

europäischem Recht', DB 1996, 513; Merkt, 'Creditor Protection Through Mandatory Disclosure', (2006) 7 *EBOR* 95; Miola, 'Legal Capital and Limited Liability Companies: the European Perspective', (2005) 2 *ECFR* 413; Morse, 'The Second Directive: Raising and Maintenance of Capital', (1977) *ELR* 126; Mülbart, 'Kapitalschutz und Gesellschaftszweck bei der Aktiengesellschaft', *Festschrift für Lutter* 2000, 535; id., 'A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection', (2006) 7 *EBOR* 357; Mülbart/Birke, 'Legal Capital – Is there a Case against the European Legal Capital Rules?', (2002) 3 *EBOR* 695; Müller, 'Zum Entwurf eines Gesetzes zur Durchführung der Zweiten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Kapitalschutzrichtlinie)', *WpG* 1978, 565; Natterer, 'Bezugsrechtsausschluss und zweite gesellschaftsrechtliche Richtlinie', *ZIP* 1995, 1481; Nienhaus, *Kapitalschutz in der Aktiengesellschaft mit atypischer Zwecksetzung – eine rechtsvergleichende/europarechtliche Untersuchung für Deutschland, Frankreich, Belgien, Großbritannien und Irland*, (Cologne [et al.], Heymanns, 2002); Niessen, 'Gründung und Kapital von Aktiengesellschaften im Gemeinsamen Markt – zum Vorschlag der Kommission einer zweiten Richtlinie zur Angleichung des Gesellschaftsrechts', AG 1970, 281; Notari, 'The Appraisal Regime of Contributions in Kind in the Light of Amendments to the Second EEC Directive', (2010) 7 *ECFR* 63; Oechsler, 'Die Änderung der Kapitalrichtlinie und der Rückwerb eigener Aktien', *ZHR* 170 (2006) 72; Pellens/Jödicke/Schmidt, 'Reformbestrebungen zum Gläubigerschutz', *Der Konzern* 2007, 427; Richter, 'Reconciling the European Registered Capital Regime with Modern Corporate Reorganization Law: Experience from the Czech Insolvency Law Reform', (2009) 6 *ECFR* 358; Rickford, 'Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance', (2004) 15 *EBLR* 919; id., 'Legal Approaches to Restricting Distributions to Shareholders: Balance Sheet Tests and Solvency Tests', (2006) 7 *EBOR* 135; Röpke, *Gläubigerschutzregime im europäischen Wettbewerb der Gesellschaftsrechte*, (Berlin, de Gruyter, 2007); Santella/Turrini, 'Capital Maintenance in the EU: Is the Second Company Law Directive Really That Restrictive?', (2008) 9 *EBOR* 427; Schäfer, 'Vereinfachung der Kapitalrichtlinie – Sacheinlage', *Der Konzern* 2007, 407; Schmitthoff, 'The Second EEC Directive on Company Law', (1978) 15 *CMLR* 43; Schmolke, 'Finanzielle Unterstützung des derivativen Aktienwerbs – Gläubiger- und Aktionärsschutz nach der geplanten Änderung der Kapitalrichtlinie', *WM* 2005, 1828; Schön, 'Deutsches Konzernprivileg und europäischer Kapitalschutz – ein Widerspruch?', *Festschrift für Kropff* 1997, 285; id., 'Balance Sheet Test or Solvency Test – or Both?', (2006) 7 *EBOR* 181; id., 'The Future of Legal Capital', (2004) 5 *EBOR* 429; id., 'Die europäische Kapitalrichtlinie – eine Sanierungsbremse?', *ZHR* 174 (2010) 155; Spickhoff, 'Der verbotswidrige Rückwerb eigener Aktien: Internationales Privatrecht und europäische Rechtsangleichung', *BB* 1997, 2593; Tridimas, 'Direct Effect and the Second Company Law Directive', (1992) 17 *ELR* 158; Vella/Prentice, 'Some Aspects of Capital Maintenance Law in the UK', in: 'Tison/de Wulf/van der Elst/Steennot (eds.), *Perspectives in Company Law and Financial Regulation: Essays in honour of Eddy Wymeersch* (Cambridge [et al.], Cambridge University Press, 2009), 276; Verse, *Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften*, (Tübingen, Mohr Siebeck, 2006); Westermann, 'Kapitalschutz als Gestaltungsmöglichkeit', *ZHR* 172 (2008) 144; Wooldridge, 'The Harmonization of Company Law: The First and Second Directives of the Council of Ministers of the European Economic Community', (1978) *Acta Juridica* 327; Wüstemann/Bischoff/Kierzek, 'Internationale Gläubigerschutzkonzeptionen', *BB* Beilage 2007, Nr. 5, 13; Wymeersch, 'Article 23 of the second company law directive: the prohibition on financial assistance to acquire shares of the company', *Festschrift für Drobnig* 1998, 725; id., 'Das Bezugsrecht der alten Aktionäre in der

Europäischen Gemeinschaft – eine rechtsvergleichende Untersuchung', AG 1998, 382; on the specific treatment of 'disguised contributions in kind' in Germany see N. 71.

I. IMPORTANCE, SCOPE AND SUBJECT MATTER

1. *Capital Directive as a Core Part of European Company Law*

1. While the Second Directive supplements the First Directive in some respects on the disclosure of public limited companies in the register (see Art. 2 et seq., and on this above §9 para. 22, 24, 26, 35), it primarily regulates the protection of capital and more generally the equal treatment of shareholders. The protection of capital had already been considered to be a good candidate for a first directive – and remained on the agenda when disclosure was finally chosen as the chief content of the First Directive.¹ However, since it was only in 1970 that the Commission presented an official Proposal², with the result that (following enlargement) changes were asked for by the United Kingdom and also Ireland and Denmark, the Directive was not adopted until 1976.³ In 1992, Art. 24a was added by Amending Directive 92/101/EEC,⁴ in 2006 (along with other amendments) Art. 10a, 10b and 23a (see on this, more in detail, below §11 para. 11). British influence is still discernible in the regime on company-owned shares ('treasury shares') and in some particular rules (such as Art. 23 and 39).⁵ The basic conception, however, remained continental – German law being particularly influential⁶ – and the Directive entailed substantial changes for the United Kingdom in core questions such as minimum capital, distribution of profits, contributions and in particular scrutiny of contributions in kind, pre-emption rights and the competence of the shareholders' meeting for capital

¹ See pre-draft, *Doc. Com. 6063/III c 65-D of 4 May 1965*.

² Proposal of 9 March 1970, OJ 1970 C 48/8, COM(70) 232 final; Opinions OJ 1971 C 88/1 (Economic and Social Committee) and 1971 C 114/18 (European Parliament); see already General Programme for the abolition of restrictions on freedom of establishment of 18 December 1961, OJ 1962, 36 (39) = OJ Special Edition, Second Series IX, 7.

³ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ 1977 L 26/1.

⁴ OJ 1992 L 347/64; Proposal OJ 1991 C 8/5, COM(90) 631 final; Opinions OJ 1991 C 240/103 (European Parliament) and 1991 C 269/21 (Economic and Social Committee). The next amendment came in 2006 via Directive 2006/68/EC, OJ 2006 L 264/32, on this amendment and the legislative material see below N. 30.

⁵ Edwards, *EC Company Law*, 51 (at least restrictions on the purchase by a company of its own shares and prohibition of an under-par issue of shares had been familiar to UK law).

⁶ Edwards, *EC Company Law*, 51 et seq.; Lutter, *Europäisches Unternehmensrecht*, 48; rather stressing equal weight of the influences (also that of the UK): Schmitthoff, (1978) 15 *CMLR* 43.

measures and in the event of serious losses.⁷ The underlying idea was – again influential mainly on the Continent – that **raising and maintaining capital is the corollary to market access with limited liability**.⁸ In order to achieve this goal, the Directive regulates the minimum sum, effective raising of subscribed capital (including a premium), subscribed capital maintenance and – applying basically the same regime – capital measures (increases and reductions). All this is aimed at **avoiding a dilution of the proportionate share** – be it only in proportionate value. Efficient protection of capital and the proportionate share are thus part of the very core corpus of European company law (see above §4 para. 23).

