governance is linked directly to the core of company law: the structure and operation of boards of companies and the relationship with their shareholders. As this core of company law is designed differently across Member States, based on different legal, social, financial and cultural traditions, it is unlikely that Member States at EU level will reach agreement on a single model to be applied across the EU. It is also very doubtful whether creating and imposing such a model would really be efficient. But the EU can coordinate the efforts of Member States to protect and where necessary improve the integrity of their corporate governance models. This is particularly so because of the warm reception the so-called comply-or-explain model has received in Member States. This model avoids mandatory legislation on the substance of corporate governance by implementing corporate governance codes, compliance with which or proper explanations for non-compliance are to be enforced primarily by shareholders. The High Level Group that I chaired and the European Corporate Governance Forum recommend this model as a means to create and improve corporate governance in the EU.[11] But if we are honest, we should admit this is one big experiment. There is little or no experience with corporate governance codes and comply-or-explain in most Member States. There is also little understanding of what type of regulatory environment is required for such a system to function properly. What can or should

[11] See the report 'A Modern Regulatory Framework for Company Law in Europe' of November 2002, http://ec.europa.eu/internal_market/company/modern/index_en.htm#background. See also the Statement of the Forum on comply-or-explain, (note 8, above).

be done to ensure sufficient explanation for non-compliance? The systems assumes that shareholders can exercise certain rights effectively in order to enforce proper compliance or explanation, but it is not clear that shareholders actually have these rights in all Member States and it is certainly clear that most shareholders cannot exercise their rights efficiently across borders. The Directive on Shareholders Rights, which has been adopted to solve problems of cross-border voting in the EU, is precisely not doing that.[12] There are also questions in cases where the company is controlled by a major shareholder and the (non)compliance with the code fulfils the major shareholder's wishes (possibly to the detriment of minority shareholders), particularly if the major shareholder is able to exercise more control rights than are proportionate to his ownership of share capital. Comply-or-explain works fundamentally differently in those circumstances.[13] These are issues where the EU should at least coordinate the efforts of Member States. By using instruments such as the Recommendation the Commission would create a sort of comply-or-explain environment for Member States, which may create incentives to actively improve the national corporate governance system while retaining some flexibility between Member States.[14]

V. A new avenue for progress: the free movement of capital

The legislative remit for the EU in company law may be limited; this does not mean to say that the EU will not have an important impact on the company laws of Member States in different ways. The European Court of

[12] Directive of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies 2007/36/EC [2007] OJ L 184/17; see also the recommendations made by the European Corporate Governance Forum on solutions for cross-border voting, see statement of 24 July 2006, http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.

[13] After having called for substantial research into whether there is a need to regulate structures which create disproportionate control rights, EU Commissioner McCreevy abandoned this in October 2007. See for the reports on disproportionality http://ec.europa.eu/internal_market/company/shareholders/indexb_en.htm. The European Corporate Governance Forum did recommend several measures to be taken, including a higher level of disclosure of disproportionate control structures, see the statement of the Forum and the paper of the Forum's working group on proportionality on

[14] See for example the Commission's Recommendations on the role of independent directors and on director remuneration, http://ec.europa.eu/internal_market/company/independence/index_en.htm and http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm.

Justice has proven to be a particular driving force, with its judgments on the freedom of establishment. The *Centros*, *Überseering* and *Inspire Art* judgements[15] have established that, where Member States have not agreed on harmonization of certain aspects of company law, a Member State may not impose barriers to the freedom of establishment merely because a company with an establishment in that Member State is incorporated in another Member State in which it does not perform any real business activities. Restrictions imposed on such a company, such as not allowing registering the establishment in the Member State, denying legal standing in court and imposition of additional administrative and substantive legal burdens, are not justified by the fact that the company does not adhere to the same capital maintenance rules as companies incorporated in the Member State itself. This case law has had at least three effects: (i) an increased trend to use English limited liability companies instead of the national form of limited company for doing business in other Member States, in particular Germany,[16] (ii) a fundamental discussion on whether the real seat theory is still a viable theory on the basis of which to apply company law of a Member State to a company incorporated in another Member State,[17] and (iii) some Member States have initiated proposals to deregulate their laws on limited companies, like the Netherlands and Germany.[18] This may lead to a convergence of company law from the bottom up, by incorporation choices of companies and by legislative actions by Member States without any EU legislation.

