

not be directly applicable to such cases (this will be explored in greater detail shortly). In any case, the Court takes no account at all of the system of policy considerations contained in the Directive. Was the Directive not about relieving third parties of the risks of the vicissitudes of foreign law? Lacunae (if there are any) can be filled in two ways: via reference to national law or via taking the value judgments contained in the Directive seriously (system-building).⁶⁴ It does seem very far-fetched to argue with a rule which never entered into force, which had not even been proposed when the First Directive was adopted and also when the contract was entered into, and which moreover can easily be interpreted as concerning only the company's internal relations. On the other hand, one can refer to the goal and the system of the First Directive. The ECJ's decision largely destroys what has been achieved in terms of integration.⁶⁵ If the third party cannot have assurance in situations where he did not even know about the conflict of interests or self-dealing, the basic value judgment of the Directive is not respected: namely, exceptions from the principle can be invoked against the third party only when he knew about them or should at least have known (gross negligence), or when looking (solely) into the foreign law would have told him about the exception. Under the Directive, not even registration and publication can be invoked against third parties who did not consult them. If this is the system of the Directive, a fact which the third party did not know and which flows from the rich vicissitudes of life can even less be invoked against him. Even the case where the third party knew at least that there was a conflict of interest or self-dealing is probably to be decided the other way. There is a huge difference between conflicts of interest and actual violation of the interests of the company: unlike cases of structural change, cases of conflict of interests do not necessarily and systematically lead to a loss of competence of the board under the different national laws. Quite the contrary: only a few laws decide in this way. The ECJ opens up a lot of potential exceptions – completely unforeseeable – in foreign law. This leads to the argument of exact interpretation. In order to avoid inflation of exceptions, the Directive accepts only clearly defined ones, i.e. in situations where the board or the member of the board *cannot* have power of representation under national law, not merely that he does not have it in the particular case. Conversely, both self-dealing (for instance in Germany §181 BGB) and even Art. 10 of the Proposal for a Fifth Directive are cases where the board or the member of the board *can* very well have power of representation under virtually all national laws; authorisation is always possible in these cases.

⁶⁴ Extensively on these guidelines, which, even in the case of an international convention, would speak in favour of closing the lacunae exclusively on the basis of the system of the (supranational) legal measure applied: Schmid, AG 1998, 127 (129–131).

⁶⁵ The harsh consequences are vividly described by Mellicke, DB 1999, 785 (787) (it would not only be necessary to see for each transaction whether a member of the board is subject to a conflict of interests (each individual member separately) but also to obtain a legal opinion on

§9. DISCLOSURE, MAINLY AT THE TIME OF FORMATION (FIRST AND SECOND DIRECTIVES)

*Bibliography: Grohmann, *Das Informationsmodell im Europäischen Gesellschaftsrecht*, (Berlin, de Gruyter, 2006); Grundmann, 'Information und ihre Grenzen im Europäischen und neuen englischen Gesellschaftsrecht', *Festschrift für Lutter 2000*, 61; id., 'Ausbau des Informationsmodells im Europäischen Gesellschaftsrecht', *DStR 2004*, 232; Karsten, 'Das EHUG – ein weiterer Schritt auf dem Weg zu einem modernen Unternehmensrecht in Deutschland', *GewArch 2007*, 55; Kort, 'Paradigmenwechsel im deutschen Registerrecht: Das elektronische Handels- und Unternehmensregister – eine Zwischenbilanz', *AG 2007*, 801; Leuering/Nießen, 'Die Pflicht zur Offenlegung von Unternehmensdaten bekommt Krallen', *NJW-Spezial 2006*, 411; Liebscher/Scharff, 'Das Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister', *NJW 2006*, 3745; Merkt, *Unternehmenspublizität – Offenlegung von Unternehmensdaten als Korrelat der Marktteilnahme*, (Tübingen, Mohr-Siebert, 2001); id., 'European Company Law Reform: Struggling for a More Liberal Approach', (2004) 1 *ECFR* 3; Meyding/Bödeker, 'Gesetzentwurf über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG-E) – Willkommen im Online-Zeitalter', *BB 2006*, 1009; Paefgen, 'Handelsregisterpublizität und Verkehrsschutz im Lichte des EHUG', *ZIP 2008*, 1653; Sander, *Moderne Kommunikationsformen im deutschen und europäischen Gesellschaftsrecht*, (Frankfurt am Main [et al.], Lang, 2003); Schlöter, 'Das EHUG ist in Kraft getreten: Das Recht der Unternehmenspublizität hat eine neue Grundlage', *BB 2007*, 1; id., 'Ein Jahr EHUG – die ersten Praxiserfahrungen', *BB 2008*, 118; Schmidt-Kessel, 'Das Gemeinschaftsrecht des Handelsregisters', *GPR 2006*, 6; Schön, 'Das Bild des Gesellschafters im Europäischen Gesellschaftsrecht', *RabelsZ 64* (2000) 1; id., 'Corporate Disclosure in a Competitive Environment – The Quest for a European Framework on Mandatory Disclosure', (2006) 6 *JCLS* 259; Schröder, *Unternehmenspublizität und Kapitalmärkte – eine rechtsvergleichende Untersuchung unter besonderer Berücksichtigung der ökonomischen Analyse des Rechts*, (Baden-Baden, Nomos, 2002); Seibert/Decker, 'Das Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG) – Der "Big Bang" im Recht der Unternehmenspublizität', *DB 2006*, 2446; Spindler, 'Abschied vom Papier? Das Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister', *WM 2006*, 109; see also bibliographies on the First and Second Directives in §§8 and 11.

1. The First Directive forms the first cornerstone of an information model in European company law – a model which stands out among the others in this area of law.

I. DISCLOSURE – IMPORTANCE AND SUBJECT MATTER (INFORMATION MODEL)

1. *Information Rules – Concept and Characteristics*
2. Information rules primarily contain a duty to transfer information to others. This can be prescribed via individual communication, for instance within

for instance via publication (a register or the media) or other forms of distribution. The second form is more important in European company law, the addressees being mainly the existing shareholders (in the case of structural changes) or indeed almost everybody (in the case of publication).¹ Information alone is not sufficient for an information model; what is needed in addition is the **possibility to react**, and this is not always easy to define in company law and has always to be discussed in the following. Information in turn presupposes both access to it and the capacity to understand it (see below §9 para. 12–18).

3. Information rules not only provide for duties to transfer information – these are in fact the primary duties – but also cover secondary duties, those applying when the primary duties are violated. These additional information rules can state that information given is binding, or that **information withheld or defective information is a ground for liability**. The second type of sanctions (secondary duties) are more important in European company law.² They can partly be found in secondary law, in fairly detailed form, and partly in EU Treaty law, albeit only as rather broadly defined framework concepts.³

*4. Information rules in European company law are always mandatory. They are, however, different from other mandatory rules, which prescribe a substantive solution. Unlike the latter, information rules, although mandatory in legal construction, leave the parties leeway as regards substantive design. They therefore allow different designs for different preferences and also experimentation with different solutions – all representing key advantages in a market economy based on private initiative.⁴

2. Importance in European Company Law

a) Supremacy of Information Rules in EU Treaty Law

5. The First Directive is also known as the Disclosure Directive. In European company law, indeed – perhaps unlike national corporate law – information

rules dominate.⁵ The starting point is EU Treaty law. According to this, national law (and probably also the EU legislature) may not provide for mandatory substantive solutions (or at least not impose them on foreign suppliers) **whenever protection is also possible via disclosure**.⁶ Whenever an informed decision by the party or parties concerned is possible (disclosure and capacity to understand), mandatory substantive solutions may not be imposed.

b) Dominant Position of Information Rules in EU Secondary Law

6. The EU legislature follows this guideline. This is evident with respect to the duty to disclose the material information on the company in the companies register, the **centrepiece of the First Directive**. Often, however, rules which do not seem to impose a duty to disclose directly actually can cure information problems – especially in cross-border commerce. For example, Art. 9 of the First Directive states that the information given is binding (above §8 para. 21 et seq.). And Art. 10 of the Directive can also be conceived as facilitating information in the sense that the power of representation is unrestricted only in principle, as a default rule, and agreement and some designs are always possible: the main idea is that the player who can best provide information in an easily understandable way (the company), is forced to do so if it wants to avoid adverse consequences (unrestricted power). Likewise, the whole set of rules on the raising and maintenance of subscribed capital in the **Second Directive** can be conceived in the same way,⁷ and this is one – perhaps even the true – centrepiece of the Directive. The content of subscription is to be standardised and thus becomes more easily comparable and visible.