2. In the case of the Second (Capital) Directive in particular, it is disputed whether (if not explicitly stated) the rules should be considered as **minimum standards or whether more stringent national rules are prohibited**.⁹ The first solution would be in the interest of creditors and also of shareholders – and this interest is stressed in the legal basis (Art. 50(2)(g) TFEU, ex-Art. 44 (2)(g) EC); moreover this protection is indispensable for integration (see already §2 para. 11). Therefore, the question raised is not to be answered (primarily) using a case-by-case approach, interpreting each individual rule of secondary legislation,¹⁰ but on the basis of the principle that every rule in secondary legislation has to be

interpreted in conformity with (primary) EU Treaty law: more creditor or shareholder protection ('more stringent' national law) can only be excluded if otherwise the capacity of national companies to act in the internal market would be reduced. An exception should only be made for the freedom of establishment: the freedom to found companies from abroad in a host country renders inapplicable national rules which have a deterrent effect (and which cannot be justified on the basis of mandatory requirements in the public interest). This, however, seems to be so only in exceptional cases, for instance in that of a very high minimum capital (below §11 para. 15).

2. Application Only to the Public Limited Company or To All Limited Companies?

3. The Second Directive applies only to public limited companies (Art. 1(1)), i.e. EU law provides for a particularly 'safe' organisation only in the case of PLCs (special safeguards for creditors and shareholders). In order to be more easily recognised, they enjoy 'trademark protection' and even have to use the denomination distinguishing them from others (second paragraph of Art. 1(1)).¹¹ If the Member States provide for them, there can be exceptions – which again have to be made identifiable – in the case of cooperative societies¹² and open-ended investment funds organised as PLCs; for the latter, there were plans for extensive harmonisation which were indeed successful later on (Art. 1(2)).¹³ With this, the Directive also establishes in EU law the **distinction between two types of limited liability company**, one for public companies and one for a limited circle of shareholders – a step of fundamental importance for some Member States,¹⁴ namely the Netherlands and the United Kingdom with their unitary concept of the limited liability company (above §3 para. 13, §8 para. 4).

¹¹ Certification of quality and their protection enhance efficiency without restricting the freedom of design and therefore are viewed positively almost without exception; on this see, for instance, Grundmann/Kerber, 'Information Intermediaries and Party Autonomy – the example of securities and insurance markets', in: Grundmann/Kerber/Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market*, (2001), 264 (282 et seq.).

¹² This was important for France and Italy, see Edwards, *EC Company Law*, 54; and on this exception Mülberr, *Festschrift für Lutter* 2000, 535 (548 et seq.); Nienhaus, *Kapitalgesellschaft*, 136 et seq.

¹³ Edwards, *EC Company Law*, 54; Mülberr, *Festschrift für Lutter* 2000, 535 (547 et seq.); Nienhaus, *Kapitalgesellschaft*, 133–135; Niessen, AG 1970, 281 (282 et seq.); Wooldridge, *Company Law*, 25. References for the so-called UCITS Directive (investment funds) above §4 N. 36. In open-ended investment funds, the investor can ask that his share be bought back at share (proportionate) value.

⁷ Davies, *Gower's Principles of Modern Company Law*, (6th ed. 1997), 239 ('most fundamental adoption so far by English company law of civil law practices') (similar in content also the 8th ed.); Edwards, *EC Company Law*, 52; see also below §11 para. 3.

⁸ Adams, *Ökonomische Theorie des Rechts – Konzepte und Anwendungen*, (2nd ed. 2004), 250 et seq.; Habersack, *Europäisches Gesellschaftsrecht*, §6 para. 3; Lutter, AG 1998, 375 (375); Rojo/ Beltrán, 'El Capital Social Mínimo', *Revista de Derecho Mercantil* 1988, 149 (152–153); Schön, *Editorial ZHR* 166 (2002) 1 (3 et seq.); more reserved Mülberr/Birke, (2002) 3 *EBOR* 695 (717 et seq.); and particularly Enriques/Macey, 86 *Cornell L. Rev.* (2001), 1165 (1200) ('unjustifiable entrance fee').

⁹ In principle in favour of the first: ECJ case C-42/95 *Siemens v. Nold* [1996] ECR I-6017 (6034–6036 para. 15–22); case C-338/06 *COM/Spain*, [2008] ECR I-10139 (para. 23, and still more explicit para. 26: "the Second Directive [...] for the protection of shareholders and creditors of public limited liability companies, by leaving the Member States free to adopt provisions that are more favourable to them"); case C-101/08 *Audiolux* [2009] ECR I-09823 (para. 39); Benoit-Moury, *RevDrIntDrComp* 1993, 105 (127–129) see also Drinkuth, *Kapitalrichtlinie*, 53–57; Markt, 'Europäische Rechtsetzung und strengere autonomes Recht – Zur Auslegung von Gemeinschaftsnormen als Mindeststandards', *RabelsZ* 61 (1997) 647 (esp. 650–652, 662 et seq.). In principle in favour of the second: Advocate General Tesauro in ECJ case C-83/91 *Meilicke* [1992] ECR I-4871 (4907 et seq.); Edwards, *EC Company Law*, 56; Kindler, *ZHR* 158 (1994) 339 (352 et seq.); Meilicke, *Die "verschleierte" Sacheinlage – Eine deutsche Fehlentwicklung*, (1989), 98–103. In *Meilicke*, the ECJ did not answer the question referred for a preliminary ruling because the action had been initiated for purely academic purposes.

¹⁰ In this sense Mülberr/Birke, (2002) 3 *EBOR* 695 (701); Habersack/Mayer, *CFILR* 2000, 330 (331); Lang, *Irish Jurist* 1976, 37 (38 et seq.); Drinkuth, *Kapitalrichtlinie*, 53–57; Drygala, 'Die Vorschläge der SLIM-Arbeitsgruppe zur Vereinfachung des Europäischen Gesellschaftsrechts', AG 2001, 291 (294 et seq.); Habersack, *Europäisches Gesellschaftsrecht*, §6 para. 6;

4. In an early period, the EU Commission envisaged extending the scope of the Directive to all limited liability companies.¹⁵ And indeed, creditor protection, which has tended to be seen as even more important than shareholder protection (next §11 para. 5), seems even more important in the case of the small limited liability company. The high 'infant mortality'¹⁶ of limited liability companies is even more of a problem here. Therefore, in Germany and on the Continent, there have been many voices favouring such an extension of the scope of the Directive, to some extent even in the most recent past.¹⁷ Other arguments in favour are equal treatment of different types of company and the idea that capital should be the correlate of market participation with limited liability. Conversely, in the United Kingdom, critical voices with respect to this Directive are strong.¹⁸ An extension is certainly no longer on the political agenda.¹⁹ Quite the contrary: the trend, also in national laws and now at the EU level, is in the opposite direction, towards deregulation for PLCs as well, hitherto mainly in the area of own shares (with all the deregulation measures enacted so far), but perhaps also more generally. This is due to a changed evaluation of the Directive and capital protection as a whole.

3. Creditor and Shareholder Protection and Questioning the Goal of the Capital Directive

a) Creditor and Shareholder Protection via Protection of Capital

5. The Capital Directive is aimed at creditor and shareholder protection. Creditor protection is often seen as being even more important,²⁰ although on

the other hand criticism of the Directive can be levelled at this goal more directly (see later). The starting point is that capital is the corollary to market access with limited liability. If this is so and if protection is not to remain purely formal, capital must be raised effectively and may at least not be handed back to the shareholders. This is the main content of the Directive. However, the capital raised and not handed back does not guarantee complete protection. Even though a minimum capital is prescribed, this minimum capital is not proportionate to the risk incurred (material undercapitalisation) and in addition, it has to be raised only once, at formation (i.e. there is no permanent coverage).²¹

6. There is shareholder protection in two respects: administration rights are guaranteed (competences of the shareholders' meeting, for instance in Art. 17, 19(1)(a), 25(1)), as is also, and very prominently, equal treatment and thus mainly the content of pecuniary rights. The principle of equal treatment is to be found in Art. 42, but is also the basis of the rules on capital protection (in so far as they protect shareholders, see further below II.); a number of rules in the Directive are aimed at minimising the risk of the proportionate share of the shareholder being reduced and also diluted in value. Such a principle which is binding for all potential agents (managers or other shareholders having decision-making power) can easily be justified by principal-agent considerations: the open-ended decision-making power which has to be given to the agent has its corollary in rules which exclude action in respect of which it can be foreseen that the principal would not accept it. The principle of equal treatment is a limit on the agent's action, a 'constitutional' minimum guarantee for any principal who entrusts decision-making power to managers or dominant shareholders. It is aimed at reducing the risk of the agent making use of his decision-making power – conferred upon him for a specific use in the interest of the principal – for another purpose (moral hazard, above §3 para. 20). It thus also fosters investors' confidence and readiness to invest.

¹⁵ Explicitly in this sense justification of the Proposal of 9 March 1970, OJ 1970 C 48/8 (8); Ankele, BB 1970, 988 (988); Edwards, EC Company Law, 52.

¹⁶ Fleischer, DStR 2000, 1015 (1021) ('infant mortality' / 'Säuglingssterblichkeit').

