

CORPORATE LAW AND
INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION
INTERNATIONAL CORPORATE LAW AND FINANCIAL
INTERNATIONAL CORPORATE LA
INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION
INTERNATIONAL CORPORATE LAW AND FINANCE
AND FINANCIAL
MARKET AND FINANCIAL
INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION
AND FINANCIAL
INTERNATIONAL CORPORATE LAW AND
FINANCIAL MARKET REGULATION

Perspectives in
Company Law and
Financial Regulation

**EDITED BY MICHEL TISON,
HANS DE WULF,
CHRISTOPH VAN DER ELST AND
REINHARD STEENNOT**

CAMBRIDGE

A short paean for Eddy: Clever, Wise, August, Funny and European*

RUBEN LEE

When archaeologists finally unearthed the foundation stone of the ruins of the modernist building close to the Arc de Triomphe with the unknown logo 'ESEC' on its fascia, they were surprised to discover underneath it the following short text:

Efficiency with our Head, Protection with our Heart, Stability with our Soul.

We are One, We are Many.

We Change, We Remain the Same.

Efficiency with our Head, Protection with our Heart, Stability with our Soul.

No Process, No Substance.

No Justification, No Action.

Efficiency with our Head, Protection with our Heart, Stability with our Soul.

No Controls, No Freedoms.

No Consensus, No Decisions.

The Facts are the Facts.

The Vision is the Vision.

Know which Must Triumph.

If there is one thing that has been universally accepted about this intriguing and ancient text, it is that the language seeks to capture the essence of what is now believed to have been a widely followed cult from the early twenty-first century, promoting a range of private and public securities and services at the heart of a series of cultural, social, economic and financial exchanges.

There is little doubt that the repeated chorus of *efficiency*, *protection*, and *stability* reflects the three inner goals the cult's regulators or gods were mandated to achieve. The first verse is also broadly viewed as representing the essence of the contradictions at the heart of the movement: the union requires sublimation of the individual state to the one, yet at

* With great thanks and apologies to Ursula and her Acacia Seeds.

the same time, the many must remain; to meet the future the union must be in a continuous flux of change, yet at the same time it must remain true to itself and never abandon its underlying philosophy.

It is over the interpretation of the subsequent verses, however, that a passionate controversy has raged for many centuries. Two major opposing schools of thought have developed. There are the *idealists*, those who believe that the unknown author of the ESEC manuscript depicted the world as he viewed it should be. The text is viewed as a mantra that should lead to utopian harmony, if only it were followed and repeated often enough. Its meaning is clear: no substance is possible without due process; no action can be taken without justification; no freedoms are possible without appropriate controls; no decisions can be taken without consensus.

The opposing school of analysis is composed of the *realists*, those who maintain that the poet must have written the ode to depict the world as it was, rather than as it should be. For them, rather than being a mantra to follow, the text is the author's description of the harsh and forbidding environment as then existed. The meaning of the language is also clear, and, in this instance, relentlessly nihilist: there is no worthwhile process; there is no substance; there is no justification; there is no action; there are no controls; there are no freedoms of movement; there is no consensus; there are no decisions that cannot be challenged.

The final verse provides no respite to this battle of wills. For the idealists, everything is true to itself and consistent. So, the facts are accepted as facts, the vision is accepted as a vision, and there is no need to determine which will triumph. The vision can only triumph if it responds appropriately to the facts. For the realists, in contrast, the facts and the vision are a world apart. While they know that the facts should be determinative in deciding what is to be done, they also know it is the vision that will always triumph in the end, irrespective of the facts.

Will it ever be possible to reconcile these two opposing views? The strength with which they are held, and the certainty of each school that only their explanation is correct, is without question. If only we could travel to this fascinating and distant period, and ask the mysterious author where the truth lay and how to resolve the perpetual enigma.