7. European company law is most intensively harmonised in **accounting law** – the Fourth, Seventh and Eighth Directives (§§15–17) – and in **capital market law**, here with the directives on disclosure in primary markets (§§20 et seq.) and with the Insider Dealing Directive (today the Market Abuse Directive) and the Investment Services, then Markets in Financial Instruments Directive (MiFID) as the core measures on secondary markets (§§22 et seq.). In accounting and capital market law, in particular that relating to primary markets, the dominant

⁵ Cheffins, 'European Community Company and Securities Law: A Canadian Perspective', (1991) 36 *McGill L.J.* 1269 (1301); Grohmann, *Informationsmodell*; Grundmann, *Festschrift für Lutter 2000*, 61; with respect to corporate governance in general Sørensen, 'Disclosure in EU Corporate Governance – A Remedy in Need of Adjustment?', (2009) 10 *EBOR* 255 (256 et passim); with respect to various issues in current and still projected European rule-making: Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron', (2003) 3 *JCLS* 221 (225); on the model in company law see monograph by Merkt, *Unternehmenspublizität*; and in contract law see Grundmann/Kerber/Weatherill (preceding N.).

⁶ For the EC case law which goes in this direction and which is based on the third and fourth paragraph of Art. 5 TEU, see references above in §7 N. 77 et seq.

⁷ On all these measures see in more detail Grundmann, *Informationsmodell* 254–260.

¹ The ECJ gives access to everybody if information is to be disclosed in the companies register, see below §9 para. 30 et seq., 39.

² In contract law, the simplest sanction is that of rendering information given binding as part of the contract: for the large range of rules which do exactly this see Grundmann, in: Bianca/Grohmann, *EU Sales Directive – Commentary*, (2002), Introduction para. 7; Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts*, (2003), 478–534.

³ For examples in secondary law, see below §17 para. 8, §20 para. 45, §28 para. 26; for the broad principles in EU Treaty law, see below §9 para. 56.

⁴ See, for instance: Grundmann/Kerber, 'European System of Contract Laws – a Map for Combining the Advantages of Centralised and Decentralised Rule-making', in: Grundmann/Stuyck (eds.), *An Academic Green Paper on European Contract Law*, (2002), 295 (296–306); Grundmann/Kerber, 'An optional European Contract Law Code – Advantages and Disadvantages', (2005) 21 *European Journal of Law and Economics* 215, see also Gomez, 'The Harmonisation of Contract Law through European Rules – a Law and Economics Perspective',

position of information rules is obvious,⁸ but it is also the case in secondary markets, i.e. where trade in securities is regulated (below §22 para. 2, 7–12).

8. The First, Second, Fourth, Seventh, Eighth and Eleventh Directives and those on capital market law deal (primarily) with third party relationships, i.e. relationships with creditors or investors when taking investment decisions. Alongside these harmonisation acts, there are only a few which primarily deal with the (internal) structure of the company: these are, besides the Statutes for the supranational types of company and the Twelfth Directive on single-member companies (§§10, 33 et seq.) the **Third and Sixth Directives on (national) mergers and divisions** (§28) and more recently also the Takeover Directive and the Cross-Border Mergers Directive. All four directives deal with structural changes. The following elements have been described as the most important for the Third and Sixth Directives, i.e. those which build the systemic framework:⁹ the board has to draw up a plan and a report on the chances and risks of the deal (procuring information); an independent professional has to examine the report (information intermediary and reliability of information); and the parties concerned themselves, the members, have to have the decision-making power (shareholders' resolution needed, with a qualified majority).¹⁰ It is clear that a similar analysis is possible for the Takeover and the Cross-Border Mergers Directive. Only the Shareholders' Rights Directive really differs in its approach, but even this directive deals quite obviously with informed choice.

9. In summary: there is virtually no legislative measure in European company law which is not primarily about information.

3. Information – Necessity and Economic Theory

a) Necessity

10. Whereas information was not a field of research in its own right in neoclassical economic theory, because it was assumed (in part implicitly) that

⁸ On the core importance of disclosure philosophy in capital market law see, for instance, Creaven, 'Inside outside leave me alone – domestic and EC-motivated reforms in the UK securities industry', 60 *Fordham Law Review* 285, 299 (1992); Farrar/Hannigan, *Company Law*, 11; Grundmann, 'Europäisches Kapitalmarktrecht', ZSR 1996, 103 (114–120); Hopt, 'Vom Aktien- und Börsenrecht zum Kapitalmarktrecht', ZHR 140 (1976) 201 and 141 (1977) 389 (411–416).

⁹ Hommelhoff/Riesenhuber, 'Strukturmaßnahmen, insbesondere Verschmelzung und Spaltung im Europäischen und deutschen Gesellschaftsrecht', in: Grundmann (ed.), *Systembildung*, 259 (272–279); also Barbaso, 'The Harmonisation of Company Law with regard to Mergers and Divisions', (1984) *JBL* 176 (179–182); Lutter, ZGR 2000, 1 (4) ('instruments which are modern and efficient').

¹⁰ A sell-out right, however, is not given in all cases; critical: Hommelhoff/Riesenhuber (last N.),

action taken on markets was typically informed, with information always available and for free, information became a core subject of discussion in institutional economics.¹¹ Information on elements which are material to the quality of the offer or an investment or more generally to the advantages derived from a bargain is the **precondition for rational, profit-maximising decision-making**. Such decision-making has already been described by Adam Smith as the core factor of the market mechanism.¹² Without (sufficient) information, markets cannot fulfil their allocative function and 'decide' on good and poor offers, investments etc. (§9 para. 12–14).

11. Nevertheless, information rules are not without problems because **disclosure of information** also has its disadvantages. Access to information (see below b) is therefore discussed mainly in relation to balancing advantages and disadvantages. It is on this issue that so-called information economics concentrates. It is much less problematic to state that information which should be disclosed has to be understandable for the addressees envisaged (see below c) and, moreover, that, at least in relationships in which information is paid for, the party giving information should also be liable if information is not given or is given incorrectly.¹³ Moreover, importantly for investment decisions and therefore for European company law, the concept of non-gratuitous transfer of information should be conceived rather broadly: information is already paid for if it is given to the public at large, because it is the public (clients and investors) who contributes to the capitalisation and supply of the company.¹⁴

b) Access to Information (Information Economics)

*12. It is undisputed in information economics that the possibility of utilising information to the exclusion of others is a core incentive to create valuable information.

¹¹ Macho-Stadler/Pérez-Castrillo, *An Introduction to the Economics of Information*, (2nd ed. 2001); Göbel, *Neue Institutionenökonomik – Konzeption und betriebswirtschaftliche Anwendungen*, (2002), 133–136; Ogus, *Regulation – Legal Form and Economic Theory* (1994), 122–149; Kitch, 'The Law and Economics of Rights in Valuable Information', 9 *J. Legal Stud.* 683 (1980); see also Voigt, *Institutionenökonomik*, (2nd ed. 2009), 84–86 (principal agent problems as information problems); worth reading: Grohmann, *Informationsmodell*, 23–56. For a good recent survey on advantages and problems of the disclosure model: Sørensen, 'Disclosure in EU Corporate Governance – A Remedy in Need of Adjustment?', (2009) 10 *EBOR* 255.