¹⁷ Fleischer, DStR 2000, 1015 (1020 et seq.); Lutter, ZGR 2000, 1 (9 et seq.); Ulmer, 'Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fikktivem Auslandsitz', JZ 1999, 662 (664); but see also Enriques/Macey, 86 Cornell L. Rev. (2001), 1165 (1186) (taking into account the relation between pursued business activity and leverage effect); explicitly opposing Eidenmüller/Grunewald/Noack, in: Lutter (ed.), Legal Capital, ECFR Special Volume 1 (2006), 17 (36 et seq.) (arguing that competition is needed in this respect).

¹⁸ See mainly Modern Company Law For a Competitive Economy – The Strategic Framework – A Consultation Document from the Company Law Review Steering Group, (February 1999), 11 et seq. and 21–23; see for criticism (English company law, including because of the 2nd Directive, being 'in a worse state than at any time this century'): Edwards, EC Company Law, 410 et seq. (not sharing this point of view); see also references to the recent literature in: Vella/Prentice, 'Some Aspects of Capital Maintenance Law in the UK', Essays in Honour of Eddy Wymeersch (2009), 276 (282 et seq.).

¹⁹ There had been a study in this direction: Commission of the European Communities, Studie über die Erweiterung des Anwendungsbereichs der 2. Richtlinie auf Gesellschaften anderer Rechtsform, (1993), 25 (B 3); the action plan of 2003 (N. 29), however, does not deal with this question any longer.

²⁰ See, for instance, Mühlert/Birke, (2002) 3 EBOR 695 (716–722); Habersack, Europäisches

Europäischen Bilanzrecht', ZGR 2000, 706 (709 et seq.); considering almost exclusively the creditor protection dimension: Armour, (2006) 7 EBOR 5 (8 et seq., 11–15 and 16 et seq.); Enriques/Macey, 86 Cornell L. Rev. (2001), 1165 (1185 and 1202); see the stringent analysis (shareholder protection via optimisation of the information regime) in: Grohmann, Das Informationsmodell im Europäischen Gesellschaftsrecht, (2006), 254–302; and seeing both aims more at an equal footing; Fleischer, (2006) 7 EBOR 29 (31–33).

²¹ Armour, (2006) 7 EBOR 5 (19); Kübler, in: Hopt/Wymeersch (eds.), Capital Markets, (2003) 95 (100 et seq.); Bauer, Gläubigerschutz durch eine formelle Nennkapitalziffer – Kapitalgesellschaftsrechtliche Notwendigkeit oder überholtes Konzept?, (1995), 134–136; Easterbrook/Fischel, The Economic Structure of Corporate Law (2nd ed. 1996), 60; Ganssen,

b) Critical Evaluation in Economics and Policy Issues

7. No other European company law directive is (or was in the first years of this millennium), in its core part, subject to such fundamental criticism as the Capital Directive. Whereas on the Continent there are only a few critical voices, in the Anglo-American world and (probably also in) economic literature they largely prevail. They are based on two considerations. These rules, it is said, fail to achieve their goal of (creditor) protection or do so only in part or other, **less intrusive rules**, especially information rules, **achieve this goal equally well**.²² Alternatives discussed are (or were) mainly mandatory disclosure as a tool for creditor protection and a mere solvency test – an approach based on a forecast by the board which makes distribution dependent upon ‘sufficient liquidity’ in a certain period of time (to be set). In the discussion, the weaknesses already named (capital not proportionate to risk and not guaranteed on a permanent basis) were and still are highlighted. Restricting the distribution of profits and introducing certain safeguards (see below IV. and VI.) are good only for partial protection. It is also argued that (ongoing) disclosure of the financial circumstances, coupled with individual designs of protection (security arrangements), are more promising a form of protection. Indeed, particularly collateral which a company has given already (‘the property already pledged’) is disclosed more systematically in the British companies register.²³ Moreover, the principle of prudence, which is typical for continental and especially German accounting law, engenders the risk of early indications in the balance sheet of a coming crisis being obscured (below §15 para. 20). More meaningful information

²² For an overall (economic) assessment, see, for instance Cheffins, *Company Law – Theory, Structure and Operation*, (1997), 531–537; Ferran (2006) 3 *ECFR* 178 (183–200); Kübler, ‘Institutioneller Gläubigerschutz oder Kapitalmarkttransparenz? – Rechtsvergleichende Überlegungen zu den “stillen Reserven”’, *ZHR* 159 (1995) 550 (560–563); id., in: Hopt/Wymeersch (eds.), *Capital Markets*, 95. Today it is undisputed that at most a signal of seriousness is given, see references in N. 49 below. For the alternatives discussed see namely Hopt/Hertig/Kanda in: Kraakman/Davies/Hansmann/Hertig/Hopt/Kanda/Rock, *Anatomy* (1st ed. 2004) and also *High Level Group II* (below N. 32); for disclosure as an alternative see, for instance, Merkt, (2006) 7 *EBOR* 95; for references for the solvency test see below N. 80; considering the alternative between solvency test and capital requirements as being less important than the introduction of a wrongful trading regime in insolvency cases: Müllbert, (2006) 7 *EBOR* 357 (377–408); similar, based on the Czech experience Richter, (2009) 6 *ECFR* 358. Considering these alternatives as a ‘movable system’ (in the sense of Wilburg) according to which a problem may be regulated by several and often competing principles which all can be realised only in part – to a higher or lesser extent –, but partly substitute each other: Fleischer, (2006) 7 *EBOR* 29.

²³ On the register of charges, designed for the limited liability company: Sec. 860–894, esp. Sec. 860 (7) C.A. 2006; Davies, *Gower’s Company Law*, para. 32–22 through 32–34; Hannigan, *Company Law*, para. 21–51 through 21–81 also Merkt (last N.); Hunger, *Offenlegungspflichten und Handelsregisterpraxis in Großbritannien und Deutschland*, (1993), 50–52; comparative

enables at least contract creditors having the necessary expertise to ensure for themselves more tailor-made protection.²⁴ It is said, however, that other types of creditors are not covered by this protection – less professional contract creditors and creditors who did not voluntarily decide to become so (mainly tort creditors). On the other hand, the proportion which these creditors still receive in insolvency is negligible, i.e. in the precise situation both systems in fact protect only contract creditors who arrange protection for themselves. Capital protection does not change the situation in insolvency, but at most serves as insolvency prevention. Empirical data on this seem to be lacking.²⁵ What would have to be compared (in order to exclude other factors which may influence these figures) is whether the difference in insolvencies between the PLC and the private limited company is higher in the UK than on the Continent (because in the first case capital protection, as applied to all PLCs in Europe, does not apply to the private limited company, whereas in the second it does).

8. The second line of reasoning advanced by critics of capital protection broadens the perspective still further, in that the costs of capital protection are calculated too.²⁶ Scrutiny of contributions in kind slows down (and renders more costly) the formation of companies; the fact that services are not allowed as contributions makes it difficult to take know-how contributions into account, for instance in the technology sector, and repurchases of own shares (also to a higher extent) often make returns and stock prices grow.

9. All that has been said does not, however, apply completely to the goal of **shareholder protection**. Even if scrutiny of contributions in kind does not help with creditor protection (some use other protective devices and others do not get a share in insolvency anyway) it may well be meaningful for shareholders

²⁴ On the use (via so-called covenants) of this possibility in the US where minimum capital has been abandoned: Begley, ‘Debt Covenants and Accounting Choice’, (1990) 12 *Journal of Accounting and Economics* 125; Ferran (2006) 3 *ECFR* 178 (183 et seq.); Müllbert/Birke, (2002) 3 *EBOR* 695 (723 et seq.); Kalay, ‘Stockholder-Bondholder Conflict and Dividend Constraints’, (1982) 10 *Journal of Financial Economics*, 211 (214–216); Alberth, ‘US-amerikanische Gläubigerbilanzen durch Covenants in Verträgen – der Versuch einer weltweiten Kategorisierung der Rechnungslegung und Folgen für die internationale Harmonisierungsdiskussion’, *ZfB* 1998, 803; Kübler, *Aktie, Unternehmensfinanzierung und Kapitalmarkt*, (1989), 31–33.

²⁵ On the lack of convincing and extensive empirical data see Fleischer, *DSR* 2000, 1015 (1019); see, however, at least: Statistisches Bundesamt, *Statistisches Jahrbuch 2002 für die Bundesrepublik Deutschland*, (2002), 138 (in 1998, only 4.1% of the claims still served in bankruptcy were not secured, and in the case of private limited companies and PLCs even only 3.3 and 2.9%).

