Topics of Seminar 8

**European Company (Part 2)**

- Internal governance rules of the SE
- Board structures
  - one tier and two-tier systems
- Employee participation and corporate law
  - Theoretical foundations
  - Employee participation in the SE – procedures
  - Legal arbitrage and employee participation
Internal governance of the SE

Structure of the SE

- “Company Organs”
  - General meeting
  - Unitary board (“administrative organ”) – **one-tier structure**
  - Management board and supervisory board - **two-tier structure**

- Choice to be made in Statutes (AoA)
  - i.e. ultimately by the shareholders

- General meeting
  - Appoint (supervisory) board members
  - Exact competence of GM defined by national (plc) law and EU company law (where harmoised)
  - E.g. issuing shares
SE boards

- Terms of board members not to exceed 6 years
  - Re-election possible
- Disqualification (Art 47)
- Certain transactions subject to express board approval
  - Subject to statutes and applicable national law
- Liability of board members:
  
  “Members of an SE’s [board] shall be liable, in accordance with the provisions applicable to [PLCs] in the Member State in which the SE’s registered office is situated ... following any breach [of their] duties.”

  – Art 51
Board structures in the EU

- Monistic (one-tier board)
- Dualistic (two-tier board)
- Choice (subject to AoA)
Two-tier structure

- **Management board**
  - responsible for day-to-day management
  - Informs supervisory board

- **Supervisory board**
  - supervises work of the management organ
  - must not exercise the power to manage the SE

- **Board size subject to statutes and Member State regulation**

- **Appointment**
Internal governance of the SE

Two-tier structure

General Meeting (shareholders) appoints Supervisory board

Supervisory board appoints Management board

Alternative route

No cross-membership
One-tier structure

- Unitary board (administrative organ)
  - responsible for day-to-day management
  - Usually: executive and non-executive members
  - Advise / supervise

- Board size subject to statutes and Member State regulation

- Appointment by general meeting
Employee involvement

- Employee information and consultation
  - Providing employees (representative bodies) with information about corporate decisions
  - Establishing a dialogue between employees and management

- Employee participation
  - Influence on composition of administrative/supervisory body
  - Election / nomination / recommendation / opposition rights
Employee participation and corporate law

- What is the theoretical justification for a system of “shareholder primacy”?
- Are employees “adjusting stakeholders”?
- Protection by contract?
- Is employee participation detrimental to shareholder wealth?
- In what way can employee participation influence employee behaviour?
- What is a firm-specific investment?
Board-level employee participation in the EU

- **Board-level representatives**
- **No board-level participation**
- **Advisory BL participation**
- **Employee nomination rights (Netherlands)**
The political dimension

- Potential distributional effects of employee participation
  - May strengthens the bargaining power of employees
  - Potential positive externalities?
  - Strikes, “social peace”, etc
  - Egalitarian society?

- Short-termism and long-term investments
  - Potential influence of shareholder primacy on investment strategies
  - Compare US / UK / Germany
Board-level employee participation in the EU

Employee Participation, GDP per capita and equality (EU-27)

(Netherlands = yes, France = no)

Board-level employee participation:
- Yes
- No

GDP per capita in Int. $ (PPP) vs. Gini Index
Board-level employee participation in the EU

Employee participation, GDP per capita and equality (EU-15)
(Netherlands = yes, France = no)

Board-level employee participation:
- No
- Yes
Board-level employee participation in the EU

Employee Participation, GDP per capita and equality (EU-15)

(with The Netherlands and France not assigned to either group, ex Luxembourg)

GDP per capita in int. $ (PPP)

Gini Index

Board-level employee participation:
- Red: No
- Green: Yes
Employee participation in the SE

- The “before and after” principle
  - BL Employee participation only mandatory where pre-existing → “defensive” approach
- Special Negotiating Body (SNB)
  - Representatives from each Member State concerned
  - One employee representative from a Member State for each 10% (or less) of total employees
  - Subject to overall cap, companies ceasing to exist (merger) shall be assigned a representative
  - Decisions usually with “double” ordinary majority
Employee participation in the SE

- **Election/appointment according to MS law**
- **Function of the SNB**
  - SNB negotiates with management about employee participation
  - Mutual agreement necessary
  - But: Strong default rules
  - Standard Rules → highest proportion
  - Negotiation timeframe: 6 months
    - (12 months with mutual agreement)
Employee participation in the SE

- The “Standard Rules”
  - “highest proportion”-principle
  - Numeric determination!
  - Participation by employees from different MS to be decided by SNB

- Scope of application
  - Agreement
  - No agreement within timeframe (default)
  - and 25% (merger) / 50% (holding/sub) or decision by SNB
  - “No escape” in transformation
Employee participation in the SE

- When can employees agree to go below “highest standard”?
  - Never if established by way of transformation
    - In other cases:
      - Supermajority (2/3) if participation applied to 25% (merger) / 50% (holding/subsidiary)

- Always supermajority if decided to opt-out completely
- “No export – no escape”