The case law on freedom of establishment is now well understood and its effects are becoming clear. The question is whether the other freedom

[15] Case C-212/97, *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459 Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, [2002] ECR I-9919 Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd,* [2003] ECR I-10155.

[16] M. Becht , C. Mayer and H. Wagner, 'Where do firms incorporate? Deregulation and the cost of entry', *ECGI Law/Working Paper 70*(2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=906066.

[17] E. Wymeersch, 'The transfer of the company's seat in EU company law', *ECGI Law/Working paper 08*(2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384802.

[18] In the Netherlands a proposal to simplify and make more flexible the law applicable to *the besloten vennootschap* (limited company) has been submitted to parliament. According to this proposal the minimum capital requirement of currently €18,000 will be abolished. See for the German proposal to change the law applicable to the Gesellschaft mit beschränkter Haftung www.jura.uni-augsburg.de/prof/moellers/materialien/materialdateien/040_deutsche_gesetzgebungsgeschichte/momig/. The German proposal does not abolish minimum capital altogether but reduces it from €25,000 to €10,000.

relevant to company law will have similar effects. This is the free movement of capital. The ECJ by now has established important case law based on the free movement of capital in the area of so-called golden shares. Golden shares refers to arrangements, either in law or in the company's constitution, made by Member States with respect to companies in their jurisdiction, typically companies that have been privatized, and that confer to a Member State certain powers of control over those companies, or the ability to prevent certain shareholders to acquire control over those companies. This is a crucial issue in the development of the EU. It is about striking the right balance between the EU's objective to create a single market without artificial barriers imposed by Member States and the Member States´ concerns about losing control over business that are crucial to their economy and national infrastructure. The case law shows that the ECJ leaves Member States only very little scope to fence off companies with golden-share structures, which are quickly considered to hinder the free movement of capital as they are liable to dissuade investors (either direct investors interested in participating in control or portfolio investors not interested in participating in control)[19] from investing in the company. As with the freedom of establishment, the ECJ accepts only limited justifications of any impediment to the free movement of capital.[20]

So far, the case law on the free movement of capital is related to Member States and state actions, rather than to companies and citizens. However, the recent Volkswagen case may open up new avenues for development of EU company law on the basis of the free movement of capital.

VI. Volkswagen

The *Volkswagen* case[21] deals with the so called Volkswagen Act, a special Act of the German legislator dealing with certain governance arrangements for Volkswagen AG. After World War II the trade unions had started up the car-making business of Volkswagen, without it being clear who

[19] The ECJ has repeatedly ruled that both types of investors, distinguished in the Commission's statement of 19 July 1997 relating to certain legal aspects of intra-Community investments, Pub nr C 220, are protected by the free movement of capital.

[20] Case C-367/98, *Commission* v. *Portugal* [2002] ECR I-04731; Case C-483/99, *Commission v. France* [2002] ECR I-04781; Case C-503/99, *Commission v. Belgium* [2002] ECR I-04809; Case C-463/00, *Commission v. Spain* [2003] ECR I-4581; Case C-98/01, *Commission v. United Kingdom* [2003] ECR I-4641; Case C-174/04, *Commission* v. *Italy* [2005] ECR I-4933 and Cases C-282/04 [2006] ECR I-9141 and 283/04, *Commission* v. *the Netherlands* [2006] ECR I-9141.