¹² Smith, *An inquiry into the nature and causes of the wealth of nations*, (1776), especially Book 1.

¹³ Köndgen, 'Zur Theorie der Prospekthaftung', AG 1983, 85, 95 et seq.; Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems', (1995) 62 *U. Chi. L. Rev.* 1047 (1087 et seq.); Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, (4th ed. 2005), 519–531.

¹⁴ For instance Asmann, *Prospekthaftung – als Haftung für die Verletzung kapitalmarktzogener Informationsverkehrspflichten nach deutschem und US-amerikanischem Recht*, (1985),

It is also undisputed that **fully informed markets would not function**.¹⁵ Firms have an incentive to learn of information not yet public via arbitrage in knowledge and to be compensated for their efforts, and arbitrage in knowledge in turn leads to proliferation of the knowledge on the whole market.

13. Conversely, however, **market function is less than optimal**, or markets even break down, **when there is systematically too little information made public**, especially if one side of the market cannot get material information or only at a prohibitively high cost.¹⁶ The reason is that the market will disregard items on which it cannot get information when deciding. It can take into account only criteria it can recognise and therefore, in the extreme case, if quality is not recognisable, it no longer matters and markets can no longer favour good quality, the sole criterion then being the price. Good quality is no longer recognised, does not obtain a surplus and, because it normally incurs additional costs but is not compensated for these costs, disappears (lack of effects in the price, although the costs increase). In the extreme case, this continues, causing any better quality items which still remained in the market disappear, until only lowest quality items remain – which, in the end, potentially nobody is willing to buy. One speaks of **adverse selection** due to lack of information or also of a ‘market for lemons’.

*14. It is therefore unavoidable to make a choice, to look for the most efficient balance between **too much and too little or no disclosure**. There are two competing approaches here. Some authors suggest that markets are best suited to producing the right amount of information themselves. The reasoning is basically the following:¹⁷ clients anticipate that suppliers who have positive information (good developments in the firm) are eager to disclose it, i.e. that silence indicates poor standards or developments. Suppliers have to pay for remaining silent. Moreover, this, the argument goes, is true not only for top

quality, but also for any lesser quality, because when suppliers of top quality have disclosed their information, those supplying second-best quality do not want to treated (in price terms) like the other remaining suppliers, etc. A similar line of argument is advanced by those who in voluntary information-giving see signals to the market.¹⁸ In judging for himself, each supplier can then set off the advantages, for instance in prices, of a disclosure against the disadvantages, for instance that thereby the information is typically made available to competitors as well.

*15. Conversely, **mandatory disclosure** is rigid. Opponents argue that all firms and their information policy are thereby treated according to one sole pattern. Nevertheless, there are also proponents and theoretical arguments for mandatory disclosure. Information mainly serves the need to compare offers. Comparison is facilitated when information is presented in the same way and always contains the same items, through standardisation via mandatory disclosure rules. This is all the more important inasmuch as information would be presented in different ways and to a different extent without such mandatory rules. The risk is increased if markets with different traditions come together. Moreover, the system of information based on voluntary disclosure, in the case of firms and their whole business, would lead to a multitude of information of different kinds. There is a risk that the capacity to process such a non-systematised multitude of information may be limited. Asking firms to focus on the truly material information is a value which can be fostered by mandatory information rules. Moreover, for some information, basically about extraordinary adverse developments, the model named above does not function typically. The large majority of firms which do not face adverse developments would have to deny constantly that any such catastrophe had happened.

*16. When **evaluating mandatory disclosure**, it is advisable to look each time at the case in question, i.e. to **distinguish between different subjects of disclosure in European company law**. Among the subjects which have to be disclosed under the First and Second Directives, only two raise problems, because only in these two cases is it conceivable that disclosure (benefiting competitors as well) may also entail substantive disadvantages:¹⁹ only in these two cases is it sensible to believe that the incentive to create valuable information may be decreased and that beneficial transactions are complicated or even impeded. The first such subject is accounting – for which many authors, mainly in Germany, have always contested a general need for disclosure – and the second is shareholder structure. For both of these the pros and cons of mandatory disclosure will be taken up again in the relevant chapters.²⁰ For the other subjects, mandatory disclosure and its beneficial effects seem to be not very problematic.

¹⁸ Spence, *Market Signalling – Information Transfer in Hiring and Related Screening Processes*, (1974).

¹⁹ The question is whether it is permissible to prescribe disclosure in a mandatory way (as in the First Directive). Positive answer to this question (no restriction, or in any case only a restriction which is justified) in: EGC case T-47/02 *Danzer* [2006] ECR II-1779 (para. 41–46).

¹⁵ Groundbreaking: Grossmann/Stiglitz, ‘On the Impossibility of Informationally Efficient Markets’, 70 *Am.Econ.Rev.* 393 (1980); currently, for instance, Rudolph/Röhr, ‘Grundfragen der Börsenorganisation aus ökonomischer Sicht’, in: Hopf/Rudolph/Baum (eds.), *Börsenreform – eine ökonomische, rechtsvergleichende und rechtspolitische Untersuchung*, (1997), 143 (181 et seq., 204–208); Villiers, ‘Disclosure Obligations in Company Law: Bringing Communication Theory into the Fold’, (2001) 1 *JCLS* 181 (188–191).

¹⁶ Groundbreaking for the following: Akerlof, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’, 84 *Q.J.Econ.* (1970), 488. See since then Emons, ‘Warranties, Moral Hazard, and the Lemons Problem’, 46 *Journal of Economic Theory* 16 (1988); Merkt, *Unternehmenspublizität*, 207–228; Schwartz, ‘Legal implications of imperfect information in consumer markets’, (1995) 151 *JITE* 31 (46); Strassner, *Verbraucherinformationsrecht – rechtliche Grundlagen und rechtsökonomische Aspekte*, (1992), 133–136; Wein, ‘Consumer information problems – causes and consequences’, in: Grundmann/Kerber/Weatherill (N. 4), 80 (especially 89).

¹⁷ Grossmann/Hart, ‘Disclosure Laws and Takeover Bids’, 35 *J. Fin.* 323 (1980); Grossmann, ‘The Informational Role of Warranties and Private Disclosure of Product Quality’, 24 *Journal of Law and Economics* 461 (1981); Milgrom, ‘Good News and Bad News: Representation Theorems and Applications’, 12 *Bell Journal of Economics* 380 (1981); Fleischer, *Informations-*

c) Capability to Act on Information Received

*17. Access is only one precondition; the other is the ability of the addressee to understand and so act on the information received. It is largely unproblematic to introduce rules which favour this goal. The adverse effects of disclosure, for instance the provision of information to competitors as well, are typically incurred even if the information given is difficult to understand and the positive effects, especially the provision of information to the demand side, have not yet necessarily been realised. Understanding is facilitated if the information is always easily at hand, which would speak for keeping it in a register. Moreover, understanding is facilitated when the items have to be disclosed in the briefest possible manner and as concisely as possible. It is therefore helpful to standardise the subjects of disclosure and to attribute standardised meanings to certain statements – for instance, that subscribed capital always has the same meaning (subordination, degree of payment realised, substantive examination in the case of contributions in kind, etc.). There are limits only where, with simplification, material information is curtailed – mainly in the case of complex information such as accounting, and for this reason the so-called short prospectus is disputed as an instrument of information (below §20 para. 10).