²⁶ Davies, ‘Legal Capital in Private Companies in Great Britain’, *AG* 1998, 346 (353); Ferran (2006) 3 *ECFR* 178 (183 et seq.), 189 et seq., 213–215); Müllbert/Birke, (2002) 3 *EBOR* 695 (722 et seq.); Kübler, in: Hopt/Wymeersch (eds.), *Capital Markets*, 95 (101–103, 107–114); Spolidoro, ‘The legal capital and the raising of funds through the issuance of securities in Italy’, *AG* 1998, 363 (365 et seq.). See, however, also the results of the feasibility study (N. 35).

nevertheless: it may better guarantee that shares are really only issued for par (full) value, and this protects the value of the shares of other shareholders having contributed in cash or otherwise in full value (protection against dilution). Furthermore, unlike in the case of creditors, this is also important for shareholders when the company is doing well. Two conclusions may be appropriate: a rule which is aimed solely at creditor protection is questionable as to its effect; many rules, however, also have a shareholder protection element and may well trigger other positive effects (creation of confidence, incentive for investment). In these cases, only the second line of argument mentioned earlier is fully convincing: it may always be that shareholder protection comes at too high a cost and that, therefore, a well-informed shareholder would opt against it. One should then look for other solutions – instead of prohibitions and prescriptions – to guarantee equal treatment.

c) Critical Evaluation in Practice

10. Capital protection has been questioned in practice mainly by the case law of the ECJ on the private limited company. Insofar as there is freedom to choose between the PLC and private limited company (in most countries) and both forms serve the needs in the particular case, mainly that shares shall not be listed (above §1 para. 14), this case law concerns the PLC as well. According to ECJ case law, a private limited company formed under English law (and continuing to exist under it)²⁷ has to be recognised as such in the other Member States as well, and this even if it transfers its main seat of administration and/or all its business to another Member State (or has its premises there from the outset). Minimum capital requirements, in particular those which exist in that other country, cannot be applied to such a private limited company (§25 para. 25 et seq.).

d) Deregulation Trends at the EU and National Levels

11. Over the past years, deregulation has been discussed at the EU level in seven areas (and lately also occurred in most of them): the non-par value share (§11 para. 18 et seq.), scrutiny of contributions in kind (§11 para. 24 et seq.), purchase of own shares (§11 para. 36), restriction of the prohibition on making loans in this case (§11 para. 40), relaxation of the requirements governing exclusion of pre-emption rights in the case of listed companies (§11 para. 49), safeguards for creditors in the event of capital reductions (§11 para. 50) and extension of squeeze-out possibilities (also §11 para. 50). The proposals were

developed within the 'Simpler Legislation for the Internal Market' (SLIM) Initiative,²⁸ and most of them were endorsed by the Action Plan of 2003.²⁹ Accordingly, in September 2004, the Commission proposed amendments to the Capital Directive – in four out of the seven areas envisaged – which have been adopted in 2006.³⁰ This meant more systematically including tendencies which had already existed for quite some time in the Member States. Especially with respect to company-owned shares, prohibition as a matter of principle has given way to more subtle solutions.³¹ A fundamental reform of the Capital Directive has, however, not yet occurred and is not to be expected in the near future. There had indeed been discussions to this effect – proposals to introduce an alternative scheme of creditor and shareholder protection –, also within the High Level Group in the area of company law in 2002,³² and a potential reform had been listed among potential long term projects in the Action Plan of 2003. The EU Commission then ordered a feasibility study in October 2006 to assess the alternatives, as well as radical alternatives to the existing scheme of creditor and shareholder protection via capital protection in the Second Directive. Even before the study was finished, in 2007, the EU Commission launched yet another reform initiative. In its Communication on a simplified business environment,³³ the Commission asked the question – with a view to reduce administration costs –,

²⁸ Simpler Legislation for the Internal Market (SLIM) Initiative, EC-Doc. SEC(98) 1944 final, COM(2000) 56 final; discussed, for instance in: Drygala, AG 2001, 291; Kallmeyer, 'SLIM – Schlankheitskur für das EU-Gesellschaftsrecht', AG 2001, 406; De Vos, 'Het SLIM IV Project van de Europese Commissie: Harmonisatie door dereguleren van het Europees Vennootschappenrecht', Working Paper 1999/16, Financial Law Institute, University of Ghent, 7–11; Wymeersch, 'European Company Law: The "Simpler Legislation for the Internal Market" (SLIM) Initiative of the EU Commission', Working Paper 2000/09, Financial Law Institute, University of Ghent, 3–7 (both available at www.law.ugent.be/fil/wps/archive.php); and extensively in the monograph by Baldamus, *Reform*.

²⁹ See Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, of 21 May 2003, COM(2003) 284 final, 10, 21 (even squeeze-out and sell-out rights considered and questioning protection of capital altogether). The Communication is strongly influenced by *High Level Group II*, 119–121.

³⁰ See Directive 2006/68/EC of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital, OJ 2006 L 264/32; proposal: COM(2004) 730 final; Opinion OJ 2005 C 294/1 (Economic and Social Committee). The European Parliament's Committee on Legal Affairs favoured the proposal unanimously on 23 February 2006 (not published). On the different amendments, see survey in: Westermann, ZHR 172 (2008) 144.

³¹ See for German developments: Bezzemberger, *Erwerb eigener Aktien*, 15–24; comparative law references below N. 90.

³² See the report of the High Level Group II of 04 November 2002 (company law modernisation), p. 84 et seq., available at: http://ec.europa.eu/internal_market/company/docs/modern/report_de.pdf.

³³ Communication from the Commission on a simplified business environment for companies in the areas of company law, accounting and auditing, COM(2007) 394 final of July 12, 2007, available at: http://ec.europa.eu/internal_market/company/docs/simplification/com2007_394_en.pdf.

²⁷ In about 75% of cases with a subscribed capital of no more than 100 £ (March 2007): *Verfahrensgeschichte* I para. 10 N. 1 (the private limited company amounting to 90% of

whether the Second Directive should be abolished or revoked in part or only be simplified. As the large majority in the consultation process declared itself clearly *against* the abolition of the Directive, the EU Commission proposed in September 2008 (only) some targeted amendments with respect to the scrutiny of contributions in kind (see on this problem below §11 para. 26) which soon afterwards, in September 2009, were adopted.³⁴ Meanwhile, the *feasibility study* (by KPMG) had been completed and published in January 2008.³⁵ The study addressed the following: the administrative costs caused by the currently existing rules on capital maintenance, the costs and the use of a solvency test and of other alternative methods to set the threshold for distribution of profits, the shareholder and creditor protection in alternative systems (the inquiry focused on five European and four non-European legal systems, moreover on four proposals from academia)³⁶ and finally also the costs which the transfer to an alternative system would create. The core results of the study are that the capital maintenance system of the Second Company Law Directive does not cause considerable operative problems for the companies and does not cause excessive administrative costs (at least not higher than alternative systems). As the Directive also leaves options to the Members States, for instance with a view to introducing a solvency test (see below §11 para. 30), the EU Commission drew the conclusion that no (urgent) need to take action existed and no fundamental reform of the directive was needed.³⁷ A deregulation process comparable to the one experienced in the US in the 20th Century (which had been predicted by some authors and potentially also with strong arguments)³⁸ is not to be expected, at least not in the

³⁴ See Directive 2009/109/EC of the European Parliament and the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and the Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions OJ 2009 L 259/14; Proposal: COM(2008) 576 final; Council Document 13548/08.

³⁵ Feasibility study on an alternative to the capital maintenance regime established by the second company law directive 77/91/EEC of 13 December 1976 and an Examination of the Impact on Profit Distribution of the New EU Accounting Regime, January 2008, available at: http://ec.europa.eu/internal_market/company/docs/capital/feasibility/study_en.pdf; critical survey by Fuchs Mtwabana, (2011) 22 EBLR 237 (238–245 and 257 et seq.).

³⁶ See in the Feasibility Study (N. 35) the European systems of France, Germany, Sweden, Poland, and the UK, p. 25–154, and the extra-European systems of: US-MBCA/Delaware/California, Canada, Australia, New Zealand, p. 155–268, and from the literature: High Level-Group; Rickford-Group; Lutter-Group and Dutch Group, p. 269–310; summary by Santella/Turrini, (2008) 9 EBOR 427 (449 et seq.); on the reform proposals of the expert groups, see already: Fuchs/Stibi, BB 2007, 93 (94 et seq.); Lanfermann/Röhrich, BB Beilage 2007, Nr. 5, 8 (10 et seq.); Pellens/Jödicke/Schmidt, *Der Konzern* 2007, 427 (430 et seq.).

³⁷ See the Position taken by the GD Internal Market and Services, January/February 2008, available at: http://ec.europa.eu/internal_market/company/docs/capital/feasibility/market_position_en.pdf; Concurring (namely on the flexibility issue) Santella/Turrini, (2008) 9 EBOR 427. Critical in this respect Vella/Prentice (N. 18), 276 (281 et seq.); criticising the lack of alignment of the rules on distribution of profits and of the IFRS-accounting standards: Maul/Lanfermann/Richard, AG 2010, 279, (280).