INDEX

- Accounting law
 - enforcement, 232, 237, 240
 - standard setting, 235, 238
- Accounting standards (IFRS), 271
- Agency conflict, 167, 168
- Alternative dispute resolution
 - securities litigation, 567
- Anti-director index, 331
- Asset-backed securities (ABS), 570, 574
- Audit committee, 140, 231, 272
- Audit Regulatory Committee, 252
- Auditing standards, 231
 - Audit Directive, 251, 252
 - Audit Regulatory Committee, 252
 - Audit report standard, 255
 - Clarity project, 248, 259
 - EU competence to regulate, 251
 - genesis, 245
 - harmonization, 250, 256, 261
- Auditor
 - audit certificate, 232
 - support to supervisory board, 266
- Auditor liability, 260, 262
- Aufsichtsrat, 138, 141, 178
- Autorité des Marchés Financiers (AMF), 223
 - injunctive power, 228
 - mediation, 228, 229
- Best execution, 454, 470, 478, 491
 - bond trading, 493
- Board of directors
 - remuneration, 268
- Board structure, 135, 151, 265, 308, 329
 - committees, 140
 - structure regime (the Netherlands), 326
 - supervisory board, 138
 - two-tier structure, 269
- Bond, 309
 - trading, 478
- Bond market
 - market transparency, 488
 - transparency, 456
- Branch
 - CESR protocol, 469
 - supervision (MiFID), 459
- Branching
 - costs, 93
- Business judgment rule, 414
- Business organisation, 304
 - legal persons, 304
- Business organization
 - anatomy of the corporation, 168
 - historical overview, 27
 - legal person, 169, 179
 - legal persons, 30
 - Rheinland model, 29
 - theory of the firm, 166, 171
 - workers' involvement, 177, 180
- Cadbury Report, 153
- Capital
 - capital maintenance, 278, 279
 - financial assistance, 293
 - initial capitalisation, 283
 - reduction, 296
 - share repurchase, 299
- Capital requirements, 532
- Central Securities Depository (CSD), 514, 517
- Centre of main interests, 128

- Class action, 200, 226
 - collective action, 213
 - conduct test, 204
 - contingent fee, 202
 - effects standard, 204
 - enforceability, 209
 - EU countries, 200, 213
 - European Union, 218
 - settlement, 202, 206
 - US jurisdiction, 204
- Clearing and settlement
 - Central Securities Depository (CSD), 503
 - CESR, 454, 465
 - Code of conduct, 462
 - Delivery versus Payment (DVP), 504
 - EU legislation, 499
 - EU power to regulate, 510
 - Giovannini report, 499
 - securities settlement system, 514
- Collateralized Debt Obligations (CDOs), 574
- Collective action, 213, 225
- Combined Code (London Stock Exchange), 153
- Commercial law, 607
 - academia, 611
 - bridging theory and practice, 610, 614
 - role of practitioners, 609
 - theory, 612
- Committee of European Securities Regulators (CESR)
 - accountability, 464, 466, 474
 - bond market transparency, 488
 - branch supervision protocol, 469
 - CESR-FIN, 459
 - CESR-Pol, 459
 - CESR-Tech, 460
 - Charter reform, 472
 - consultation procedure, 462, 471
 - consumer interests, 462
 - cooperation with SEC, 463
 - co-ordination of enforcement, 459
 - corporate governance reform, 457
 - decision-making process, 465
 - financial information standards, 234
 - financial market monitoring, 457
 - guidance, 455
 - Himalaya report, 461
 - issuer disclosure, 452
 - Lamfalussy process, 449, 454
 - network of supervisors, 453
 - Peer Review Panel, 458
 - policy advice, 456, 462
 - Q & A documents, 456
 - quasi-enforcement, 458
 - Review Panel, 474
 - supervisory convergence, 451, 458, 460, 475
- Commodities Future Trading Commission (CFTC), 524
- Company Law Review (UK), 278, 287, 289, 290, 294, 296, 299
- Company mobility, 51, 93, 94, 124
 - incorporation agent, 97
- Comptroller of the Currency (OCC), 524
- Concentration rule, 481
- Conflict of interest, 317, 333, 340, 494
 - shareholder representation, 193
- Consumer association, 181
- Convertible bonds, 310
- Corporate control, 374
- Corporate governance code, 47, 135, 165, 266, 329
 - comply or explain, 49, 266, 267
 - enforcement, 335
- Corporate performance, 173, 328, 330
- Corporate reorganisation, 305
- Credit rating agency (CRA), 570
- Creditor protection, 180, 318
 - company law, 311
- Delivery versus payment (DVP), 515
- Derivative action, 226
- Director
 - criminal liability, 274
 - independent director, 142