*18. Therefore, if possible, understandability is to be facilitated with respect to each individual partner as well. With large investments, higher costs for information, for instance for obtaining advice on complex conditions, can be compensated more easily. With private investment, typically involving smaller amounts, this is less often the case. If there is a duty to give information individually, this difference in expertise and in capacity to pay for additional advice or to invest time has to be taken into account. In European company law (outside structural changes), which generally does not harmonise the internal structure of the company and has changed this only lately with respect to shareholders' voting rights (and in this context also a right to information), the most extensive and the most systematic such right to information is regulated in capital market law, in the Markets in Financial Instruments Directive (MiFID, formerly Investment Services Directive), i.e. for the moment at which the share is bought or sold.²¹

4. Survey of the Disclosure Rules Contained in the First and Second Directives

19. The basic regime on disclosure in European company law is to be found in the First Directive. It deals with the questions of which items have to be disclosed (below II.), where they have to be disclosed and kept available for public scrutiny (below III.) and what effect publication has on transactions undertaken (below IV.). With respect to the first question, i.e. the items to be disclosed, the First Directive is supplemented by the Second and Fourth Directives. The sanctions or penalties, also regulated in the First Directive, are important independently of an individual transaction (below VI.). There are special rules on branches (below

V.). Enhancing the efficiency of the disclosure rules was probably the most important goal of the proposals of the SLIM initiative.²²

II. ITEMS TO BE DISCLOSED (FIRST, SECOND AND ALSO FOURTH DIRECTIVE)

20. The items to be disclosed are regulated in Art. 2 of the First Directive. In accordance with the main goal of the directive, this is primarily information which matters for creditors. This corpus is supplemented by the rules contained in Art. 3 and 4 of the Second Directive, which demand disclosure of (additional) subjects of importance primarily for investors. The reason is that the PLC is potentially open for an investment by a multitude of shareholders. The list of items to be disclosed contained in the First Directive is supplemented also – and even primarily – by the Fourth Directive, which introduced the duty to disclose the accounts (Art. 2 lit. (f) of the First Directive) also for the private limited company. This duty was disputed a great deal and was not included in the First Directive for that very reason (otherwise it could and should have been), but it is only this duty which really gives the information model contained in the First and Second Directives its distinctive feature.

1. Instrument of Constitution and Statutes

a) Art. 2(1)(a-c) of the First Directive

21. The company has to disclose, first, its instrument of constitution (with its statutes), any amendment (as such) and the complete text as amended to date. All persons concerned – members and third parties – must be kept continuously informed on the constitution of the company and have easy access both to what has been changed and to the current complete version.²³

b) Supplementation in the Second Directive

22. The First Directive does not specify the content of the company's statutes: nomination of board members and the statement of accounts are based on resolutions, and subscribed capital does not have to be named in the statutes under all national laws. The content of the statutes is specified only in the Second

²² On this below N. 32 and on several occasions in the following. In favour of an intensification of disclosure philosophy in order to prevent fraud also: 'Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward', COM(2003) 284 final, 26 et seq.

²³ The latter was new for German law, see Lutter, *Europäisches Unternehmensrecht*, 48; Schwarz,

²¹ On this mechanism see more in detail below §22 para. 2, 8–12; on information intermediaries

Directive. However, important prescriptions contained in the Second Directive have their equivalent in the First Directive in other instances, and other prescriptions contained in the Second Directive are really important only for the investor who is not close enough to the company to have all information but who nevertheless carries the residual risk. The individual items which are relevant in this respect will be discussed separately and in a little more detail (see below 3. and 5-7).

2. Composition of the Bodies

a) Art. 2(1)(d) of the First Directive

23. The identity of members of bodies (organs) has to be disclosed at **appointment and termination**. It must be a body prescribed by law (not one established voluntarily) and a body which is authorised to represent or administer the company. Consultative committees are not caught, nor are the auditors, although they are prescribed by law (Art. 51 of the Fourth Directive).²⁴ Moreover, it must be clear from the disclosure **whether the board as a whole or (each) individual member(s) has power of representation**, even if this is already established in the national law itself.²⁵ This question is not harmonised (like most others on power of representation based on membership of an organ) and therefore the third party must be given the easiest possible access to this information. It is of considerable importance to him because of Art. 10(3) (above §8 para. 30).

b) Supplementation in the Second Directive

24. Additionally in the case of a PLC, the **procedure for appointing members** for all management bodies, the number of members and the allocation of powers have to be disclosed, albeit only insofar as they are not already set in the national law itself (Art. 2(d) of the Second Directive). For creditors, this is immaterial information, because the power of representation depends only on which competences the organ *can* have (not on which competences it really has in the individual company) and even if only the board as a whole has the power of representation, the contract is entered into validly if all members registered consented (Art. 2(1)(d) and Art. 3(6) of the First Directive). Conversely, for

investors, the information named in Art. 2(d) is important, as information about the most important data in the internal decision-making structure.

3. Capital

a) Art. 2(1)(e) of the First Directive

*25. Subscribed or authorised capital may have to be named in the statutes or the instrument of constitution; this is decided by national law. If so, subparagraphs (a-c) would also apply. Otherwise, **subscribed capital** has to be disclosed at least once a year if the company has authorised capital.

b) Supplementation in the Second and Fourth Directives

*26. Art. 2(c) of the Second Directive additionally requires that subscribed capital be disclosed in any case, and similarly authorised capital if it exists. As from the first accounts, the same already follows for **subscribed capital from Art. 9 of the Fourth Directive** ('Liabilities' under A. I.) – for all limited liability companies. Therefore, there are differences of regime between the different types of company only with respect to **authorised capital**, which is not yet a guarantee for creditors. But authorised capital is typically of minimal importance for the private limited company anyway.²⁶

4. Accounting (Art. 2(1)(f) of the First Directive and Fourth Directive)

a) The Fourth Directive As Lex Specialis

27. Accounts have to be disclosed, and the amendment of 2003 specifies clearly that they must be disclosed **in their entirety**. In the 2009 consolidated version, this is already taken for granted. Previously, Art. 2(1)(f) had been more restrictive, but the Fourth Directive (§15) had already changed this (Art. 47(1)). Moreover, Art. 47-50 of the Fourth Directive have to be regarded as *leges speciales*. This is important for the (partial) exceptions and privileges granted to small and medium-sized enterprises (publication only of an abridged version or no publication if the accounts are available at the seat of the company and reference to this has been published).

28. The identity of the **auditor(s)**, as prescribed by Art. 51 of the Fourth Directive, has to be disclosed as well. Art. 48 of the Fourth Directive extends this to the audit report, even if negative, and to the **appropriation and distribution of profits** (Art. 50 of the Fourth Directive). The Fourth Directive thus still quite considerably extended the subjects of disclosure with respect to economic results.

²⁴ Edwards, *EC Company Law*, 21 (referring to a passage in this sense in the Council's minutes).

It is, however, captured by Art. 2(1)(f).

²⁵ ECJ case 32/74 *Haaga* [1974] ECR 1201 (1207 para. 6); virtually all authors consenting, for instance Habersack, *Europäisches Gesellschaftsrecht*, §5 para. 12; and (insofar): Houin, *RTDE* 1975, 313 (314) (note); it is well in the spirit of this prescription when the German Supreme

²⁶ Not possible in Germany: see, for instance, Lutter/Hommelhoff, *GmbH-Gesetz* (17th ed. 2009),

29. All this applies to all companies because, after the harmonisation of accounting law for all limited liability companies in the Fourth Directive, the third and fourth sentences of Art. 2 lit (f) of the First Directive (original version) had become obsolete.²⁷ Therefore, the Fourth Directive also led to an **extension of the duty to disclose to all private limited companies.**

b) Importance

30. Disclosure of accounts was the **most disputed item** of all, yet, at least from a British perspective, also the most important. In Germany and France in particular, disclosure of economic results was seen as such delicate information, full of business secrets, that it was likely to damage the company. The United Kingdom had not had this experience, however.²⁸ Moreover, accounts could be kept secret anyway only in the case of very restricted membership. The clear interest of creditors could not be challenged seriously. In *Daihatsu*, the ECJ even held that the circle of addressees was much larger, i.e. all interested parties. Opting for disclosure of accounts was probably the **single-most important step in the direction of a general disclosure philosophy** in European company law.