³⁸ Kübler, in: Hopt/Wymeersch (eds.), *Capital Markets*, 95 (esp. 111–114); monograph by Escher-

near future. The full picture requires, however, to also take into consideration capital markets and trends of competition.

II. EQUAL TREATMENT AS A CORE PRINCIPLE (ART. 42)

12. The rule which is least disputed today is placed at the end of the Directive. According to Art. 42, shareholders must be treated equally. Some policy considerations and fundamental dogmatic positions should be remembered (above §11 para. 6). Although the rule applies (in the framework of the Capital Directive) mainly to questions concerning capital, it is formulated as a general principle.³⁹ The ECJ, however, does not see this rule as the expression of a broad principle of equal treatment of shareholders, not even in the framework of the Second Directive.⁴⁰ It applies, according to Art. 42, (only) to the extent that shareholders are ‘in the same position’, and this seems to indicate that only arbitrary discrimination is excluded.⁴¹ This, however, is true only in part. One can deduce from the individual rules that a changing of the pro rata share – be it only in fact, i.e. in its economic value (dilution) – is forbidden. Here, the principle is **more than a prohibition on arbitrariness**. The principle is less strict as regards whether the title itself is guaranteed, but here again different standards seem to apply (there is at most a formal protection in the case of capital increases against contributions in kind, perhaps a more demanding standard for increases against contributions in cash; see in more in detail §11 para. 48). Equal treatment is the aim of all rules which also protect shareholders, with the exception of those which prescribe a shareholders’ meeting (administration rights). On the other

³⁹ Edwards, *EC Company Law*, 56 (therefore should rather have been put at the beginning); Kalss, in: Koppensteiner (ed.), *Europäisches Wirtschaftsprivatrecht*, 119 (215); Lang, *Irish Jurist* (1976), 37 (58); Lutter, ‘Zur Europäisierung des deutschen Aktienrechts’, *Festschrift für Perid* 1978, 599 (605–608); Mühlbert, *Festschrift für Lutter* 2000, 535 (546).

⁴⁰ In this sense now ECJ case. C-101/08 *Audiolux* [2009] ECR I-09823 (para. 40) with reference to ECJ case. C-338/06 *COM / Spain*, [2008] ECR I-10139 (para. 32 et seq., interpreting Art. 42 restrictively in order to avoid that Art. 29(4) on the exclusion of the pre-emption right becomes in fact inoperative). The Court opines that, given the 5th recital of the Second Directive, the right to equal treatment (apparently) applies only in case of ‘capital increases and decreases’, see ECJ case *Audiolux* (para. 37); see on this decision: Habersack/Tröger, NZG 2010, 1 (4); Rieder, GWR 2009, 392; and as well Haar, *GPR* 2010, 187 (189 et seq.); a more general discussion in: Basedow, ‘Mangold, Audiolux und die allgemeinen Grundsätze des europäischen Privatrechts’, *Festschrift für Hopt* (2010), 27; Schön, ‘Allgemeine Rechtsgrundsätze im Europäischen Gesellschaftsrecht’, *Festschrift für Hopt* (2010), 1347; see as well below §11 para. 48.

⁴¹ BGHZ 120, 141 (150 et seq.) (on the Directive); Bungeoth, in: MünchKommAktG, §53a AktG para. 14–16; in tendency also Lutter, *Festschrift für Perid* 1978, 599 (607); and also Grechenig (2007) 4 *ECFR* 571 (581). Advocate General *Trstenjak*, however, stated that any deviation from equal treatment required objective grounds of justification, see her opinion in case C-338/06 *COM / Spain* [2008] ECR I-10139 (para. 61). For this question, see also the extensive discussion

hand, equal treatment is nowadays confirmed in other directives as a principle for more specific questions – namely information and voting rights – for companies traded on regulated markets in Art. 17(1) of the 2004 Transparency Directive and Art. 4 of the Shareholders' Rights Directive. According to the ECJ in case *Audiolux*, these rules of secondary law – and as well Art. 5 and 16 of the Takeovers Directive – can, however, not be seen as the basis of a general principle of equal treatment of (minority) shareholders in company law. The rules named are seen as referring exclusively to specific situations; moreover, a principle of equal treatment, it is argued, would not answer the question of which one of the different instruments of minority protection should be selected.⁴² Today, however, it remains an open question whether – after the adoption of the Takeovers Directive – the basis for such a general principle is not much broader than before.

III. PROTECTION OF CAPITAL AT THE TIME OF FORMATION (ART. 4–14)

13. For formation, the Second Directive contains similar provision for the protection of third parties to that in the First Directive (see below 1.), but in addition and primarily rules on the raising of capital, including for the protection of creditors, though not exclusively. These rules prescribe first that a minimum sum has to be subscribed (see below 2.) and then regulate that the capital subscribed (whatever sum, with premium) be effectively raised (see below 3.), with particular rules for contributions in kind (see below 4.). Art. 13 makes it clear that transformation into a PLC (which in practice is perhaps the most important form of creating a PLC)⁴³ is subject to the same rules as is formation from scratch, and Art. 14 states explicitly that rules on amendments to the company statutes or instrument of incorporation are not affected.

⁴² See ECJ case, C-101/08 *Audiolux*, [2009] ECR I-09823 (para. 34–52). In substance, the question was whether a dominant shareholder when acquiring control before the adoption of the Takeover Directive, was obliged because of an assumed general principle of equal treatment to buy the shares of all minority shareholders at equal conditions to those which were in place when he had gained control; on this question see Bengoetxea, (2010) 47 *CMLR* 1173; Habersack/Tröger, NZG 2010, 1 (4); Klöhn, LMK 2009, 294692; Mucciarelli (2010) 7 *ECFR* 158; Rieder, GWR 2009, 392; Thurnher/Meusberger-Hammerer, *ELR* 2009, 393; van Bakkum, (2010) 7 *ECL* 161; Wilsing/Paul, *EWIR* 2009, 755; a more general discussion in Basedow, 'Mangold, Audiolux und die allgemeinen Grundsätze des europäischen Privatrechts', *Festschrift für Hopt* (2010), 27; Schön, 'Allgemeine Rechtsgrundsätze im Europäischen Gesellschaftsrecht', *Festschrift für Hopt* (2010), 1347. Discussion of the final opinion submitted by Advocate General Trstenjak already in: Möslin, *EWS* 2009, 1.

1. General Rules on Third Party Protection (Art. 4 et seq.)

*14. Third parties are protected in transactions with a PLC by Art. 4 et seq., which supplement similar rules in the First Directive wherever these do not already solve the case. According to Art. 4 Member States must, if they forbid business activities before issuance of a licence, prescribe that in the event of this prohibition not being respected there shall be a debtor – either the person acting or the company.⁴⁴ This is important only if Art. 8 of the First Directive (2009, ex Art. 7) does not already solve the case by prescribing that the party acting is liable (only, however, 'unless otherwise agreed': see in more detail §8 para. 18–20). Art. 8 does not apply if the company already has a legal personality under national law, but is not yet entitled to engage in business.⁴⁵ In this case, too, the third party must have the guarantee – as more generally under the First Directive – that there is a debtor. According to Art. 5 a company may not be dissolved automatically if the number of members no longer reaches the minimum required by national law, again because the third party must not lose its debtor (no retroactive effect). The rule supplements that contained in Art. 12 lit. b no. vi First Directive 2009 (ex-Art. 11(2) lit. f), according to which national law may not declare a company void which does not have at least two founders. For the PLC, Art. 12 lit. b no. vi of the First Directive is not obsolete, whereas for the private limited company it is, because of the Twelfth Directive (see §10).⁴⁶

2. Minimum Capital (Art. 6)

15. Art. 6 prescribes a minimum capital of at least 25,000 euro – in the first Proposal this was also the maximum allowed,⁴⁷ but in the adopted version this is no longer the case. However, a minimum capital cannot be set at a prohibitively high amount, because then freedom of establishment would come into play.⁴⁸ As

⁴⁴ Different apparently Kalss, in: Koppensteiner (ed.), *Europäisches Wirtschaftsprivatrecht*, 119 (212) (company liable). See also Wooldridge, (1978) *Acta Juridica* 327 (336).

⁴⁵ Similar Habersack, *Europäisches Gesellschaftsrecht*, §6 para. 14; Kalss, in: Koppensteiner (ed.), *Europäisches Wirtschaftsprivatrecht*, 119 (212 et seq.).

