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General Principles of EU Corporate and Insolvency Law

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and ECGI

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Abstract

Over more than forty years, the European Union (formerly the European Community) has enacted a large number of directives aimed at harmonising company law rules across Member States. Nevertheless, differences across Member States persist with regard to company law rules. Member States' regimes share a core of fundamental features: shareholders are not liable for the company's debts; companies have a separate legal personality; and the capital investment is commodified through the vehicle of freely disposable shares. Beyond these fundamental elements, it is more uncertain whether other general principles, having legal relevance, exist throughout the EU.

By looking at national company law regimes and EU harmonising directives, this work has isolated only two principles that seem sufficiently general, common, and fundamental. The first principle is the unrestricted powers of directors to act on behalf of the company: this principle is based upon the German tradition and has been extended to public companies of all Member States by the First Company Law Directive of 1968. The second principle is equal treatment of shareholders who are in the same condition: this is a general duty that all companies' bodies should respect when they make decisions that affect shareholders. Such a principle, however, is not a rigid equality rule, as differentiated treatment might still be justified in the interest of the company. However, its status within case-law of the European Court of Justice it is still unclear: on the one hand, the Court has denied that this duty is a general principle of EU law, with the consequence that it only applies within the scope of the specific provisions entailing this rule; on the other hand, other decisions of the Court seem to follow an opposite logic.

Concerning insolvency law, it is much more controversial whether general principles exist within the EU legal order. Insolvency proceedings are country-specific, as most of their rules have a re-distributive impact on a broad range of stakeholders of the company, such as employees, creditors, and customers. Therefore, insolvency regimes are strictly related to political balances and national social security policies. The only common denominator of Member States insolvency regimes seems to be the duty to treat creditors equally and respect pre-insolvency entitlement and creditor ranking. Nevertheless, there is also an intricate web of exceptions to this principle, which vary broadly across jurisdictions and aim at protecting specific classes of creditors.

Keywords: Harmonization, Convergence, Company Law, Insolvency Law, General Principles, Companies' directors, Shareholders' equality.

JEL Classifications: K22

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General Principles of EU Corporate and Insolvency Law

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Over more than forty years, the European Union (formerly the European Community) has enacted a large number of directives aimed at harmonising company law rules across Member States. Nevertheless, differences across Member States persist with regard to company law rules. Member States' regimes share a core of fundamental features: shareholders are not liable for the company's debts; companies have a separate legal personality; and the capital investment is commodified through the vehicle of freely disposable shares. Beyond these fundamental elements, it is more uncertain whether other general principles, having legal relevance, exist throughout the EU.

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I. Introduction: corporate and insolvency rules in the EU

In advanced capitalist countries, economic activities are predominantly run through legal entities called 'companies' or 'corporations,[1] whose members are not personally liable for the business' debts. All jurisdictions provide for special rules, departing from general contract and tort law, aimed at regulating companies' internal affairs and their distress.[2]

Over more than forty years, the European Union (formerly the European Community) has enacted a large number of directives aimed at harmonising company law rules across Member States. These directives address issues ranging from companies' formation and their financial structure to specific corporate transactions, such as capital amendments, mergers, and

[1] While 'company' is the term used in British legal jargon, 'corporation' is the American definition. It is worth stressing, however, that many Continental European legal systems (such as France, Germany or Italy) employ a general concept that covers both companies and partnerships (i.e., entities whose members do not enjoy limited liability): for instance, *société* in French, *Gesellschaft* in German, *società* in Italian. Nicholas Foster, 'Company Law Theory in Comparative Perspective: England and France' (2000) 48 *American Journal of Comparative Law* 573.