31. Like the German model in the case of the power of representation, the British disclosure philosophy prevailed in the area of the companies register. Again, the **solution enhancing integration** prevailed. This is remarkable: the United Kingdom was not yet even a Member State, and the two economically most important Member States were hesitant! For Germany, getting used to this development was extremely difficult, as the *Daihatsu* case and the facts surrounding it show.

5. Seat, Legal Form and Objects of the Company (First and Second Directives)

32. A **transfer of seat**, which is important for creditors but not always easy to follow, has to be disclosed by all limited liability companies (Art. 2(1)(g)). Conversely, seat and legal form/type of company have to be named only on business correspondence (Art. 5 of the First Directive). Anybody who becomes a creditor receives business correspondence anyway. **In the case of a PLC**, seat, legal form/type and trade name have to be specified anyway in the statutes, the

²⁷ Explicitly ECJ case C-97/96 *Daihatsu* [1997] ECR I-6843 (6863 et seq.); 'almost incomprehensible' that Germany still invoked sentences 3 and 4 (in the original version of the First Directive); Schulze-Osterloh, ZIP 1997, 2155 (2157) (case note). In the consolidated version of 2009, sentences 3 and 4 have been deleted accordingly.

²⁸ On this dispute and on the fact that this item of disclosure was the only truly new one in many Member States see: Ault, 20 *Hastings Law Journal* 77, 92-99 (1968); Edwards, *EC Company Law*, 19, 22 et seq.; van Ommeslaghe, *CDE* 1969, 495 (especially 556-561); Stein, *European Company Laws*, 252-254 (all with extensive bibliographies); in Germany reservations can still be found today, for instance in Schön, *JZ* 1998, 194 (195) (case note); different Leib, *ZHR* 162 (1998) 594 (618); on the weighing of interests in this respect, now

instrument of incorporation or a separate document (Art. 2(a) and 3(a) of the Second Directive). The reason is that investors can also invest in the company without entering into contact with it. Seat and legal form/type are important parameters for their decision.

33. Knowing the **objects of the company** is in principle immaterial for creditors (see Art. 10(1) of the First Directive). Therefore, EU law does not prescribe disclosure for all limited liability companies. National law can certainly do so, in which case potential restriction of the power of representation materialises more easily (above §8 para. 29). EU law, however, prescribes such disclosure **only for the PLC** (Art. 2(b) of the Second Directive), again because it is certainly important for investors.

6. Winding Up, Nullity and Termination of Liquidation (Art. 2(l)(h-k) of the First Directive)

*34. Winding up, nullity and liquidation are important developments for creditors (and investors) and not always visible. They have to be disclosed in **all limited liability companies** (Art. 2(l)(h-k) of the First Directive). No supplementation for the PLC was necessary.

7. Shares and Founders (Art. 3(b-h) and (i-k) of the Second Directive)

*35. It is a central concern of European company law to render ownership structure transparent, although a legal measure on this, the Major Shareholdings Directive (now consolidated in the 2004 Transparency Directive), was adopted only in 1988, twelve years after the adoption of the Second Directive. The detailed rules on characteristics of shares, and on the status of contributions paid (subparagraphs (b-g)) are aimed at protecting interests other shareholders can have. These items are relevant, partly because of economic considerations or to make sure that equal treatment is granted and partly to know about the distribution of voting rights and the chances of change in the structure of shareholdings or also about questions of pre-emption rights. The disclosure of situations where **conflicts of interest in the formation phase** are likely to have existed (subparagraphs (i-k)), is important because shareholders of a PLC are often not so involved in these matters as shareholders of a private limited company are. Disclosure of **contributions in kind** (subparagraph (h)) is justified by both considerations.

III. MEANS OF DISCLOSURE (FIRST DIRECTIVE)

1. Source of Information: The Register (Art. 3(1-3))

36. The **basic source of information** is the companies register. Any item can be registered in full or be put into a file, again in full. Art 3(3) leaves the choice to

national laws (for the costs which may be charged for registration see below §24 para. 9). Two requirements are, however, set by EU law: all documents have to be available in full from the register or its annexes and the register has to contain one individual file or sheet for each company separately (Art. 3(1)), which then has to lead, possibly via reference, to the **documentation in full**. Since 2007, the register (also) has to be kept in electronic form, Member States are then entitled to – also – require electronic filing, but have to allow it in any case (Art. 3(3) amended version, second and third subpara.). The text of the directive would seem to indicate that Member States can also prescribe paper bound *and* electronic filing of the information owed.²⁹ It is in any case in electronic form that the Member States then have to make this information available, also if it has been handed in only in paper bound form (Art. 3(3), third subpara. of the First Directive in the consolidated version of 2009), and this already because of the dimension ‘European Companies’ Register’ (next para.). So far, however, there has not been the majority needed for adopting the proposal to transform the register on the national level into a purely electronic one (as in Austria) (amendment of Art. 3(5)).³⁰ In many Member States like Germany, already the introduction of an electronic register in addition to a paper bound register was perceived as rather revolutionary.³¹

37. Any third party can expect this type of procedure anywhere in the Community. Since 1 January 2007, access is still facilitated in that the content of each national register can **additionally be filed in a (second) electronic European register which can be consulted from all Member States** (which, moreover, also allow for a filing in additional, non-mandatory languages).³² As the combination

of registers and thus the cumulative use of them suffers in practice from the fact that transmission is voluntary and that the national registers are structured in different ways, have different contents and also different language versions, the EU Commission has now launched a **consultation process on the ‘interconnection of companies’ registers**. Most answers favoured an interstate convention which would require mandatory transmission, standardisation of contents and a much deeper interconnection of the national registers – probably on the basis of the much advanced project BRUTE (Business Register Interoperability).³³

2. *Means of Communication: Extract from the Register, Publication, Indication on Business Correspondence*

a) Extract from the Register (Art. 3(4))

38. The contents of the register can be made available to the public by various means. Art. 3(4) names first the **extract** – complete or in part, authenticated or not, as the applicant wishes. Normally it will be a photocopy or a printout from an electronic file; since 2007 it must also be possible to choose the **electronic version** (Art. 3(4) amended version, second subpara.).

39. Art. 3(4) tries to ensure the efficiency of this means in that it allows **duties only insofar as they cover costs**. What has not been regulated is whether the applicant has to claim a **justified interest** or even to show probable cause or fully prove it. The ECJ’s decision in *Daihatsu* and its reasoning³⁴ show that any third

European Company Law: The ‘Simpler Legislation for the Internal Market’ (SLIM) Initiative of the EU Commission, (Working Paper 2000–09), both available at the Financial Law Institute Ghent’s website (<http://www.lawugent.be/fli/wps/archive.php>); id., ‘Company Law in the Twenty-First Century’, 1 *ICCLJ* (2000), 331 (332–335); on the electronic register see, for instance, Lutter, *ZGR* 2000, 1 (10); Noack, ‘Modern communications methods and company law’, (1998) 9 *EBLR* 100; in more detail Sander, *Moderne Kommunikationsformen*. The idea of a centralised register had also been discussed when the Directive was first drafted but was then judged to be problematic: van Ommeslaghe, *CDE* 1969, 495 (544).