- liability, 264, 272, 273, 313, 317
- remuneration (disclosure), 134, 136
- East Indian Company, 28
- Enforcement
 - risk-based regulation, 429
- Enterprise Chamber (the Netherlands), 337, 363
- EU company law, 278
 - Action Plan, 9
 - European Model Company Act, 9
 - freedom of establishment, 8
 - harmonization, 6, 8, 10, 30, 43, 132, 145
 - legal foundation, 149
 - listed companies, 48
 - Model Business Corporation Act (MBCA), 12, 149
 - protectionist policies, 62
 - SLIM Group, 280, 292, 295
 - Winter group, 9, 280, 292
- European Central Bank, 509
- European Company (SE), 7, 12, 47, 127, 153, 178, 302
- European Financial Markets Lawyers Group (EFMLG), 501
- European Model Company Act (EMCA), 5
 - co-determination, 15
 - drafting commission, 16
 - functions, 11
 - goals, 9
 - scope, 14
 - working plan, 16
- European Private Company (EPC), 8
 - capital and shares, 35
 - characteristics, 34
 - Commission consultation
 - document, 24
 - contribution, 36
 - corporate reorganization, 40
 - dissociation and expulsion of members, 39
 - history, 22
 - internal organization, 36
 - limited liability, 38
 - reorganizations, 40
 - requirements, 26, 34
 - statute, 26, 33
- European Securities Committee (ESC), 449
- European Securities Markets Expert Group, 461
- European System of Central Banks (ESCB), 506
- Eurosystem, 505, 506
- Federal Accounting Standards Board (FASB), 237
- Federal Deposit Insurance Corporation (FDIC), 524
- Federal Reserve Board, 524
- Financial market
 - competition, 491
 - order-driven market, 478
 - OTC market, 478
 - quote-driven market, 478
- Financial reporting
 - CESR Guidance, 454
 - ex post review, 232
 - pre-clearance, 233, 234
 - review panels, 232, 240, 241
- Financial Services Action Plan, 49, 449
- Financial Services Authority (FSA)
 - injunctive power, 440
- Financial supervision, 533
 - accountability of supervisors, 401, 535
 - consolidation, 525, 530
 - enforcement, 429
- European Union, 528, 536
- Financial Services Authority (FSA), 428
 - market abuse, 433
 - regulation by objective, 527
 - regulatory capture, 536
 - regulatory competition, 535
 - role of central banks, 528
 - supervisory convergence, 451
 - takeovers, 401
 - US structure, 524
- Fin-Net, 230