[2] Further on the general principles of EU 'private' law, see the chapter of Lucinda Miller in this book.

divisions.[3] These harmonising measures are based on provisions of the Treaty that allow actions aimed at repealing restrictions to freedom of establishment[4] and at approximating Member States' laws in order to create a single market.[5]

Regarding corporate distress situations, the European Union has recently approved a directive that aims at harmonising Member States' rules on restructuring frameworks,[6] while general insolvency law proceedings fall within the competence of Member States. The EU, however, has unified the private international law criterion establishing which Member State is competent to hear and regulate insolvency cases.[7] In particular, the general criterion is the debtors' centre of main interests, which is 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.[8]

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[3] First Council Directive 68/151/EEC, of 9 March 1968, on the disclosure and the validity of obligations entered into by, and the nullity of, companies with limited liability [1968] OJ L65/8, codified through the Directive 2009/101/EC, of 16 September 2009 [2009] OJ L258/11; Second Council Directive 77/91/EEC, of 13 December 1976, on the formation of public limited liability companies and the maintenance and alteration of their capital [1976] OJ L 26/1, codified through the Directive 2012/30/EU of 25 October 2012 [2012] IO L315/74; Third Council Directive 78/855/EEC, of 9 October 1978, on domestic mergers of public limited liability companies [1978] OJ 295/36, codified through Directive 2011/35/EU of 5 April 2011 [2011] IO L110/1; Fourth Council Directive 78/660/EEC, of 25 July 1978, on annual accounts of companies with limited liability [1978] IO L222/11; Sixth Council Directive 82/891/EEC, of 17 December 1982, on the division of public limited liability companies [1982] IO L378; Seventh Council Directive 83/349/EEC, of 13 June 1983, on consolidated accounts of companies with limited liability [1983] OJ L193; Eighth Council Directive 84/253/EEC, of 13 June 1983, on the qualifications of persons responsible for carrying out the statutory audits of accounting documents [1983] OJ L126; Tenth Directive 2005/56/EC, of 26 October 2005, on cross-border mergers of limited liability companies [2005] OJ L310/1; Eleventh Council Directive 89/666/EEC, of 21 December 1989, on disclosure requirements in respect of branches [1989] OJ L395/36; Twelfth Council Directive 89/667/EEC, of 21 December 1989, on single-member private limited liability companies [1989] OJ L395/40; Directive 2004/25/EC, of 21 April 2004, on takeover bids [2004] IO L142/12 (the 'Takeover Directive'); Directive 2007/36/EC, of 11 July 2007, on the exercise of certain rights of shareholders in listed companies [2007] IO L184/17, as amended through the directive 2017/828/EU if the European Parliament and the Council, of 17 May 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1. The First Directive, the Second Directive, the Third Directive, the Sixth Directive, the Tenth Directive and the Eleventh Directive have been replaced with Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017, relating to certain aspects of company law (codification) [2017] OJ L169/46 (hereinafter the 'Directive 2017/1132'). On the EU principles of antitrust law, see the chapter of Max Hjärtström and Julian Nowag, in this book.

[4] See Art. 50(2)(g) of the Consolidated versions of the Treaty on the Functioning of the European Union, OJEC C 115/01 (formerly Art. 44(2)(g) of the Treaty Establishing the European Community) (TFEU).

[5] Art. 26 TFEU: '1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties; 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties; 3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.' On the general principles of the internal market, see the chapter of Jukka Snell in this book.

[6] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 [2019] OJ L172/18 (Directive on restructuring and insolvency).

[7] Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency procedures [2015] IO L141 (recast [2015] OJ L141/19). Formerly, these issues were governed by Regulation of the Council (CE) 1346/2000 of 29 May 2000 on insolvency procedures [2000] IO L160.

[8] ibid Art. 3(1).

In this complex scenario, it is therefore worth asking whether general principles of company or insolvency law exist in the EU.[9] It will be shown in the following sections that some common features and a few general principles can be isolated regarding company law, while the answer is much more uncertain regarding insolvency regimes.

II. Corporate law in the EU: in search of a common framework

1. Spontaneous convergence and 'top-down' harmonisation of company law

At a very general level, companies seem to be governed by the same principles and conceptions across all Member States. All companies established in Member States share the following common elements: (a) they have an independent legal personality; (b) shareholders are, at least in principle, not liable for their companies' debts; (c) shareholders' private creditors have no claim on the company's assets;[10] (d) shareholders are not co-owners of the business: they own shares in the company; (e) shareholders cannot withdraw their membership at will; and, (f) shares are a commodified form of capital investments so that they can be sold and purchased like other commodities.[11]

It is interesting to note that these features are familiar to all companies around the globe, at least in countries of advanced capitalism, as they reflect the objective economic necessities of centralising capital and allowing shareholders to liquidate their investments. These elements are thus, in a sense, general principles stemming from the spontaneous convergence of Member States' laws, driven by economic needs shared across economically advanced countries. And yet, jurisdictions can provide for exceptions or carve-outs to these principles, for instance by accepting that in specific circumstances shareholders are liable for their company's debts or for damages occurred due to their company's activity (these situations are often called 'piercing the corporate veil').

