# Contents

## Special notice — XIII

- 1 What is European Union company law? ---- 1
  - 1. The concept of "public" and "private" companies in Europe ---- 1
  - "EU company law" in the broader context of EU lawmaking bodies 4
  - 3. EU legislative acts and the jurisprudence of the Court of Justice of the EU 6
  - The competence of the Union in the area of company law: the EU may only "harmonize", through directives and regulations, national company laws and does not have exclusive power 8
  - 5. The main directives adopted in the area of company law (and the ones that remained at the draft stage) 13
  - 6. The theoretical debate on EU "harmonization" versus "regulatory competition" among national State legislations 17
  - The "rush to incorporate" in different States and the jurisprudence of the CJEU: the Daily Mail, Centros, Überseering, Inspire Art (and Cartesio, Sevic, Vale, Polbud) cases — 21
  - 8. Towards "soft" harmonization? Recommendations, "Action Plans" and the "European Model Company Act" ---- 27
  - The foreseeable expansion of the jurisprudence of the CJEU: the "horizontal direct effect" of the principles of free establishment and free movement of capital (*Volkswagen* and *Vivendi* as flagship cases) — 31
  - "Transnational" corporate types (with different fates): the "Societas Europea", the "Societas Privata Europea" and the "Societas Unius Personae" ---- 35

# 2 Formation and share capital ---- 37

- The reasons for relatively uniform national laws. The main fundamental arguments not addressed by the directives (and the question of contractual freedom: "mandatory" and "default" rules) — 37
- Formation of the company: instrument of incorporation and statutes — 42
- 3. Nullity of the company 44
- 4. Single-member company 46



- 5. Share capital. From "minimum" to "adequate" capital? ---- 47
- 6. The assessment of capital in kind: the evaluation by experts ---- 51
- 7. Rules on capital protection. (a) Distributions ---- 53
- 8. (b) Share buy-backs ---- 56
- 9. (c) Financial assistance 57
- 10. (d) Cross-shareholdings 60
- 11. (e) Relevant losses and compulsory recapitalization (or liquidation) 62
- 12. The reduction of capital in excess ---- 66

## 3 Management of the company and controls — 69

- 1. The different governance systems and the failed proposal of the Fifth Directive 69
- The "menu" legislative approach adopted in most Member States — 71
- 3. Main features of the different governance systems: monistic (onetier), traditional and dualistic (two-tier) — 76
- 4. A controversial issue: the balance of powers between shareholders and directors 84
- 5. "Internal" controls on management: audit committees, statutory auditors, supervisory boards ---- 92
- 6. "External" controls on management: audit firms and special examiners 96
- 7. Management board and supervisory board meetings and resolutions 98
- 8. Shareholders' agreements ---- 100

# 4 Shares ----- 105

- 1. Characteristics of the shares (bearer, name, paper, dematerialized, par and no-par) 105
- 2. Basic and secondary rights of shares ---- 109
- 3. Classes of shares: special financial, voting and administrative rights 111
- 4. "Golden shares" and the jurisprudence of the CJEU (cases *Elf-Aquitaine, BBA, Volkswagen* and others) **120**
- Transferability of the shares (clauses of consent, first refusal, tag along, drag along, change of control). The jurisprudence of the CJEU on national laws preventing investors to pursue cross-border transactions (cases *Tipou*, *Vivendi* and others) — 126

## 5 Financing — 133

- 1. Capital increases ---- 133
- 2. Equity linked instruments (convertible bonds, warrants, options) **136**
- 3. Hybrid instruments 138
- 4. Bonds 141
- 5. Shareholders' loans (and reserve contributions) ----- 143

## 6 Protection of minorities (right to vote and right to exit) ---- 147

- 1. Shareholders' voice and exit (and directors' liability). Different approaches of national laws 147
- 2. Right to vote in general meetings and to challenge shareholders' resolutions 149
- 3. Right to information 155
- 4. Right to withdrawal ---- 158
- 5. Right to sell out (and to winding up) ---- 161
- 6. Shareholders' litigation and jurisdiction: the jurisprudence of the CJEU (case *E-ON Czech Holding*) 163