See Green paper on the interconnection of business registers, COM(2009) 614 final of 4. November 2009; Synthesis of the comments to the Green paper of the European Commission on the interconnection of business registers April 2010, p. 4, available at: http://ec.europa.eu/internal_market/company/docs/business_registers/2010_consultation_final_report_en.pdf; literature on the whole process: Clausnitzer, ‘Konsultation zum Grünbuch über die Verknüpfung von Unternehmensregistern’, *EuZW* 2010, 364; Fischer zu Cramburg, ‘EU-Kommission forciert die Vernetzung der elektronischen Unternehmensregister’, *NZG* 2009, 1425; id., ‘Ein elektronisches Unternehmensregister für Europa’, *Finanzplatz* 2010, 28; Philipp, ‘Verknüpfung von Unternehmensregistern’, *EuZW* 2010, 803. Criticism was mainly directed at the voluntary basis on which the system rests so far, but which leads to a situation in which only 18 Member States participate.

ECJ case C–97/96 *Daihatsu* [1997] ECR I–6843 (especially 6864 et seq. para. 20 et seq.). See

²⁹ Seeing these rather as mere alternatives: Habersack, *Europäisches Gesellschaftsrecht*, §5, para. 10.

³⁰ Art. 1 of the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 68/151/EEC and 89/666/EEC as regards publication and translation obligations of certain types of companies COM(2008) 194 final of 17 April 2008.

³¹ Kort, *AG* 2007, 801 (on the transposing law ‘EHUG’); on the Law (or the proposal for it) see as well Karsten, *GewArch* 2007, 55; Liebscher/Scharff, *NJW* 2006, 3745; Meyding/Bödeker, *BB* 2006, 1009 (‘welcome to the online-age’); Paefgen, *ZIP* 2008, 1653; Schlotter, *BB* 2007, 1; id., *BB* 2008, 118; Seibert/Decker, *DB* 2006, 2446; Spindler, *WM* 2006, 109; and already as well Sander, *Moderne Kommunikationsformen*.

³² Art. 3, 3a as amended by Directive 2003/58/EC, Art. 3 and 4 of the consolidated version of 2009; on the basis of: *Simpler Legislation for the Internal Market (SLIM) Initiative*, EC Doc. SEC(98) 1944 final, COM(2000) 56 final; No 1 et seq. of the ‘Recommendations by the Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives’ submitted to the EC Commission, (10/1999); on this change see, for instance, Drygala, ‘Die Vorschläge der SLIM-Arbeitsgruppe zur Vereinfachung des Europäischen Gesellschaftsrechts’, *AG* 2001, 291 (292); Neye, ‘Die Vereinfachung des Europäischen Gesellschaftsrechts: Irrungen und Wirrungen – ein Bericht’, *Festschrift für Hopt* (2010), 1079; see for SLIM also Kallmeyer, ‘SLIM – Schlankeitskur für das EU-Gesellschaftsrecht’, *AG*

party can apply, not just third parties who already have a legal relationship with the company. Since there are no conditions for application listed in the wording of the Directive, national law cannot formulate any such additional requirements –³⁵ this is also in line with the spirit of the said decision, and legislative history likewise points in this direction. By opting for disclosure of accounts, the EU legislature also settled the question whether the company was to be subjected to full disclosure only in already legally binding third party relationships, or whether it was to be seen as a player acting in public life and that therefore basic data should be public as well.

b) Publication (Art. 3(5))

40. Art. 3(5) names publication of the content of the register as a second means of communication. This means, again, is **not on the same footing as the register itself**.³⁶ Art. 3(6 and 7) may perhaps suggest that publication is ranked higher than, for instance, an extract from the register (Art. 3(4)) and indication on business correspondence (Art. 5). This, however, is not really the case. Already with respect to Art. 3(6 and 7), the other two means of communication typically have the same effects (see, for instance, below §9 para. 49 and 52). What is more important, the Directive does not prescribe that publication as a means of communication has to contain the document in full. It only has to indicate that registration has taken place. Whether there is a more extended duty of publication is decided by the national legislatures³⁷ (whereas, for instance, the extract has to be complete already under EU law). Furthermore, publication cannot guarantee that the information is available constantly or in an easily accessible manner. However, complete information on the subjects which have to be disclosed and ongoing availability are the two pillars of disclosure, i.e. of disclosure in the register. These goals are then furthered by various additional rules on availability which are all aimed at facilitating access to the register.

41. Therefore, the duty of publication is aimed at quickly rendering public ('conveying it to third parties') the information that a change which must be disclosed has occurred (nothing more). In parallel, the right to apply for extracts from the register (Art. 3(4)) serves the goal to always have full access to the content of the register, including later, and the duty under Art. 5 serves the goal

that third parties, when entering into business contact with the company, i.e. at a time when this information really matters, can find the source of information quickly. The introduction of a European electronic register still diminishes the importance of publication (see Art. 3(5) second subpara. of the amended version), whereas the same is not true at least for indication on business correspondence.

42. Publication has to take place in a national gazette appointed for that purpose by national law; it does not need to be edited by a state body. In order to fulfil its informative function, however, it must be the same for all companies and remain the same. Member States, under the amended version of Art. 3(5), can also opt for an electronic system, which in that case has to be in chronological order. The proposal to rest the whole system exclusively on an electronic basis has – as has been mentioned – not yet received sufficient consent (see §9 para. 36)

c) Indication on Business Correspondence (Art. 5)

43. Art. 5 names a third means of communication. In any business correspondence, certain indications have to be given. Two questions were disputed: the first was for which types of document the duty should be introduced. The EU legislature opted to restrict the range of documents concerned and did not state the duty for every kind of communication for business purposes emanating from the company.³⁸ Such a broad duty would have been rather burdensome, and problems would even have increased in the age of electronic communication. The legislature opted instead for two (today three) specific types of communication, one of which, in the due course of negotiations, any creditor should receive before concluding the contract. This was really the goal to reach! Therefore, the duty applies only to business letters, order forms and company websites – not invoices, for instance.³⁹

44. The second question was that of the subjects to be disclosed. Unlike in extracts and publication, these are rather limited. What has to be disclosed is the key to more information, i.e. the register (and number), and the seat, which is important for material contact. In addition, the type of company and, where applicable, the fact that the company is in liquidation, have to be disclosed: these are the two categories according to which national laws differentiate with respect to the power of representation and/or protection and amount of capital stock needed. The limits on the power of representation set by national law itself have

³⁵ In this sense apparently also Guyon, *Revue des Sociétés* 1998, 68 (69 et seq.) (note); Lutter, in: Grundmann, *Systembildung*, 121 (124); opposite Schwarz, *Europäisches Gesellschaftsrecht*, para. 317.

³⁶ Opposite view in Lutter, *EuR* 1969, 1 (4); this is the mainstream view now in German literature, for instance Habersack, *Europäisches Gesellschaftsrecht*, §5 para. 10 et seq.

³⁷ In this sense also van Ommeslaghe, 'La Première Directive du Conseil du 9 mars 1968 en matière des sociétés', *CDE* 1969, 495 (548); Schwarz, *Europäisches Gesellschaftsrecht*, para.

³⁸ In this sense also the initial Proposal, see Edwards, *EC Company Law*, 24; critical Einmahl, *AG* 1969, 131 (134); and (with a comparative law survey) Fischer-Zernin, *Rechtsangewandte*, 73 et seq.

³⁹ The passage in the first Proposal which included this type of document was deliberately

to be respected by the contracting partner (above §8 para. 25 et seq.); and capital is seen as a core factor of creditor protection. It is at this point that dispute about the subjects to be disclosed starts. There were often calls also to require indication of the minimum capital and/or the capital subscribed on business correspondence (not just the type of company).⁴⁰ The EU legislature opted for a compromise, prescribing that the company, whenever it chose to indicate any figure on capital at all, had to observe completeness and indicate both the capital subscribed and capital paid up.