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[9] Generally, on the nature, function and roles played by general principles in the EU legal order, see Katja Ziegler, Paivi Neuvonen, and Violeta Moreno-Lax, 'Framing Chapter' in this book.

[10] Henry Hansmann, Reinier Kraakmann, 'The Essential Role of Organisational Law' (2000) 110 *Yale Law Journal* 387.

[11] Margaret Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organisers in the Nineteenth Century' (2003) 51 *UCLA Law Review* 404; Lorraine Talbot, *Critical Company Law* (2nd edn, Routledge 2015) 23–30.

In this regard, it is crucial to stress that the very existence of a legal entity separated from their members requires the intervention of a legal system that incorporates it and grants to its members the benefit of limited liability.[12] Although the origin of legal entities is necessarily rooted in national legal systems, it is a fact that company law regimes are gradually converging throughout the world, mostly regarding public companies that are exposed to the pressure of a globalised financial market. Such a convergence derives from the combination of harmonising 'top-down' measures and spontaneous 'bottom-up' developments.[13] EU directives are a piece of this tendency towards convergence and a mechanism for mutual learning across EU Member States.[14]

Nevertheless, it is still discussed whether and to what extent such measures have increased the uniformity of Member States' company regimes,[15] as many provisions mimic common standards or are merely optional.[16] What is certain is that the harmonising directives do not cover issues that are vital for corporate governance, notably director duties and their enforcement mechanisms, which are, therefore, exclusively governed by national rules.[17] Other relevant issues, such as director remuneration packages, are only addressed through non-binding recommendations issued by the European Commission; these rules, as a result, are far from being harmonised throughout the EU.[18] Among the harmonising directives that have had

[12] See: Case C-81/87, *The Queen v HM Treasury and Commissioners for Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, at 19: '[c]ompanies are creatures of the law and, in the present state of Community law, creatures of national law'.

[13] Mathias Siems, *Convergence in Shareholder Law* (Cambridge University Press 2008) 373.

[14] See Siems (n 13) 340 – 353 (stressing that the internationalisation of shareholder structure will induce convergence as to shareholder rules). See also: Clive M Schmitthoff, 'The Future of the European Company Law Scene' in Clive Schmitthoff (ed.) *The Harmonisation of European Company Law* (The UK National Committee of Comparative Law 1973); Vanessa Edwards, *EC Company Law* (Clarendon Press 1999) 6–8; Jan Wouters, 'European Company Law: Quo Vadis?' (2000) 37 *Common Market Law Review* 257; Christoph Teichmann, *Binnenmarktkonformes Gesellschaftsrecht* (De Gruyter 2006) 198–203.

[15] On the law-making power allocation and regulatory competition see: John Armour, 'Who Should Make Corporate Law? EC Legislation v Regulatory Competition' [2005] *Current Legal Problems* 369; Marco Ventoruzzo, 'Cost-based and Rule-based Regulatory Competition: Markets for Corporate Charters in the US and the EU' (2006) 3 *New York University Journal of Law and Business* 91; Stefano Lombardo and Piero Pasotti, 'Disintegrating the Regulation of the Business Corporation as a Nexus of Contracts: Regulatory Competition vs. Unification of Law' (2009) 10 *European Business Organization Law Review* 35.

[16] Luca Enriques, 'EC Company Law Directives and Regulations: How Trivial are they?' (2006) 27 *University of Pennsylvania Journal of International Economic Law* 1; Luca Enriques, Matteo Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonisation in the European Union' (2006) 27 *University of Pennsylvania Journal of International Economic Law* 939.

[17] Carsten Gerner-Beuerle and Edmund-Phillip Schuster, 'The Evolving Structure of Directors' Duties in Europe' (2014) 15 *European Business Organization Law Review* 191.