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

actually owned the business. In 1959–60 the Federal German government and the government of the state of Lower Saxony discussed and agreed with the trade unions on the ownership of the business. It was decided that Volkswagen was to be a publicly held company, an Aktiengesellschaft, in which both the Federal State and Lower Saxony would each hold 20% of the company's share capital and the rest would be offered to the public. To date, Lower Saxony has maintained a stake of approximately 20% in Volkswagen, by subscribing for and investing in new shares whenever they were issued by the company. The Federal State has sold its shares. Part of the deal struck in 1959–60 was that minority shareholders would be protected against a party trying to take control of the company without acquiring the full share capital. At the same time this would protect employees against a possible hostile bid that could lead to lay-offs in Germany. The parties agreed to the adoption of three key governance provisions:

- the voting rights of each Volkswagen shareholder are limited to a maximum of 20% of the total votes that can be cast, even if the shareholder holds more than 20% of share capital;
- special resolutions of the general meeting of shareholders of Volkswagen that require a 75% majority under standard German law, require a majority of 80%;
- Germany and Lower Saxony may each, as long as they are Volkswagen shareholders, appoint two members to the Volkswagen supervisory board.

These provisions have not only been incorporated in the articles of association of Volkswagen AG, but have also been imposed on the company and its shareholders by the Volkswagen Act. As a practical result, Lower Saxony by maintaining its 20% in Volkswagen could veto important resolutions in the general meeting and no other shareholder could acquire more voting rights than Lower Saxony.

Germany had argued that all of this was nothing more than a private agreement between parties who had disputed the ownership of the company, which private agreements have merely been confirmed by the Volkswagen Act. The Court rejects this argument. The Volkswagen Act, a state measure, imposes these arrangements on the company and its shareholders and does not allow for the shareholders to decide to change them.[22]

[22] In the cases against the Netherlands, the Court considered putting certain clauses in the articles of association granting it special rights in companies the Netherlands was

Germany then argued that the voting cap and the super-majority requirement did not restrict the free movement of capital, because they apply without distinction to all shareholders, including Lower Saxony, and work both to the benefit (reduced chance of a third party acquiring cheap control with a relatively low percentage) and detriment (reduced ability to exercise control yourself with a relatively low percentage) of all shareholders, including Lower Saxony. The Court rejected this argument as well. But in doing so and by arguing that the Act does restrict the free movement of capital, the Court took a new turn. The Court basically argued that the 80% super-majority requirement created an instrument for Lower Saxony, as an approximately 20% shareholder, to procure for itself a blocking minority allowing it to oppose special resolutions on the basis of a lower level of investment than would be required under general company law. The 20% voting cap supplements this legal framework and enables Lower Saxony to exercise considerable influence on the basis of such a lower investment. The combination of the 80% super-majority requirement and the 20% voting cap, the Court ruled, diminishes the interest in acquiring a stake in the capital of Volkswagen as it is liable to limit the possibility for other shareholders to effectively participate in the management and control of Volkswagen. By arguing in this way, the Court made instrumental to its reasoning the investment Lower Saxony held in Volkswagen and continued to maintain at around 20% by subscribing for newly issued shares. The Court uses vague words in this respect. It does not rule that the provisions of the Act as such are liable to deter investors, but states: this 'situation', i.e. rules combined with a private investment by Lower Saxony, is liable to deter investors from other Member States. This raises at least two interesting questions: how would the Court have ruled if Lower Saxony had not maintained its investment at around 20% and its investment would have dropped significantly as a result of share issues to others? Could the Volkswagen Act still be saved if Lower Saxony was to sell a significant part or all of its shares in Volkswagen?[23]

privatizing, as taking a state measure. In Volkswagen the 20% voting cap and the 80% majority requirement did not create special rights, but there was a clear state act in the form of the Volkswagen. It would be interesting to see how the Court would rule if the state acts as a shareholder to include certain restrictive clauses in the articles of association of a company, which do not grant special rights to the state. See on this J. van Bekkum, J. Kloosterman and J. Winter, 'Golden Shares and European Company Law: the Implications of Volkswagen', *European Company Law* (2008), 9.