⁴⁶ On Art. 5 see §10 para. 5 et seq., including on the problem that Art. 12 lit. b n. vi of the 1st Directive forbids a rule which would require more than two members in the case of a PLC. On the acceptance of single-member PLCs (free choice by the Member States, see Art. 6 of the 12th Directive) see §10 para. 10 (also comparative law indications). On the problem of no-member companies in Germany see §10 N. 12.

⁴⁷ Art. 6 of the Proposal (N. 2); on this Edwards, *EC Company Law*, 60; Ankele, *BB* 1970, 988 (990); Niessen, *AG* 1970, 281 (285–287).

⁴⁸ Stressing the fundamental rights dimension: Armour, (2006) 7 *EBOR* 5 (24 et seq.); similar Drinkuth, *Kapitalrichtlinie*, 137 (Art. 6 therefore also a maximum rule, which, however, means going too far, given the wording and the arguments above). The EU Commission sees minimum capital under Art. 6 as an "almost symbolic" prerequisite, see position taken by the GD Internal Market and Services in January/February 2008 (N. 37), p.2; in most Member States, minimum capital is higher, for instance EUR 50,000 in Germany, GBP 50,000 in the UK and in principle EUR 37,000 or EUR 225,000 for listed companies in France; see Feasibility Study (N. 35) p. 144/145. On the motives why subscribed capital is typically well beyond minimum capital in public companies, for instance in Germany, see Eidenmüller/

the minimum capital required is not proportionate to the risk incurred, it is seen today **only as a signal of seriousness**, not as an instrument which could protect creditors in the event of adverse developments in the company's business.⁴⁹

3. *Raising of Subscribed Capital and Surcharge (Art. 7–9, 12, 18)*

a) Capital and Duty to Contribute

16. The Capital Directive regulates first the composition of subscriber capital. **Three principles** are visible: the principle of fixed capital, the principle of nominal equivalence between contributions and subscribed capital plus premiums (nominal duty to contribute) and the principle of full equivalence in value of the contributions made and the nominal duty to contribute. Therefore, subscription of own shares or subscription on behalf of the company are forbidden (Art. 18(1) and (2) respectively). Both principles are subject to sanctions for the founders and the managers (Art. 18(3)).

17. European law prescribes the **principle of fixed capital** for the PLC, which forms the basis of Art. 8(1). According to this principle, shares must either have a fixed nominal (money) value (face value) or have this nominal value at least indirectly, in that the subscribed capital has to be fixed at a certain amount (of money) and shares are expressed as a proportion of this figure (so-called par value, to be distinguished from true non-par value shares).⁵⁰ True non-par value shares, which would be the portion of subscribed capital not fixed at a certain nominal figure (or of minimal subscribed capital, see above N. 27), are not allowed, which is different from what is (partly) the case in Anglo-American law.⁵¹

18. **The duty to contribute (debt) must reach nominally at least the face value** or the share value which can be computed in the event of par value (Art. 8(1),

prohibition of an issue below par), with an exception in the case of credit institutions assisting in the issue (Art. 8(2)), because the latter should be allowed to get payment for their efforts and for taking over the risk of placing the securities. This is the subscribed capital. Moreover, Art. 10(2) (dealing with contributions in kind) is based on the idea that a premium agreed upon (agio) is equally owed – and this cannot be different for contributions in cash.⁵² Only the moment chosen for performance is different for subscribed capital and the premium: Art. 9(1) refers only to capital (see below b). The duty to contribute as the core duty to perform is regulated not only in amount but also in its existence: renunciation is unlawful unless there has been a capital reduction beforehand (Art. 12), making the resolution of a shareholders' meeting necessary and triggering the right of creditors to ask for security.

19. Art. 8 and 12 are worded in a general manner. They should therefore also **apply to capital increases**.⁵³ Here again, an issue below par is prohibited – even if the company's net assets no longer reach the value of the subscriptions made only by the existing shareholders and therefore, new shares are not worth the face value. Again, a capital reduction has to come first. Therefore, particularly with respect to capital increases, the SLIM Initiative asks the question whether the introduction of true non-par stock should not at least be considered. In this case there would no longer be an obligation to issue shares always at least at nominal value.⁵⁴ However, the Commission did not take up this suggestion in its Proposal for the amendment of the Capital Directive, therefore a change in this area is not to be expected in the near future.⁵⁵

20. Finally, the contribution actually made (instrument of performance) must **in fact reach the (face value of) the obligation to contribute**. Art. 10 is based on this idea (see below 4.), and Art. 7 regulates the core parameters: the instrument of performance must have a value which can be assessed. Since the Accounting Directives allow any value to be entered as an asset to the extent that it was acquired for valuable consideration and with the sole exception of goodwill (increasingly vanishing, see below §15 para. 38), these are all values which are capable of being entered as assets.⁵⁶ This range of possible contributions is

⁵² In this sense probably also Habersack, *Europäisches Gesellschaftsrecht*, §6 para 20; extensively on the duty to contribute (also comparative law aspects): Manfredonia, in: Buttaro/Griffi (eds.), *La seconda direttiva*, 33–58.

⁵³ At least to them: Kalss, in: Koppensteiner (ed.), *Europäisches Wirtschaftsprivatrecht*, 119 (274).

⁵⁴ SLIM Initiative (above N. 28), proposal 2; on this see *High Level Group II*, 89; Baldamus, *Reform*, 105–115; not adopted in Directive 2006/68/EC (N. 30).

⁵⁵ In the Feasibility Study (N. 35) p. 410–423, several models are sketched for the introduction of genuine non-par value shares; the EU Commission did, however, not react to this. See on this question also Santella/Turrini, (2008) 9 *EBOR* 427 (444 et seqq.).

⁵⁶ Therefore, it is irrelevant (though disputed) at the EU level whether only values can be included

⁴⁹ This is conceded even by all supporters, for instance Fleischer, *DSrR* 2000, 1015 (1020 et seq.); Lutter, *AG* 1998, 375 (375); Merkt, 'Das Centros-Urteil des Europäischen Gerichtshofs – Konsequenzen für den nationalen Gesetzgeber', *VGR* 2 (2000) 111 (138). Schön, *ZGR* 2000, 706 (728); see already justification of Art. 6 in the first Proposal (above N. 2). Even more sceptical (no useful information to creditors at all): Enriques/Macey, 86 *Cornell L. Rev.* (2001), 1165 (1187); Ferran (2006) 3 *ECFR* 178 (197 et seq.); and similar Armour, (2006) 7 *EBOR* 5 (10, 15, 17–21). The Feasibility Study (N. 35) p. 145 also emphasizes that fixed capital is of minor importance for the rating of an issuer, more important in practice are criteria such as 'net equity' or 'market capitalisation'.

⁵⁰ *Modern Company Law* (N. 18), 22 and 89; Regierungsentwurf zur Zulassung von Stückaktien, *ZIP* 1998, 130 (131 et seq.); see also Mühlbert/Birke, (2002) 3 *EBOR* 695 (702). Systematic survey in: Eidenmüller/Grunewald/Noack, in: Lutter (ed.), *Legal Capital, ECFR Special Volume 1* (2006), 413 et seqq. On the different approaches to transposition in the different Member States (for instance par value shares and fixed nominal value shares in Germany and France, however only par value shares in the United Kingdom), see the summary in the Feasibility Study (N. 35) p. 147.

reduced because an undertaking to perform work or supply services is excluded from it⁵⁷ and this – together with the prohibition of issues below par – makes it difficult to take into account contributions of know-how, thus creating difficulties in using the PLC as a start-up form for certain kinds of business enterprise. If national law does not apply the same rules to the private limited company (as in Germany),⁵⁸ creation in this form and – later on – transformation into a PLC can be considered, for instance when going public, because then the proportionate quota can remain unchanged, provided only that the company's net assets created until then are in fact equivalent to the face value of subscribed capital.

b) Performance of the Obligation to Contribute

*21. Apart from the amount and existence of the obligation, the time of performance is also regulated at least in part by EU law: a portion of the cash contributions have to be made right away (not less than 25%, Art. 9(1)), but this does not apply to premiums (second sentence of Art. 26 e contrario). Contributions in kind have to be due after five years at the latest and then in full (Art. 9(2)). For these contributions, the Proposal would have prescribed immediate performance in full.⁵⁹ This is understandable because of the risk of depreciation, but is often not practicable. The principle of equal treatment is important in particular when the company asks shareholders that the obligation to contribute be performed.

4. Scrutiny and Particular Safeguards in the Case of Contributions in Kind (Art. 10 et seq.)

a) Scrutiny of Contributions in Kind

22. There is no problem in establishing that face value is in fact reached in the case of contributions in cash. This problem does, however, arise with

contributions in kind, and their valuation is dealt with procedurally. An independent scrutiny (Art. 10(1) and (2)) and publication of the resulting report (Art. 10(3)) are prescribed as the means of guaranteeing that the contribution in fact reaches face value.