[18] See Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies Text with EEA relevance [2004] OJ L385/55; Commission Recommendation 2005/162/EC of 15 February 2005on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board [2005] OJ L52/51; Commission Recommendation 2009/385/EC of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies [2009] OJ L120/28.

a real impact upon national company law regimes, we can mention the Shareholder Right Directive,[19] the Cross-border Merger Directive,[20] and the recently approved Directive on Cross-border Conversions.[21] The former has increased the level of shareholders' participation and has mandatorily introduced in all Member States the 'record date' concerning shareholder voting rights.[22] Their provisions, however, are very specific and technical, so that they can hardly be defined 'general principles' of EU company law. The Cross-border Merger Directive also had a significant impact on national company law regimes since, before this directive, several Member States banned cross-border mergers.[23] Eventually, the directive on cross-border conversions has resolved the sensitive and uncertain question of whether freedom of establishment also grants companies a right to change applicable regime rules (namely their *lex societatis*) without liquidating.[24] The latter directives (namely the Cross-border Merger Directive and the Directive on Cross-border Conversions), however, do not entail any general principle of substantive company law: they are enabling measures that stimulate intra-EU corporate mobility and regulatory competition, not uniformity.

2. Directors' authority and companies' capacity after the First Directive

In this scenario, rules on directors' authority and companies' capacity entailed in the First Directive from 1968[25] might have acquired the status of general principles of European company law. These rules, now enshrined in Directive 2017/1132, aim at protecting third

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[19] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 [2007] OJ L184/17 (Shareholder Rights Directive).

[20] Directive 2005/56/EC of the European Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1.

[21] Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (COM(2018)0241 – C8-0167/2018 – 2018/0114(COD)) [2019] approved by the European Parliament (not yet published in the Official Journal).

[22] See Luca Enriques, 'A Harmonized Company Law: Are We Already There?' (2017) 66 *International and Comparative Law Quarterly* 763, 768.

[23] This enabling function was weaker than we can think at first glance. The same year when the Cross-border Merger Directive was eventually approved, the European Court of Justice declared that a prohibition to inbound cross-border mergers was an unacceptable restriction of EU freedom of establishment: Case C-411/03 *SEVIC System AG* [2005] ECR I-10805.

[24] The European Court of Justice had liberalised cross-border re-incorporations by way of the relocation of a company's registered office from one country to another: Case C-210/06, *Cartesio Oktato es Szolgaltato bt* [2008] ECR I-9641; Case C-378/10, *VALE Építési kft.* ECLI:EU:C:2012:440; Case C-106/16 *Polbud v Wykonawstwo sp. z.o.o* ECLI:EU:C:2017:804. Nevertheless, only few Member States allow cross-border re-incorporations, so that, without harmonising measures, these transactions are at the mercy of domestic rules and idiosyncrasies: Carsten Gerner-Beuerle, Federico M Mucciarelli, Edmund-Phillip Schuster and Mathias Siems, 'Cross-border Reincorporations in the European Union: The Case for Comprehensive Harmonisation' (2018) 18 *Journal of Corporate Law Studies* 1.

[25] First Council Directive 68/151/EEC (n 3).

parties from the risk that contracts with a company be declared null and void because directors have acted outside their authority or have violated the company's capacity. Their main purpose is facilitating intra-EU commerce, which is deemed necessary to establish a single market. To this aim, the Second Directive has increased directors' autonomy *vis-à-vis* third parties and the market. First of all, rules on directors' authority exclude that contracts exceeding a company's object (that is to say, the company's capacity) could be declared void.[26] Member States can, however, relax this rule when the third party knew or ought to have known that the act exceeded the company's object. Secondly, any acts of directors outside their authority cannot be declared avoidable, as '[t]he limits on the powers of the organs of the company … may not be relied on as against third parties, even if they have been disclosed'.[27] Such a provision reflects the principle of unlimited and unlimitable directors' authority, which is rooted in the tradition of German company law since the nineteenth century.[28] By contrast, in other Member States, before the implementation of the First Directive, violations of directors' authority or company's capacity could affect the contracts signed with third parties. For comparative and explanatory purposes, it is interesting to explore two legal systems, which belong to different legal traditions and that were affected by the implementation of the First Directive: Italy and the UK.