[23] Interestingly, Porsche, which in the meantime has acquired a 30% stake in Volkswagen sought to get shareholder approval from removing the provision copying the Volkswagen Act from the Articles of Association of Volkswagen in the Volkswagen annual general

By drawing Lower Saxony's investment decisions into its reasoning, the Court at least conceptually opens the door to applying the free movement of capital to the private sphere. In *Volkswagen* the Court did not have to dwell on this, as the Volkswagen Act itself is clearly a state act. But broadening the scope of the free movement of capital by bringing it into the private sphere would not be surprising, in light of the trends in the case law of the Court on the other Community freedoms. The free movement of capital case law has traditionally trailed the case law on the other freedoms but has picked up quite a bit over the last decade. And recent case law shows only few differences between the doctrinal features of this freedom compared with the others.[24]

VII. Free movement and the private sphere

For the other freedoms, the Court has already addressed the question whether and to what extent they could be applied to private person. In particular the free movement of workers has triggered Court rulings that apply the freedom into the private realm. In cases such as *Walrave*[25] and *Bosman*[26] the Court held that provisions limiting the free movement of workers were adopted in a collective manner (e.g. by international cyclist and football organizations), these provisions should be caught by Article 39 and 49 EC and should be subjected to the same standards applicable to state measures. In *Ferlini*[27] the Court went a little further by arguing that the discrimination prohibition of article 12 EC also applies to a case where an organization (in this case an organization of Luxembourg hospitals) exercises a certain power over individuals and is able to impose conditions upon them as a result of which the exercise of fundamental freedoms guaranteed under the Treaty is made more difficult. And in *Agonese*[28] the Court ruled that the requirement imposed by a private bank in Northern Italy for candidates applying for a job at the bank to prove their bilingual capabilities (Italian–German) by a

meeting held on 24 April 2008. The resolution was rejected as 'it did not obtain the required majority' (i.e. still 80% under the Articles of Association), the Volkswagen website announces, see http://www.volkswagenag.com/vwag/vwcorp/info_center/en/news/2008/04/AGM.html.

24 L. Flynn, 'Coming of Age: the free movement of capital case law', *Common Market Law Review* (2002), 773–805.

25 Case C-36/74, Walrave and Koch [1974] ECR 1405.

26 Case C-415/93, Bosman [1995] ECR I-4921.

27 Case C-411/98, Ferlini [2000] ECR I-8081.

28 Case C-281/98, Angonese [2000] ECR I-4139.

diploma that can only be obtained in one province of Italy, constitutes a prohibited discrimination on the basis of nationality. The precise extent of this case law is not yet clear. One interpretation is that the prohibition against discrimination may be applied against any person (as shown in *Angonese*), while the prohibition against restrictions on the free movement of workers only applies to measures of a collective character with semi-public implications (*Walrave, Bosman, Ferlini*).[29]

For the free movement of goods, the Court traditionally takes the view that articles 28 and 29 only apply to measures taken by Member States and not by private persons.[30] There is backdoor, however, through which even this freedom may have its effects on the actions of private persons. In *Commission* v. *France* [31] French farmers repeatedly and violently obstructed Spanish farmers from selling their strawberries in France. The Court ruled that the actions undertaken by the French government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them. It is for the Member State concerned to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators. The actions of the French farmers were extreme, but the case may provide the basis for a more general rule that if private persons repeatedly and consistently obstruct the exercise of the Treaty freedoms by others, Member States may have to take measures to guarantee that these freedoms can be exercised.

VIII. Let's speculate: cross-border voting

There is no reason why the extension of the Treaty freedoms to the private sphere as follows from the case law referred to above could or should not also apply to the free movement of capital.[32] Speculating about the

[29] P. Oliver and W.-H. Roth, 'The Internal Market and the Four Freedoms', *Common Market Law Review* (2004), 423.