- Fiscal Compliance Experts' Group, 500
- Foreign investment, 388
 - disclosure rules, 384
 - public security, 389
- Free movement of capital
 - beneficiaries and territorial scope, 65
 - comparison with other freedoms, 64
 - control transaction in company, 66
 - cross-border voting, 58
 - definition, 66
 - establishment, 67
 - general interest test, 70
 - golden shares, 51, 68
 - horizontal effect, 53, 55, 83
 - horizontal effects, 85
 - private law restriction, 71
- Freedom of establishment, 12, 43, 50, 91, 125
 - cost of incorporation, 24
 - fraud / abuse, 126
 - horizontal effect, 85
- Gatekeeper, 335
- Golden share, 51, 68, 382, 421
 - Volkswagen Act, 52, 76
- Group of companies, 172
 - group law, 15, 607
- Harmonization
 - auditing standards, 256, 261
 - corporate governance, 49
 - EU company law, 43, 48
 - EU decision making process, 45
 - Takeover directive, 354
- Hedge fund, 383, 389
- Himalaya Report, 453, 461, 464
- Incorporation market, 92
- Independent directors, 158
- Initial public offering (IPO)
 - non-US companies, 547
- Insider dealing, 159, 230, 433
 - criminal prosecution, 436
- Insolvency Regulation, 128
 - centre of main interests, 128
 - groups of companies, 129
- Institutional investors
 - securities litigation, 565
- International accounting standards, 542
- International Accounting Standards Board (IASB), 232, 245, 542
- International Accounting Standards Committee (IASC), 245
- International Auditing Guidelines (IAG), 245
- International Federation of Accountants (IFAC), 245
- International Financial Reporting Interpretation Committee (IFRIC), 232
- International Financial Reporting standards (IFRS), 232, 236, 238, 452, 540, 542
 - CESR-Fin, 459
 - US GAAP reconciliation, 463, 548
- International Organization of Securities Commissions (IOSCO), 542
- International Standards on Assurance Engagements (ISAE), 246
- International Standards on Auditing (ISA), 244
 - EU adoption, 251
 - history, 245
- Investigation procedure, 363
- Investor associations, 225
- Investor protection, 265
 - benchmarking, 330
 - class actions, 226
 - collective actions, 225, 226
 - shareholders rights, 224
- Issuer disclosure
 - CESR Guidance, 452, 456
 - foreign companies, 542
 - multi-jurisdictional disclosure (MJDS), 543
 - Officially Appointed Mechanism, 452, 460
- Lamfalussy process, 449, 450, 453, 464
 - review, 472
- Legal Certainty Group, 500

- Limited Liability Corporation (LLC), 20
 - background, 19
 - history, 18
 - rationale, 21
- Management board, 269
 - appointment of members, 273
 - duties, 269
- Management report, 271
- Market abuse
 - accepted market practices, 456
 - administrative enforcement, 440
 - CESR Guidance, 454
 - CESR-Pol, 459
 - criminal prosecution, 435, 436
 - enforcement, 433
 - misleading statements, 437
- Market transparency
 - impact on best execution, 479
 - impact on liquidity, 479
 - Investment Services Directive, 481
 - limit order display rule, 485
 - MiFID, 482
 - pre-trade transparency, 484
 - quote rule, 484
- Memorandum of understanding, 552
- Mergers
 - cross-border mergers, 374
- MiFID
 - best execution, 454, 470, 478, 491
 - bond markets, 487
 - CESR guidance, 455, 468
 - inducements, 454
 - passport, 454
 - post-trade transparency, 460
 - supervision of branches, 469
 - systematic internalizer, 486
 - transaction reporting, 454
 - transparency, 456, 467, 486
- Minority shareholder protection, 312
 - derivative action, 313
 - expertise de gestion, 314
- Misappropriation of assets, 274
- Model Business Corporation Act (MBCA), 149
- Mortgage-backed securities, 571
- Multilateral Trading Facility (MTF), 482
- Mutual recognition
 - dispute regulatory authority, 560
 - equivalence of regulation, 551
 - financial intermediaries, 552
 - financial supervision, 463
 - governance rules, 555
 - IFRS/US GAAP reconciliation, 548
 - investor protection, 553
 - issuer disclosure, 543, 544, 555
 - issuer fraud, 563
 - jurisdiction of US securities law, 558
 - MiFID passport, 454
 - national treatment, 541
 - regulatory arbitrage, 561
 - securities market, 546, 547
 - securities regulation, 540
 - takeovers, 544
- Nomination committee, 141
- Northern Rock, 430
- Office of Thrift Supervision (OTS), 524
- One share one vote, 156, 177, 306, 375, 392
 - non-equity shares, 307
- Payment systems, 516
- Principles-based regulation
 - auditing standards, 258
 - rule of law, 444
 - sanctions, 443
 - securities regulation, 427
 - theory of responsive regulation, 431
- Private equity, 384
- Proxy voting, 187
 - banks, 197
 - conflict of interests, 193
 - EU law, 188
 - EU Shareholder Voting Directive, 187
 - management, 195
 - mandatory vote, 198
 - market for proxies, 197
 - overview in EU countries, 190
 - shareholder associations, 196