# 7 Groups — 165

- 1. A brief history of company groups in Europe and their regulation 165
- 2. The legal definition of group: "control" and "unitary direction" 169
- Main issues addressed by Member States' laws: (a.1) unitary direction, binding instructions, group interest and parent company's liability: the German model (followed by other Member States) of "contractual groups" and "de facto groups" — 171
- (a.2) Unitary direction, binding instructions, group interest and parent company's liability in other Member States. The position of the EMCA — 175
- 5. (b) The disclosure of the existence of the group and the results of the unitary direction 182
- 6. (c) Rights of the minority shareholders of subsidiaries (to special investigation, to withdrawal) **184**
- (d) Rights of the minority shareholders of the parent company (to information, to withdrawal, to vote) 187
- 8. (e) Cross-shareholdings, intercompany loans and group financing 188

9. Cross-border groups and applicable law: the CJEU judgment on the *Impacto Azul* case — 191

## 8 Accounting and financial statements ---- 195

- 1. An overview on EU companies' financial reporting ----- 195
- 2. Layouts and principles of financial statements ---- 198
- 3. Consolidated financial statements ---- 205
- 4. Audit of the financial statements ---- 205
- 5. Approval and publication of the financial statements ---- 207
- Financial statements in listed and other companies using the "International Accounting Standards" and "International Financial Reporting Standards" ("IAS/IFRS") — 208
- 7. Profit and dividends (and the "right to dividend" acknowledged by some legislations) 210

## 9 Duties and liabilities of directors and supervisors ---- 213

- 1. Directors' duties ---- 213
- 2. Supervisory board members' and statutory auditors' duties ---- 223
- 3. Auditors' duties 225
- 4. Liabilities and proceedings 227
- 5. Liability rules between "company" and "insolvency" law: the CJEU judgment on the *Kornhaas* case 230
- 6. Shareholders' liability 232

## 10 Extraordinary transactions ---- 235

- 1. Basic principles on extraordinary transactions ---- 235
- 2. Mergers 237
- 3. Divisions, spin-offs and carve-outs ---- 248
- 4. Leveraged buyouts ---- 253
- 5. Sales of company's assets ---- 258
- 6. Shares purchases 260
- 7. Squeeze-outs and freeze-outs ---- 260
- 8. Conversions 263
- 9. Cross-border transactions ---- 266

## 11 Dissolution and liquidation — 271

- 1. Causes for dissolution and directors' duties ---- 271
- 2. Liquidators' powers and duties ---- 274
- 3. The liquidation proceedings and the cancellation of the company 275

#### 12 Listed companies — 277

- 1. The "three legs" of the EU listed companies' legislation ---- 277
- 2. Enhanced rights of shareholders in listed companies 279
- 3. Rules on takeovers ---- 281
- 4. Rules on audit committees ---- 288

#### 13 Private companies ----- 291

- Harmonization of the national laws on private companies? A "disproportionate" effort, according to the EU. Despite this, the attempt by the EMCA — 291
- The "private company" in the Member States and the EMCA: (a) formation and legal capital 293
- 3. (b) Management and control ---- 297
- 4. (c) Shares 300
- 5. (d) Financing ----- 302
- 6. (e) Protection of minorities ---- 304
- 7. (f) Directors and shareholders' liabilities ---- 306

#### 14 Societas Europea and other forms — 309

- The regulation on the "European Company" ("Societas Europea", "SE") ---- 309
- 2. The establishment of the SE ---- 311
- 3. The corporate governance of the SE ---- 313
- 4. Accounts and dissolution of the SE ---- 314
- 5. The (aborted) projects on the "Societas Privata Europea" ("SPE") and the "Societas Unius Personae" ("SUP") **315**
- 6. Branches of foreign companies 318

Table of cases ----- 321

Index ----- 324