[30] Oliver and Roth, 'The Internal Market' (note 29, above), 422, with references to relevant case law.

[31] Case C-265/95, *Commision* v. *France* [1977] ECR I-6959.

[32] Oliver and Roth refer to the complication of the justifications that may be available for Member States under the Treaty may not be available for private persons. In particular, private autonomy, protected by national constitutions and the very essence of the European market economy, does not show up as a justification, see note 28, above, 423. The justification for private persons to restrict the Treaty freedoms is indeed

application of the free movement of capital into the private realm, one example comes to mind where this could have a salutary effect.

Europe is struggling with the exercise of voting rights by shareholders in companies located in another Member State. Today, shareholders typically hold their shares through securities accounts with intermediaries such as banks and brokers. When holding shares in a company in another Member State usually a chain of intermediaries in various jurisdictions exists between the shareholder and the company, each holding shares for the next intermediary until the ultimate shareholder is reached. It is often not clear legally and practically whether the ultimate shareholder, as the person who has invested in the shares and, in principle holds the economic risks attached to the shares, is entitled and able to vote the shares. The chain of intermediaries leads to multiple contractual and ownership claims in various jurisdictions and there is no EU or other rule clarifying that the entitlement of the ultimate shareholder at the end of the chain allows him to control the exercise of the voting rights. And practically, the securities intermediaries do not have systems in place allowing for the swift identification of ultimate shareholders, or the passing on of voting instructions or powers of attorney along the chain. For the intermediaries, facilitating the exercise of voting rights by their clients is a burdensome service to their clients and most intermediaries simply do not provide the service, or at least will not ensure that the next intermediary down the chain will also provide the service.[33]

problematic. But in this respect the free movement of capital is no different than the other freedoms where the Court has brought them into the private sphere. For a different view, B.J. Drijber, 'De Dertiende Richtlijn tussen Europese politiek en Europees recht', *Ondernemingsrecht* (2004), 140, holding that art. 56 EC does not have any horizontal effect. See for further speculation into the possible horizontal effect of the free movement of capital I. van der Steen, 'Horizontale werking van de vier vrijheden en van het discriminatieverbod van artikel 12 EG', *Nederlands tijdschrift voor Europees recht* (2001), 8, relating to the effect the free movement of capital on the ability of companies to defend against hostile takeover bids. See also the report of the European Corporate Governance Forum working group on proportionality, referring to cases in which foundations hold control over listed companies through mechanisms that allow for control rights disproportionate to the investment made by the foundation to further different stakeholder and societal interests. The report suggests that the free movement of capital may offer a fruitful avenue that can be explored to restrict the use of disproportionate mechanisms by such foundations to situations which are acceptable and justified under the Treaty, see p. 19 of the report of June 2007, see the posting on the website of 12.09.2007 http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.

[33] See for a description of the problems underlying cross-border voting J. Winter, 'Cross-border voting in Europe', in K. Hopt and E. Wymeersch (eds.), *Capital Markets and Company Law* (Oxford University Press: 2003), 387–426.

A typical cross-border problem is one that cannot be solved by Member States individually and therefore calls for an EU solution. The EU has identified such problems and sought to address them. The Shareholders Rights Directive[34] is aimed at solving problems of cross-border voting. Recital 11 states:

> Where financial intermediaries are involved, the effectiveness of voting upon instructions relies, to a great extent, on the efficiency of the chain of intermediaries, given that investors are frequently unable to exercise the voting rights attached to their shares without the cooperation of every intermediary in the chain, who may not have an economic stake in the shares. In order to enable the investor to exercise his voting rights in cross-border situations, it is therefore important that intermediaries facilitate the exercise of voting rights.