- Public Company Accounting Oversight Board, 233
- Rating agencies, 463, 577, 578
 - Code of conduct, 458
 - IOSCO Code of conduct, 580
- Real seat theory, 51, 125, 127
- Regulatory competition, 10
 - financial supervision, 535
- Remuneration report, 134
- Rickford Group (UK), 282, 287, 290
- Risk-based regulation
 - EU perspective, 446
 - securities regulation, 427
 - theory of responsive regulation, 431
- Rules-based regulation
 - auditing standards, 258
- Sarbanes-Oxley Act, 544
- Securities and Exchange Commission (SEC), 524
 - cooperation with CESR, 463
 - enforcement of accounting law, 237
 - IFRS, 549
- Securities litigation, 565, 566
 - Fin-Net, 230
 - initial public offering, 567
 - institutional investor, 565, 566
- Securities market
 - Alternative Trading System (ATS), 546
 - electronic communications networks (ECN), 546
 - foreign exchanges (access to US), 546
 - national market system (NMS), 546
- Securities regulation, 555
 - cross-border activity, 558
 - enforcement, 224, 228, 428
 - mutual recognition, 540
 - supervision, 223
 - US and EU, 557
- Securities settlement systems, 514
- Securitization, 572, 573
 - procedure, 570
- Self-dealing, 333
- Share repurchase, 319
- Share transfer
 - restrictions, 320
- Shareholder meeting
 - approval of remuneration report, 134
 - cross-border voting, 56
 - proxy voting, 187, 188, 190, 194
 - remote participation, 309
 - remote voting, 185
- Shareholder rights, 173, 181, 274, 307, 309, 320, 393
 - disclosure, 394
 - EU Shareholder Voting Directive, 185
 - shareholder representation, 187, 195
 - voting rights, 184
- Shareholder structure, 154
 - insider dealing, 159
- Shareholder value, 268
- Shares
 - no discount rule, 288
 - non-cash consideration, 291
 - par value shares, 288
 - redemption, 299
 - share premium, 288, 290
- Société par action simplifiée (Luxembourg), 304
- South Sea Bubble, 28
- Sovereign wealth fund, 383, 384, 388
 - IMF Code of conduct, 390
- Stakeholder
 - bargaining power, 177
 - notion, 165
- Subprime crisis, 571, 581
- Subsidiarity principle, 9, 46, 519
- Supervisory board, 265, 269
 - composition, 138
 - independence, 141
 - members, 270
- Tabaksblat Code, 329
- Takeover Directive, 375, 397
 - anti-frustration rule, 376, 378
 - breakthrough rule, 377, 378
 - genesis, 345
 - implementation, 361, 378

- neutrality principle, 377
- reciprocity principle, 356, 378, 380
- scope of harmonization, 355
- Takeovers
 - acting in concert, 385
 - agency conflicts, 376
 - applicable law, 359
 - civil law remedies, 407
 - controlling shareholders, 410
 - cross-border offerings, 544
 - defense measures, 351, 356, 370, 416, 417
 - disclosure, 361
 - fair price, 349, 360, 410
 - foreign investment, 375, 381
 - Japan versus United States, 413
 - litigation, 367, 369
 - mandatory bid, 349, 377, 379, 383, 398, 400, 407, 422
 - market for corporate control, 374, 376
 - minority shareholder protection, 360
 - mutual recognition, 544
 - obstacles, 375
 - poison pills, 350, 413
 - Securities and Takeover Act (Germany), 399
 - shareholders rights, 338
 - squeeze-out and sell-out, 315, 350, 377
 - supervision, 401
 - third party rights, 404
 - white knight, 367
- Trade Reporting and Compliance Engine (TRACE), 480, 490
- UCITS
 - CESR Guidance, 454
- UNIDROIT
 - intermediated securities, 501
- US GAAP, 237, 452, 540