IV. EFFECTS OF DISCLOSURE (FIRST DIRECTIVE)

45. Art. 3(6) and (7) of the First Directive regulates the effects which publication has on legal relations and transactions.⁴¹ This regulation is not about protection of what has been disclosed, such as the trade name⁴² or even business secrets. The regime rests on **three pillars**: the third party can always invoke the real legal situation (Art. 3(7) third subpara.); the company can invoke a legal change in respect of which there is a duty to register only after having both registered it and (in addition) having 'conveyed' this fact to the third party (publication, plus fifteen days for collecting the information, Art. 3(6); and, least clear, errors in the course of registration and publication are imputed to the company because it, if anybody, controls this procedure.

1. Negative Effects Before Publication (Art. 3(6) and (7))

a) Third Parties Can Invoke Legal Changes

46. The third party can always invoke the real legal situation even if the change should have been registered but has not been registered or published (Art. 3(7) third subpara.).⁴³ This is true, however, only if the relevant change actually occurred at all, i.e. is valid. This is not the case whenever registration (and potentially even publication) is constitutive.⁴⁴ Therefore, **for third parties**,

failure to register does not produce negative effects, unless it even prevents the change from being valid.

b) Party Responsible for Registration Cannot Invoke Legal Changes

47. Conversely, the company can invoke the real legal situation only when either the third party had knowledge of it or the formalities have been complied with (Art. 3(6)). Therefore, **failure to register does produce negative effects**. In this respect, compliance with the formalities is equivalent to knowledge on the part of the third party (which is why one speaks of 'constructive knowledge'). This does not fully apply in a first phase of fifteen days which the third party is given to collect the information. Within this phase, the third party can prove that it was impossible for him to have the information. The basis for 'constructive knowledge', i.e. for equating this situation to knowledge, is that knowledge has been passed on via the procedure uniformly established for the purpose.

48. To reach this result, the EU legislature **requires publication**; the fact has to be 'brought' to the public's attention. It is only this which is a sufficient basis for a possibility to have knowledge. Third parties who have business contacts with the company (and many others) have to consult the official gazette constantly to be sure that changes cannot remain unknown to them yet nevertheless be invoked against them. Whether the third party took notice of the publication is of course immaterial.

49. The **other means of communication** typically again have the effect that changes can be invoked against the third party. This is so when the third party consults the register (knowledge). The same must be assumed if he receives an extract from the register and in the case of the few indications on business correspondence as well – at least if the changes are highlighted. This does not place too much of a burden on third parties who do in fact consult publications. The advantage of publication is mainly that it catches all third parties and avoids problems of proof.

2. Positive Effects of Publication (Art. 3(7) first and second subpara.)

a) Additional Content of Art. 3(7) first and second subpara.

50. Art. 3(7) first and second subpara. states, first, that Member States have to avoid discrepancies between registration and publication if at all possible and that they have to introduce **procedures** for this purpose (otherwise there is

of validity, but not so in the Benelux countries); Schwarz, *Europäisches Gesellschaftsrecht*,

⁴⁰ In this sense also the first Proposal; the wording later adopted was proposed by the European Parliament: Edwards, *EC Company Law*, 24; Einmahl, AG 1969, 131 (134).

⁴¹ For the 'effects' (sanctions) which the duty to disclose has to have in other situations see below §9 para. 54–57.

⁴² On this see Fezer, 'Liberalisierung und Europäisierung des Firmenrechts – vom handelsrechtlichen Firmenregisterschutz zum kennzeichenrechtlichen Immaterialgüterschutz', *ZHR* 161 (1997) 52; van Ommeslaghe, *CDE* 1969, 495 (550 et seq.).

⁴³ The term 'formalities' encompasses both registration and publication; Art. 3(7) third subpara. also applies where formalities have not been complied with at all.

⁴⁴ This is what Art. 3(7) third subpara. (at the end) refers to: See Edwards, *EC Company Law*, 28

potentially state liability). Moreover, the rule provides that, if there are discrepancies nevertheless, the registration can be invoked against the third party only in the event of knowledge. This, indeed, already flows from Art. 3(6).

b) Positive Effects of Publication

51. More difficult is the remaining content, dealing with the positive effects of publication. In cases of discrepancy between publication and registration, the third party can invoke the version published unless he knew it was not correct, and the company has to prove the latter. Although the wording suggests the opposite, it must suffice that the third party knew that the published version was incorrect even if he did not know the correct legal position in the register and file.

52. Several situations are disputed: the Directive protects the third party explicitly only if publication and registration diverge. The same has, however, to apply a fortiori if both are incorrect.⁴⁵ There can be doubts about whether protection (already at the EU level) is also provided if only the register is incorrect.⁴⁶ Still more disputed is the question whether the company must at least have caused the erroneous publication, because it did the filing, albeit correctly.⁴⁷ In the Directive, there is no basis for such an interpretation.⁴⁸ The objective of the Directive is to protect third parties – national law can provide for state liability in favour of the company – and typically the company is better equipped to take recourse against the body competent or to supervise publication or take notice of events. Furthermore, it is not clear whether an incorrect extract (if at all possible) can likewise be the basis of third party protection, and likewise for indications on business correspondence. In the latter case, this seems justified since the company's responsibility (for supervision) is more direct (argumentum a maiore); in the former case, state liability would seem to be the only help for the third party.

⁴⁵ Einmahl, AG 1969, 131 (137 et seq.); see also Lutter, EuR 1969, 1 (13–15); opposing, Habersack, *Europäisches Gesellschaftsrecht*, §5 para. 18; Schwarz, *Europäisches Gesellschaftsrecht*, para. 321.

⁴⁶ Pro: Einmahl, AG 1969, 131 (137); Lutter, EuR 1969, 1 (13–15); van Ommeslaghe, CDE 1969, 495 (551); contra: Ankele, *GmbHR* 1969, 52 (54); Fischer-Zernin, *Rechtsangleichungserfolg*, 84 et seq.; Schwarz, *Europäisches Gesellschaftsrecht*, para. 323.

⁴⁷ In this sense, often German authors (see next N.), because §15 HGB, transposing the Directive, could be understood this way: see Baumbach/Hopt, *Handelsgesetzbuch* (34th ed. 2010), §15 HGB para. 19; Schmidt, *Handelsrecht* (5th ed. 1999), 408 et seq.

⁴⁸ German authors, nevertheless, often read a similar reservation into the Directive: Beuthien, 'Sinn und Grenzen der Rechtsscheinhafnung nach §15 Abs. 3 HGB', *Festschrift für Reinhardt* 1972, 199 (202–204); Habersack, *Europäisches Gesellschaftsrecht*, §5 para. 41; Lutter, EuR 1969, 1 (13–16); Schwarz, *Europäisches Gesellschaftsrecht*, para. 321. In other countries, such an

V. DISCLOSURE BY BRANCHES – RENVOI

*53. Disclosure for branches in another Member State is regulated separately, i.e. in the Eleventh Directive. This needs to be discussed separately, together with structural changes in the broad sense (§26).

VI. PERSONS RESPONSIBLE AND SANCTIONS (FIRST DIRECTIVE)

1. *Responsibility For Registration Not Harmonised (Art. 6)*

*54. The question of which persons are responsible for complying with disclosure requirements is explicitly left to national legislatures in Art. 6 of the First Directive – and later in the Fourth Directive also for the accounts and in the General Prospectus, the Takeovers and Transparency Directives for the prospectus, ad hoc disclosure and major shareholdings transparency. This means that EU law does not influence even indirectly the non-harmonised question of competences.

2. *Sanctions Partly Harmonised (Art. 7)*

*55. Failure to disclose is, however, imputed to the company in the third party relationship. In legal relations and transactions, the sanction is automatic: the effects are almost those of a change which had not taken place at all (see above §9 para. 47–49).