23. Contributions in kind must be scrutinised by one or more experts and the results set out in a report (Art. 10(1)). Such experts must be independent – as in the case of auditors (below §17 para. 9). However, their professional status is not regulated – unlike with auditors – but choice must be at least approved by a court or administrative authority.

24. The content of the scrutiny and the report is also prescribed (Art. 10(2)). The expert or experts must establish the value of the contribution and check the result against the face value or par value of the shares subscribed, plus any premium (issue price of the share), and the amount of the price of all shares has to be reached by the actual value of the contribution.⁶⁰ Since the face value and any premium have a nominal value and the par value is easy to calculate, the core of the problem is that of valuing the contribution. The methods used for this valuation have to be disclosed (but not possible alternative methods),⁶¹ as well as the value of the contribution which follows from their application and – formally – the conclusion that this value is indeed equivalent to the face or par value of the share. The considerations discussed regarding the auditor (below §17 para. 8) also apply here to the question whether the expert is liable towards the addressees of the report ('third parties') for the correctness of the scrutiny.

25. The report has been understood as being primarily aimed at creditor protection,⁶² and is therefore also prescribed in the Division Directive but not

⁶⁰ Edwards, *EC Company Law*, 62; Santella/Turrini, (2008) 9 *EBOR* 427 (438); also Denecker, *Revue des sociétés* 1977, 661 (667) (however, only in favour of a formal scrutiny); efficient scrutiny seen as a necessary device against circumvention within a capital maintenance system also by Armour, (2006) 7 *EBOR* 5 (10); more in detail (with comparative law aspects) Lofoco and Pellegrino, in: Buttaro/Griffi (eds.), *La seconda direttiva*, 59–100. For transposition problems which still exist even after the transposition in the 'Aktionärsrechtlich-Umsetzungsgesetz' (§34 (1) n. 2 AktG) see Bayer/Schmidt, *ZGR* 2009, 805 (843 et seq.).

⁶¹ At least the first is needed likewise when restructuring measures are taken, see below §28 para. 25. Since the rules on valuation are very open the scrutiny of contributions in kind differs considerably from one Member State to another: SLIM Initiative (above N. 28), proposal 1, where, however, no suggestion for harmonisation is made as the remit of the Group had been to slim down the rules on harmonisation contained in directives; see some comparative law aspects, for instance for the UK, in: Gansen, *Harmonisierung*, 57–65; and Spain Franzmann, *Kapitalaufbringung*, 132–152.

⁶² Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law', (2000) 63 *Modern Law Review* 355 (365); also Lutter, *Europäisches Unternehmensrecht*, 49; contra apparently (also shareholder protection): Lang, *Irish Jurist* 1976, 37 (48); And as well Habersack, *Europäisches Gesellschaftsrecht*, §6 para. 26; in this sense as well: Westermann 172

Habersack, *Europäisches Gesellschaftsrecht*, §6 para 25; on this dispute see Kales, in: Koppensteiner (ed.), *Europäisches Wirtschaftsprivatrecht*, 119 (220). Consequently the opinion named first is to be preferred because it declares differences in national law as to which values can be entered as assets as being irrelevant. What has to matter – and this is the real point – is the question whether EC/EU accounting law allows the value in question to be entered as an asset. This value can be entered as an asset under EC/EU accounting law (and even German law): Coenenberg, *Jahresabschluss und Jahresabschlussanalyse – Betriebswirtschaftliche, handelsrechtliche, steuerrechtliche und internationale Grundsätze – HGB, IFRS, US-GAAP*, (21st edition 2009), 77–84; more optimistic also *High Level Group II*, 90. In German literature it is disputed whether the prohibition applies only to the contribution of services of founders or of all persons; for the first, in tendency: Hirte, in: Grundmann (ed.) *Systembildung*, 211 (228); contra Habersack, *Europäisches Gesellschaftsrecht*, §6 para. 25.

⁵⁸ Even after deregulation by the MoMiG, German law remains rather rigid also for the Ltd. According to the German Private Law Supreme Court, services cannot be the subject of a contribution in kind, see: BGH (*Qivive*) NZG 2009, 463 (464); different with respect to know-how as far as it is marketable: Hueck/Fastrich, in: Baumbach/Hueck, 2010, §5 para. 26.

⁵⁹ Art. 7 2nd sentence of the first Proposal (above N. 2); on this, for instance, Keutgen, *Revue*

the Merger Directive (below §28 para. 37 and 43). As an instrument of creditor protection, it may well be inefficient since the amount unsecured creditors receive in the event of insolvency is close to zero. It is, however, increasingly understood that scrutiny should also **protect shareholders** in that it helps the latter to ensure that other shares are not issued in exchange for lower value than own shares, thus diluting own investment. Informed shareholders could, however, also agree on the valuation. This speaks in favour of allowing this – i.e. allowing shareholders to dispense with such scrutiny – at least in the case of unlisted companies. Indeed, one of the six proposals of the **SLIM Initiative** – later adopted in a new Art 10a, 10b – was to reduce expert scrutiny.⁶³ This constitutes the **core exception**. However, there too the aim of creditor protection is taken as the starting point and an (optional) exception is accepted only for cases in which a similar, still relevant evaluation has already been made for another reason (via an earlier expert opinion, Art. 10a(2), or because the value has already been audited, Art. 10a(3)), or for cases in which a valuation is not needed (in the case of contributions in securities, when there is a reliable price on capital markets for them, Art. 10a(1)). These would seem to be good reasons for exemption from the scrutiny prescribed.⁶⁴ Minimal protection is secured in these cases by the requirement that there be an additional explanation which goes beyond Art. 3 lit. h (see Art. 10b(1)). In cases where a reliable evaluation of the assets is (nevertheless) not possible, for instance because the capital market price is influenced by exceptional circumstances⁶⁵ or because new relevant facts have occurred which could change the evaluation made earlier, the board is

obliged to proceed to a second evaluation under Art. 10 (see the subpara. 2 of Art. 10a (1),(2), and (3)). If the board does not comply with this duty in the cases described in Art. 10a (2) and (3), minority shareholders (who jointly hold at least 5% of the capital subscribed) have the right to ask for a re-evaluation themselves⁶⁶ (see third subpara. of Art. 10a (2)). The latter, however, will be relevant only for capital increases to which Art. 10a and 10b are indeed applicable (see Art. 27 (2)), possibly also for cases of post formation acquisition (application by way of analogy under Art. 11(1)).

26. The (additional) **exception under Art. 10(4)** is also such that creditors are protected in a different way, basically because the dominant shareholder(s) who make(s) the contribution temporarily give(s) security (see mainly subparagraphs (c) and (d)). Moreover, the other shareholders must agree to dispense with scrutiny. This, however, only applies to the rather narrow case where the company is formed mainly via contributions in kind. It must be argued e contrario that consent of the other shareholders does not justify an exception in other cases. Finally, in the last amendment of the Second Directive, the Member States have been granted in Art. 10(5) the option to introduce yet another exception to the duty to scrutinize contributions in kind. Such an exception may also be introduced for the cases in which a similar report has been made in the course of a merger or division.⁶⁷ The idea was again to avoid double checking.⁶⁸ These cases differ, however, from those described in Art. 10(3), because the Third and the Sixth Directives do not explicitly prescribe disclosure to creditors. Nevertheless, the Commission thinks that creditor protection is taken care of, because in fact disclosure is made.⁶⁹ If a Member State does not make use of the

maintenance regime, however, in: Ekkenga/Bayer, in: Lutter (ed.), *Legal Capital, ECFR Special Volume 1* (2006), 280 et seqq.

⁶³ See on this issue Schäfer, *Der Konzern* 2007, 407; Westermann, *ZHR* 172 (2008) 144 (148 et seqq.); also Notari, (2010) 7 *ECFR* 63; on the transposition in Germany see Böttcher, *NZG* 2008 481; Hertrich/Reymann, *DNofZ* 2009, 914; Merkner/Decker, *NZG* 2009, 887.

⁶⁴ In these three cases – according to the third Recital of Directive 2006/68/EC (N.32) – there is a sufficiently solid basis for the evaluation of the contributions. The details, however, are less clear, namely what exactly ‘fair value’ is under Art. 10a (2) or whether the evaluation in consolidated (group) accounts is sufficient for the purposes of Art. 10a(3); on all these questions see Schäfer, *Der Konzern* 2007, 407 (409 et seq.); Westermann *ZHR* 172 (2008) 144 (150 et seq.); very critical with respect to Art. 10a(2) and (3): Notari, (2010) 7 *ECFR* 63 (67 et seqq.; para. 2 not only a simplification, but in fact an alternative regime, and para. 3 with a high risk of excessively high evaluation). The UK has not used the option contained in Art. 10a because of fears for legal certainty, see references in: Vella/Prentice (N. 18), 276 (293); Germany used the option only for the exceptions contained in para. 2 and 3 – as an option given to the companies in §33a AktG, –, but not in para. 3 which was judged to be too vague, Böttcher, *NZG* 2008, 481 (482); in this sense also Bayer/Schmidt, *ZGR* 2009, 805 (807). See already SLIM Initiative (above N. 28), proposal 1; and vigorously in this sense High Level Group II, 90; on this Baldamus, *Reform*, 91–104; Drygala, *AG* 2001, 291 (295).