Under Italian law, until 1969, contracts violating the company's object and contracts violating directors' authority were void, if the limits to directors' authority were disclosed in the commercial register or the third party had actual knowledge of such limits.[29] In order to comply with the First Directive, the Italian Parliament introduced a radical innovation that expanded third party's protection:[30] first of all, contracts exceeding the company's object could be declared null and void only if the third party was in bad faith;[31] furthermore, contracts or acts exceeding directors' authority were not void, even if the limits to their authority were published in the commercial register, unless it was proven that the third party intentionally

[26] See Directive 2017/1132 (n 3) Art. 9(1): 'Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company unless such acts exceed the powers that the law confers or allows to be conferred on those organs.'
[27] ibid Art. 9(2).
[28] For public companies (*Aktiengesellschaften* in German) see *Aktiengesetz 1965* §82(1); for private companies (*Gesellschaften mit beschränkter Haftung*) see *GmbH Gesetz 1892* §37(2). Similar rules were formerly entailed in the *Allgemeines Deutsches Handelsgesetzbuch (ADHGB)*, 1861, §231(2) and in the *Aktiengesetz* 1937 § 74(2).
[29] Italian Civil Code, Art. 2384, original version, which applied to public companies the general rules on partnership directors' authority (Civil Code Art. 2298(1)).
[30] Decree 1127/1969 of 29 December 1969.
[31] Italian Civil Code Art. 2384-*bis,* introduced by Legislative Decree 1127/1969 and repealed by Legislative Decree 6/2003 of 17 January 2003. See Vincenzo Calandra Buonaura 'Potere di gestione e potere di rappresentanza degli amministratori' in Giovanni E Colombo and Giuseppe B Portale (eds) *Trattato delle società per azioni* vol 4 (Utet 1991) 137.

aimed at damaging the company (hence, bad faith or knowledge of the limitations to directors' authority were not sufficient).[32] Eventually, a comprehensive reform of 2003 aligned Italian rules to the German model, by maintaining that directors' authority is unlimited and unlimitable, and that violations of a company's capacity do not trigger nullity.[33]

A similar development also occurred in the UK. Originally, British courts followed the *ultra vires* doctrine, under which any contracts that did not fall within the company's object were void unless they could be deemed 'reasonably incidental' to the main objects.[34] Such *ultra vires* doctrine, however, was increasingly relaxed through the twentieth century, as courts accepted that articles of association could entail multiple objects[35] or could explicitly authorise directors to carry on any business that, in directors' opinion, maximised the company's profit.[36] Additionally, contracts violating directors' actual or ostensible authority were considered voidable, and the third party was deemed to have constructive notice of any restrictions to directors' powers; constructive notice, however, was relaxed by the assumption that the third parties only faced a duty to inspect the articles of association, not to inquire whether other limitations existed,[37] and that contractual partners were not to be affected 'by any irregularities which may take place in the internal management of the company' ('indoor management rule').[38] When the UK joined the EU, the First Directive was implemented through section 91(1) of the European Communities Act 1972, which repealed the *ultra vires* doctrine and was then included in section 108 of the Companies Act 1989. The whole matter was eventually codified through the Companies Act 2006, which maintains that the board's power to bind the company is deemed to be free of limitations in favour of persons dealing in good faith.[39]

We can conclude that, albeit at a different pace, in both jurisdictions, rules on directors' authority and companies' capacity have evolved from a low level of third parties' protection to complete insulation of directors' powers from the limits set in the articles of association. The action of EU law, therefore, was a step in this piecemeal departure from rules existing in some

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[32] Italian Civil Code Art. 2384(2), as amended by Legislative Decree 1127/1969.

[33] Italian Civil Code Art. 2384, as amended by Legislative Decree 6/2003. See Vincenzo Calandra Buonaura 'Il potere di rappresentanza degli amministratori di società per azioni' in Pietro Abbadessa and Giuseppe B Portale (eds) *Il nuovo diritto delle società* vol 2 (Torino 2006) 659.

[34] See *A-G v Great Eastern Railway Co* [1880] 5 App Cas 473. Before this decision, courts followed a much stricter approach to assess whether a contract was *intra vires*; see *Ashbury Railway Carriage & Iron Co v Riche* [1875] LR 7 HL 653.

[35] *Cotman v Brougham* [1918] AC 514.

[36] *Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 QB 656.