But then, typically for EU Member States not agreeing and the Commission for whom agreement on a Directive is often preferable over a Directive which makes sense, the Directive completely fails to provide any useful content that would allow shareholders to effectively exercise their voting rights along a chain of intermediaries. Securities intermediaries are not required to exercise voting rights according to the instruction of their clients or to pass on such voting instructions to the next intermediary in the chain or to provide powers of attorney to their clients to vote directly.[35] Instead, the real issue is moved to a possible Recommendation from the Commission to Member States, which in itself, by definition, will not be able to solve the problem as Member States can choose to ignore it and to not impose any obligation on securities intermediaries.

What good could the application of the free movement of capital do here? Banks and brokers are instrumental to the holding of shares by investors today. The vast majority of investors, big and small, hold their shares through securities accounts with these intermediaries. As a result, investors generally fully depend on these securities intermediaries to facilitate the exercise of their voting rights. Without the

[34] Directive of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies 2007/36/EC [2007] OJ L 184/17.

[35] The European Corporate Governance Forum had recommended to include such obligations for intermediaries in the Directive, see its recommendation of 24 July 2006, see http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.

banks and brokers no investor can identify themselves as shareholders to the companies in which they own shares and provide evidence of their share ownership. In chains of intermediaries, voting instructions or powers of attorney to vote need to be passed on by all intermediaries in the chain until they reach the company or the investor in question. Through their essential role in the international system of shareholding in book-entry form banks and brokers have become indispensable for the exercise of voting rights by investors. In the words of the Court in *Ferlini* the banks and brokers exercise a certain power over individuals and are able to impose conditions upon them as a result of which the exercise of fundamental freedoms guaranteed under the Treaty is made more difficult. This is precisely what banks and brokers do by not facilitating the exercise of voting rights by their clients through the chains of intermediaries across borders. The resulting inability to exercise voting rights across borders is liable to dissuade investors to invest in companies in other Member States and therefore a restriction on the free movement of capital. A different approach, based on the *Commission* v. *France* ruling, could be that Member States, allowing that banks and brokers in their jurisdiction facilitate the exercise of voting rights of their clients in their own jurisdiction but consistently refuse to facilitate (i) the exercise of voting rights by their clients on shares held in companies in another Member State, and (ii) the exercise of voting rights by investors from other Member States on shares in companies within the jurisdiction of the banks and brokers, failing to adopt all appropriate measures to guarantee the full scope and effect of the free movement of capital so as to ensure its proper implementation in the interests of all economic operators. The first, *Ferlini*-based reasoning, would allow for a case against the banks and brokers directly by investors, with the possibility of the national court to request the European Court to give a ruling on the interpretation of art. 56 EC on the basis of art. 234 EC. The second, *Commission v. France*-based reasoning, would allow for the Commission to adopt a policy not unlike its policy on golden shares, directed at ensuring that Member States require their banks and brokers to facilitate cross-border voting by their own clients and by investors from other Member States. Where a Member State fails to do so, the Commission could bring an action against that Member State with the European Court. Both avenues would allow for creating solutions to the problem of cross-border voting without legislation at EU level.

IX. *Ius audacibus*: company law and EU law

Capitalism isn't for the faint hearted, it is said. It is based on people who are willing to take risks in order to reap the fruits if they succeed. This is what produces wealth and wealth allows us to prosper as a society.

Both company law and EU law are instrumental to this objective. Company law first of all facilitates entrepreneurship, the risk-taking by business in order to generate profits. But it also seeks to protect those who are affected by companies against careless exploitation.

EU law creates a European space for entrepreneurship, where people and capital can move freely to create optimal results without artificial restrictions. Company law and EU law therefore have a common characteristic: they are both law for the brave, *ius audacibus*. It is only natural that they meet, for example in the free movement of capital.

Eddy Wymeersch has made numerous contributions to both these fields of law. It is always a delight to discuss, write and work with him and it is an honour for me to contribute to this book of his friends.