56. In addition, there are guidelines which national law has to respect when regulating sanctions. Art. 7 stresses, for two kinds of violations – failure to publish accounts (§9 para. 27–29) and failure to make the required indications on business correspondence (§9 para. 43 et seq.) – that the sanctions or penalties have to be 'appropriate'. Today this rule is no longer necessary. The ECJ states, on the basis of Art. 10 EC (today Art. 4 para. 3 TEU), that sanctions in national law always have to be 'effective, proportionate and dissuasive' (efficiency requirement) and not more lenient than sanctions imposed for the violation of similar national rules which the legislature concerned has introduced autonomously (prohibition of discrimination).⁴⁹ The EU legislature cannot, in secondary law, cut back on these guidelines based on EU Treaty law⁵⁰ and therefore, for violation of rules not named in Art. 7 an argument e contrario based on this provision is excluded.

⁴⁹ References in §5 N. 39; for company law in particular: ECJ case C-387/02 and C-403/02 *Bertusconi*, [2005] ECR I-3565 (para. 58, 64 et seq.); case C-23/03, C-52/03, C-133/03 and C-473/03 *Mulliez*, [2006] ECR I-3923 (para. 27–41).

57. For the disclosure rules contained in the First and Second Directives in particular, the ECJ specified these guidelines in its decision in *Daihatsu*.⁵¹ It had to test point 6 in the first sentence of Paragraph 335 of the German Commercial Code (old version) in conjunction with the second sentence of that paragraph, which provided for fines, but only if a member or creditor made an application. In practice, companies complied with the duty to disclose in only one tenth of cases.⁵² The ECJ held that neither the legal basis contained in Art. 44, today Art. 50 (2)(g) EC/TFEU (interpretation in conformity with EU Treaty law) nor the First Directive were to be understood in the sense that the rules on disclosure were aimed at protecting only third parties who already had a legal relationship with the company. In any case, the rule on sanctions was held to be inefficient if **application by a member or a creditor was necessary**.⁵³ This means that, whilst regulation of sanctions still remains within the competence of national law, EU law at least sets strict boundaries. National law must provide at least that all third parties can apply or that fines can be imposed ex officio. It cannot even be excluded that both possibilities must be introduced – this depends on the effects of introducing only one or the other. The ECJ implicitly also decided that granting only the right to enforce disclosure is not sufficient, even if the circle of potential applicants is enlarged to the greatest extent; there have to be elements of penalty in cases of violation.⁵⁴ Nor did the ECJ decide on the **amount of the fine**. Some German authors think that a fine of 5,000 Euro is not sufficient.⁵⁵ In this respect, it is certainly important whether a fine can be imposed on repeated occasions.⁵⁶ The body competent for registration is certainly obliged to make use of its discretion in conformity with the Directive.⁵⁷ A practice which leads to a

⁵¹ ECJ case C-97/96 *Daihatsu* [1997] ECR I-6843 (6863–6866); there were parallel proceedings for violation of the Treaty (with parallel result): ECJ case C-191/95 *Commission v. Germany* [1998] ECR I-5449; see *Leible*, ZHR 162 (1998) 594 (with further references for the many law review articles on these proceedings).

⁵² Habersack, *Europäisches Gesellschaftsrecht*, §5 para. 15; Streck, 'Die Praxis der Registergerichte angesichts der Publizitätsverweigerung kleiner GmbH', *GmbHRR* 1991, 407 (especially 407).

⁵³ This had been decided already by: ECJ case 32/74 *Haaga* [1974] ECR 1201 (1207); case 136/87 *Ubink Isolatie BV* [1988] ECR 4665 (4686).

⁵⁴ Claims for damages are not very efficient, see Hirtle, *NJW* 1999, 36 (38).

⁵⁵ For instance de Weert, *BB* 1998, 366 (368); in recent times criticism has concentrated on foreign limited liability companies with their de facto real seat in Germany which comply with their duty to register only in limited numbers see *Leible/Hoffmann*, *RiW* 2005, 544 (545 et seq.); Wachter, *GmbHRR* 2006, 793 (794); contra Scholten, 'Company Law in Europe', (1966/67) 4 *CMLR* 377 (396 et seq.) (question of criminal sanctions should be left to national law). Comparative law survey for the larger Member States in *Leible*, *ZHR* 162 (1998) 594 (611 et seq.).

⁵⁶ *Leible*, *ZHR* 162 (1998) 594 (613 et seq.).

⁵⁷ The principles of indirect effect (interpretation in conformity with the directive) are binding on all state organs, including if they have executive functions: see, for instance, ECJ case 103/88 *Costanzo* [1989] ECR 1839 (1870 et seq. para. 28–33); Temple Lang, 'The duties of national authorities under Community constitutional law', (1998) 23 *ELR* 109; Brechmann, *Die richt-*

substantial degree of non-compliance (certainly if it exceeds 50%) is inefficient and has to be tightened.

VII. TRANSPOSITION OF THE FIRST DIRECTIVE FROM A COMPARATIVE LAW PERSPECTIVE

*58. There is good comparative law material for the transposition of the Directive.⁵⁸ Transposition was particularly easy for Germany,⁵⁹ which served as a model, although the extension of the rule on disclosure and its effects to all traders (§15 HGB, see §5 para. 23) is noteworthy and finds its parallels in some other countries, and although, as has been mentioned, the German rules on sanctions were not sufficient.

59. The **core problems** are cases where publication contains errors which registration did not and where no Member State allows the company to invoke the fact that the registration was correct;⁶⁰ the rules on unrestricted power of representation where, in Anglo-Saxon countries, traditional ultra vires doctrine had posed problems for a long time;⁶¹ and the restriction of grounds for nullity, which has not been carried through consistently in France,⁶² but which elsewhere

⁵⁸ Fischer-Zernin, *Rechtsangleichungserfolg*; also van Ommeslaghe, *CDE* 1969, 495 and 619; Wooldridge, *Company Law*, 24 et seq.

⁵⁹ Gesetz zur Durchführung der Ersten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts of 15.8.1969, *BGBI.* 1969 I, 1146. On this law (in general): Ankele, *GmbHRR* 1969, 52; Einmahl, *AG* 1969, 131, 167 and 210 (AG); Meyer-Ladewig, *MDR* 1969, 818; and also Bokelmann, *NJW* 1969, 2120 (power of representation); Gustavus, *BB* 1969, 1335 (register); Kreplin, *BB* 1969, 1112 (business correspondence). The most important rules on transposition are §23 para. 4, 39 para. 1 sentence 2 AktG, 10 para. 1 sentence 2, para. 2 GmbHG (content of the statutes and the register); §275 et seq. AktG, 35, 37 GmbHG (power of representation, unchanged); §275 et seq. AktG, 75 et seq. GmbHG (limitation of grounds for nullity). The latest amendments to the Directive have now been transposed by the Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG), in force since January 1, 2007; for details see: Spindler, 'Abschied vom Papier? Das Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister', *WM* 2006, 109. See for transposition in the UK also Edwards, *EC Company Law*, 24–26, 30 et seq., 41–45.

⁶⁰ Fischer-Zernin, *Rechtsangleichungserfolg*, 85 et seq. On this problem under the Directive see references in N. 47 above. In certain countries the problem does not arise because publication is restricted to a reference to the register (which is permissible under Art. 3(5), see above §9 para. 40); see for the UK for instance: Fischer-Zernin, *ibidem*, 82 et seq.

⁶¹ Charter provisions restricting the scope of the company are no longer relevant for the extent of the power of representation under the new law. Art. 39 CA 2006; under CA 2006, such a specification of the scope is not even needed, see on all this Davies, *Gower's Company Law*, 152–155; Hanningan, *Company Law* 92 et seq. This had been different until 2006, the power of representation was seen as being restricted to the scope of the company which had to be indicated in the charter (in a mandatory way), see Edwards, *EC Company Law*, 42–45 and 1st edition of this book, para. 285.

⁶² Only three grounds for nullity are explicitly excluded, otherwise unwritten grounds for nullity seem still to be acceptable: Art. L 235–1 Nouveau Code de Commerce; Merle, *Droit*