[37] *Royal British Bank v Turquand* [1865] 6 EL & Bl 327.

[38] *Mahony v East Holyford Mining Co Ltd* [1875] LR 7 HL 869, 894; *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480. On the development of corporate capacity and directors' authority at common law see Talbot (n 11) 112–121.

[39] Companies Act 2006, s 39 and s 40.

Member States that offered weak protection to third parties, to a system in which the interest of the market is paramount. The most significant effect of this directive was expanding the German rules on directors' powers to all other Member States. These rules aim at exclusively protecting the market and neglect shareholders' intention to limit directors' powers; hence they reflect a balance of power that favours directors *vis-à-vis* shareholders. As a result, a principle of unlimited and unlimitable directors' authority is applied throughout the EU, and we can argue that such a principle is to be classified of a general principle of EU company law.

3. Shareholders' equality and equal treatment as general principles?

Companies are based upon a private agreement among shareholders (the 'articles of association' according to the English legal conceptualisation). From this contractual nature derives the principle of equality of shareholders regarding the rights and duties entailed in their shares. In this regard, it is to be remembered that, in all jurisdictions, companies can create classes of shares that bear special rights and duties, with the consequence that the principle of rights' equality only applies within a given class of shares. Within this limitation, the principle of equality can be construed as a general principle, as it derives from the contractual nature of companies and from the identity of shares.

Much more controversial is whether companies' bodies must not treat shareholders (regardless of the class of share that they hold) discriminatorily and whether such a prohibition, if existing, has the nature of a general principle of EU company law. In particular, in all jurisdictions the question arises as to whether shareholders are to be treated equally by directors and other company's bodies when they take decisions that might affect shareholders' interests or their position in the corporation. Few examples would clarify this issue: when a company decides to purchase own shares from existing shareholders, it is to be clarified whether the company can purchase such shares from selected shareholders or has to offer to all shareholders the opportunity to sell their shares if they wish so. Another example is related to selective dissemination of corporate information: directors might try to gauge the opinion of selected shareholders, such as asset managers or institutional investors, regarding an envisaged

transaction, in order to facilitate its approval and its acceptance on the market, and yet in doing this they would clearly discriminate shareholders.[40]

Many EU harmonising directives mention the principle of equal treatment of shareholders, at least for public companies. The principle of equal treatment of shareholders was introduced for public companies in the Second Directive on company law,[41] with regard to measures related to a company's legal capital, and is now entailed in the codification Directive 2017/1132. Therein, Article 85 states that 'for the purposes of the implementation of this chapter (regarding rules on capital requirements, capital increases and reductions), the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position'.[42] The principle of equal treatment was subsequently expanded to cover situations in which companies purchase their own shares.[43] Furthermore, Directive 2001/34/CE, governing conditions for the admission of securities to regulated markets, maintained that companies 'shall ensure equal treatment for all shareholders who are in the same position'.[44] Directive 2004/109 (the Transparency Directive), however, amending Directive 2001/34/CE, has replaced such a generally drafted principle with a more narrow duty of equal treatment that only applies to information received by investors upon a company's listing.[45] The Shareholder Right Directive also provides for a seemingly general principle of equal treatment, by maintaining that companies should 'ensure equal treatment for all shareholders who are in the same position concerning participation and the exercise of voting rights in the general meeting'.[46]

The European Court of Justice (CJEU) has addressed the principle of equal treatment in two crucial judgments. In the case *Commission v Spain,*[47] the question arose whether Spanish

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[40] This practice, however, has been regulated by the Market Abuse Regulation under the label of 'market soundings': see Regulation No 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1, Art. 11. On this topic see: Stefano Lombardo and Federico M Mucciarelli, 'Market Soundings: The Interaction between Securities Regulation and Company Law in the United Kingdom and Italy' (2019) 16 *European Company and Financial Law Review* 310.

[41] Second Council Directive 77/91/EEC (n 3).

[42] Directive 2017/1132 (n 3) Art. 85 (formerly Second Directive Art. 42).

[43] ibid Art. 60 (formerly Directive 2012/30 Art. 21(1)).

[44] Directive 2001/34/EC of the European Parliament and of the Council, 28 May 2001, on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] OJ L 184/1, Art 65 (this directive replaced Council Directive 79/279/EEC, coordinating the conditions for the admission of securities to official stock exchange listing, Schedule C(2)).