⁶⁵ Exceptional circumstances can occur when the trade is suspended for a longer period or completely halted for the securities concerned or in cases of market manipulation, namely manipulation of stock prices, see *BT-Dr 16/11642*, p. 22; see as well Böttcher, *NZG* 2008, 481

⁶⁶ It is disputed whether this minority right applies only when new fundamental circumstances have occurred or whether the minority may also claim that the conditions needed have not existed from the beginning. In favour of the interpretation named last: Westermann *ZHR* 172 (2008) 144 (153). The German transposition extends the minority rights also to Art. 1a(1) which is permissible (more stringent national law), in this sense also Bayer/Schmidt, *ZGR* 2009, 805 (816).

⁶⁷ The duty to scrutinize remains intact whenever the shareholders have authorised exceptions from the requirement of the expert report under the Third, Sixth and Tenth Company Directives.

⁶⁸ It is, however, argued that both tools of protection serve different needs: the expert report in mergers serves the purpose of shareholder protection; the scrutiny of contributions in kind rather serves the objective of creditor protection. For this reason mainly – correct or incorrect –, the German legislature did not make use of the option, see ‘Drittes Gesetz zur Änderung des Umwandlungsgesetzes’, BGBl. 2011 I, p. 1338; concurring Neye/Jäckel, *AG* 2010, 237 (241); dissenting Bayer/Schmidt, *ZIP* 2010, 953 (956 et seq.); on the Act Neye/Kraft, *NZG* 2011, 681; Freytag/Müller-Etienne, *BB* 2011, 1731; Leitzner, *DNofZ* 2011, 526.

⁶⁹ See the Document for Directive 2006/68/EC COM(2006) 72 final n. 30 and also Carlschne

option, it can at least allow that both examinations and reports may be produced by the same expert (second subpara. of Art. 10(5)).

- b) Protection Against Circumvention
27. Art. 11 deals with (one case of) circumvention and makes the regime of Art. 10 apply to it. This is so when the company acquires an asset from founders which – had it been contributed for shares – would have to be characterised as a contribution in kind, and when in addition the price amounts to at least 10% of the capital subscribed. The wording of the rule does not contain any time limit.⁷⁰ Since the other shareholders have necessarily subscribed beforehand and the transaction is of some importance, besides scrutiny there also has to be consent by resolution of the shareholders' meeting. For this additional requirement, however, a time limit may be set by the national legislator, but must be at least two years from formation or authorisation of the start of business. Three exceptions can be found in Art. 11(2): if the transaction constitutes a current business transaction – difficult to imagine if it exceeds 10% of the capital; if the transaction has been ordered or controlled by an administrative authority or by a court; or if the contribution has been acquired for a stock exchange price because this price has been fixed independently and, moreover, for the public at large.

28. National laws, and in particular German law, address more cases of circumvention. The second subparagraph of Art. 11(1) allows this explicitly for the transactions named (10% threshold and none of the three exceptions) if these have been entered into with shareholders who are not founders as well (§52 AktG). Whether national law may provide for more cases (more stringent national law) is an open question. Two are of particular importance: in the first, the PLC again acquires an asset from a founder or shareholder which would be classified as a contribution in kind if it were contributed in exchange for shares – without, however, reaching the 10% threshold and, conversely, strengthening the link: there has to be agreement that the price for the sale has to be set off against the (still existing) obligation to contribute in cash (§27 para 1 (2) AktG). In the second case, even a link in fact between the additional transaction and the contribution is said to suffice – without such an agreement and without reaching the 10% threshold (so-called 'disguised' contribution in kind (as now

defined in §27(3) AktG).⁷¹ The ECJ has rejected a preliminary reference asking whether this German case law was compatible with the Directive because the question was not relevant to the resolution of the case in point.⁷² What speaks in favour of allowing national law to combat even such additional instances of circumvention is the general principle named above (§5 para. 11 et seq.): it appears to be rather far-fetched to believe that the case law in question would deter the formation of companies in Germany; and creditors and other shareholders are protected more intensively. This is an argument derived from EU Treaty law which therefore has supremacy over arguments pointing to the wording of the rules contained in the Directive, namely an argument *e contrario* derived from the narrow conditions set out in the provisions or from the second subparagraph of Art. 11(1). Quite the contrary: it is even possible to point to the principle of effect utile and effective sanctions which would potentially make it necessary to interpret the EU law rules such that their objective is carried through most efficiently.⁷³

⁷¹ On this rule which diminishes the gap between German Law and the Capital Directive, but would still seem to be more stringent than EU Law, see Hertrier/Reymann, *DNöZ* 2009, 914 (919; also on the relationship with the rules on post formation acquisitions); see also Bayer/Schmidt, *ZGR* 2009, 805 (831 et seq.); Habersack, *AG* 2009, 557 (559 et seq.), and for the almost identical rule for the private limited company contained in §19 para. 4 GmbHG: BGH *WM* 2010, 1225 (1230). See on the case law before codification the previous edition of this book, and Kübler, 'A Comparative Approach to Capital Maintenance', (2004) 15 *EBLR* 1031; Merkt, 'Creditor Protection and Capital Maintenance from a German Perspective', (2004) 15 *EBLR* 1045; Henze, 'Gesichtspunkte des Kapitalerhaltungsgebots und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', *NZG* 2003, 649. For comparative law surveys see: Einsele, 'Verdeckte Sacheinlage, Grundsatz der Kapitalaufbringung und Kapitalerhaltung', *NJW* 1996, 2681; Hansen, *Die verdeckten Sacheinlagen*; Simon, 'A Comparative Approach to Capital Maintenance', (2004) 15 *EBLR* 1037 (France and Belgium); Gansen, *Harmonisierung*, 172–180 (the UK); Franzmann, *Kapitalaufbringung*, 191–219 (Spain); and Tübke, *Sachauschüttungen im deutschen, französischen und Schweizer Aktien- und Steuerrecht*, (2002). On disguised contributions in kind and the admissibility of this line of cases under EC/EU law see from the extremely rich body of literature (pro) Lutter, 'L'apport en numéraire fictive: une théorie allemande et un problème de droit européen', *Revue des sociétés* 1991, 331; Ebenroth/Kräutler, 'Der Einfluß der 2. gesellschaftsrechtlichen EG-Richtlinie auf die Lehre von der verdeckten Sacheinlage bei der Aktiengesellschaft', *DB* 1990, 2153 (2154–2156); Hansen, *Die verdeckten Sacheinlagen*, 255–293; Lutter/Gehling, 'Verdeckte Sacheinlage – zur Entwicklung der Lehre und zu den europäischen Aspekten', *WM* 1989, 1445 (1456–1460); and (con) Mellicke, "'Verschleierte' Sacheinlage und EWG-Vertrag', *DB* 1990, 1173 (1176–1178); id. (N. 9), 98–103; Mellicke/Recq, 'Plaidoyer pour un droit européen des sociétés: l'apport de créances détenues sur une société en difficulté financière', *RTDE* 1991, 587 (600–606).

⁷² ECJ case C-83/91 *Mellicke* [1992] ECR I-4871; Advocate General Tesauro had opined that the action was inadmissible, *ibid.* 4907 et seq.

⁷³ Therefore, some German authors even see a duty under the Directive to cover other instances of circumvention as well: Habersack, *Europäisches Gesellschaftsrecht*, §6 para 32 (§27 para. 1 2nd sentence AktG); more generally Lutter/Gehling, *WM* 1989, 1445 (1456–1459); also Bayer/

⁷⁰ On transposition problems in Germany see Habersack, *Europäisches Gesellschaftsrecht*, §6 para. 29; and Pentz, 'Die Änderungen des Nachgründungsrechts durch das NaStAG – ein Austausch alter durch neuer Probleme', *NZG* 2001, 346 (350); for transposition problems which continue to exist after the transposition of the Shareholders' Rights Directive, see Hertrier/Reymann, *DNöZ* 2009, 914 (920); in more detail on questions of circumvention (also comparative law aspects), Tefersio/Masferrer/Dall'Ombria, in: *Brunner/Schubert* (eds.), *The*