[45] Directive 2004/109/CE of the European Parliament and of the Council, 15 December 2004, on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L 390/38, Art. 17.

[46] Shareholder Rights Directive (n 19) Art 4.

[47] Case C-338/06 *Commission of the European Communities v Kingdom of Spain* [2008] ECR I-10139.

provisions, which allow listed companies to issue new shares without a pre-emptive right at a price below the current market price, violate the duty of shareholders equal treatment of the Second Directive. In particular, if new shares are issued at a price below the current market price, the existing shareholders would be discriminated against new shareholders, as the latter would purchase shares at a discount regardless of their real value. The outcome would be a transfer of wealth and power from the old shareholders to the new ones. In this regard, the Advocate General held that the principle of equal treatment of shareholders is 'not construed as an obligation on the part of the company to treat shareholders in the same way, but is understood to mean that unequal treatment needs sufficiently objective justification'.[48] The Court followed the Advocate General's Opinion and considered the Spanish rules not to be discriminatory. In that specific case, the fact that newly issued shares were identical to the shares owned by existing shareholders was not considered per se sufficient evidence that existing and new shareholders were in the same position for the purpose of the principle of equal treatment.[49] Therefore, in the logic of the Court's decision the principle of equal treatment is not a rigid and formal duty of non-discrimination of shareholders; this principle is rather grounded in a flexible approach that allows discriminations (or differentiations in treatment) that are economically justified to the benefit of the company as a whole, namely – in the case discussed by the Court – by the company's interest to facilitate the allotment of newly issued shares.[50] Member States can naturally exceed the minimum standard of protection and can provide for more rigid rules, including a ban on any discrimination not related to the type of shares held by shareholders, yet such uplift is not mandatory according to EU derivative law.

The decision *Commission v Spain* addressed the relations between a company and its shareholders. What was at stake was the power of an entity (the company) to treat their members differently. Still open was the question whether the principle of equality also applies to 'horizontal' relations among shareholders. This question was answered in the decision rendered in the *Audiolux* case.[51] The Court faced a situation in which, after a share exchange,

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[48] Opinion of AG Trstenjak in Case C-338/06 *Commission of the European Communities v Kingdom of Spain* ECLI: EU:C:2008:463, para. 61. On the scope of EU principle of equal treatment see Giovanni Strampelli 'Rendering (Once More) the Financial Assistance Regime More Flexible' (2012) 9 *European Company and Financial Law Review* 530, 545–546.

[49] Case C-338/06 (n 47) para. 31.

[50] See Nicola De Luca, 'Unequal Treatment and Shareholders' Welfare Growth: "Fairness" v "Precise Equality"', (2009) 34 *Delaware Journal of Corporate Law* 853, 896.

[51] Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* ECLI: EU:C:2009:626. See Federico M Mucciarelli, 'Equal Treatment of Shareholders and European Union Law' (2010) 7 *European Company and Financial Law Review* 158.

a shareholder had obtained, directly and indirectly, the overwhelming majority of its company's shares. According to the claimant, a general principle of equality also applies in the horizontal relations among shareholders and also triggers a duty to share with other shareholders the control premium paid to purchase a company's control. Allegedly, such a principle was to be deducted from the principle of equal treatment entailed in the Second Directive (discussed above) and the Takeover Directive,[52] which explicitly introduced a duty to launch a takeover bid upon the purchase of a listed company' control (this directive was, however, not yet in force). The Court denied that from EU derivative law stems a principle of equal treatment binding shareholders in their mutual relationships. In particular, the Court also stressed that the duty of equality entailed in the Second Directive only applies within the scope of such a provision, namely in relation to increasing and reduction of a company's legal capital and could not be extended to the situations discussed in that specific case.[53] In this regard, the European Court of Justice was clear in holding that the duty of shareholders' equal treatment does 'not … possess the general, comprehensive character which is otherwise naturally inherent in general principles of law'.[54] Similarly, the duty to launch a takeover bid upon acquisition of a company's control entailed in the Takeover Directive, also applies to the specific situations falling within the scope of that legislative provision, 'so that no general principle with a specific content can be inferred from them'.[55]

What emerges from these decisions of the European Court of Justice is that the principle of shareholders' equal treatment only tackles the relationships between companies and their shareholders, while horizontal relationships among shareholders are excluded. Additionally, the Court held that shareholders' equal treatment is not a general principle of EU law and that, for this reason, it cannot be extended beyond the specific provisions referring to it.

These conclusions, however, seem at odds with other decisions of the CJEU which applied a general principle of non-discrimination to national labour law. In particular, in the *Mangold* decision, the Court held that the principle of non-discrimination on the grounds of age, governed by the Employment Equality Framework Directive[56], 'must … be regarded as a general principle of Community law'.[57] It is interesting to note that the time for implementing

[52] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12, Art. 5.
[53] *Audiolux* (n 51) para. 37.
[54] ibid para. 42.
[55] ibid para. 50.
[56] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[57] Case C-144/04 *Werner Mangold v Rüdiger Helm*ECLI: EU:C:2005:709.

this directive had not yet expired, hence the decision was based upon the assumption that the principle of non-discrimination is a general principle. Similarly, in the *Kücükdeveci* decision, the Court held that a statutory rule that distinguished employees on the ground of their age violated the general principle of non-discrimination.[58] Interestingly, the CJEU also based its decision upon Article 21 of the Charter of Fundamental Rights of the European Union that bans any discrimination among citizens.[59] These decisions, therefore, isolate a general principle of non-discrimination and apply this principle to relationships between private parties (employers and employees).[60]

The decisions *Commission v Spain* and *Audiolux,* on shareholders' equal treatment, at first glance, are not coherent with the logic underlying *Mangold* and *Kücükdeveci,* on workers' discrimination based on age. This idiosyncrasy might be explained as a consequence of the different position of shareholders, on the one hand, and workers, on the other hand, in relation to the business. The shareholders' position derives from their investment in a specific commodity, that is to say, a company's shares; hence, they have a financial interest in the business, and their investment could be diversified. Labour, by contrast, can be hardly described as a commodity: employers are embedded in the business activity and make firm-specific labour investments that involve the whole of their personalities and skills.[61] Hence, it is reasonable to argue that the general principle of equality applies to the employer–employees' relationship, while intra-corporate relationships are only regulated by specific duties and rules entailed in company law regimes, not by general principles having a 'constitutional' nature.

III. The search for a common core of insolvency law across Member States

[58] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.* ECLI:EU:C:2010:21.

[59] ibid para. 22. Art. 21 Charter of Fundamental Rights of the European Union: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

[60] It is, however, unclear whether the principles of the Charter, including the duty of non-discrimination, also apply on topics not governed by any implementing directive, such as the Employment Equality Framework Directive. Stephen Weatherhill, *The Internal Market as a Legal Concept* (OUP 2017) 203.

[61] See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2001) 76: the capacity to work 'cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar commodity'. See also the declaration of Philadelphia on the aims and purposes of the International Labour Organization, 26th session, 10 May 1944, Art. 1(a).

Turning our attention from company law to rules on firms' insolvency, we discover a much more unclear situation. Member States seem to be zealous of retaining governing powers over insolvency and workout procedures, probably because these rules are strictly intertwined with national social security mechanisms and depend on political choices and values very close to the core of national sovereignty.[62] Only recently has the European Union approved a harmonising measure related to companies' distress, which however only governs workout and restructuring frameworks, while the general insolvency proceedings, including the very notion of 'insolvency', is entirely left to Member States' rules.

It is to be stressed that the primary purpose of all proceedings that govern debtors' insolvency is to limit creditors' collective action problems, with the aim of efficiently and reasonably manage the crisis.[63] Since assets of an insolvent debtor are not sufficient to repay all its debts, insolvency regimes affect the distribution of such assets among corporate stakeholders (shareholders, creditors, employees).

In general, most insolvency regimes respect pre-insolvency entitlements privately negotiated by the debtor and its creditors (*par condicio creditorum*). In particular, secured creditors usually rank in priority over unsecured creditors, while each unsecured creditor ranks equally with other unsecured creditors. Since most jurisdictions follow this fundamental policy, the *par condicio creditorum* might be considered a general principle of insolvency law.

However, if we look deeper into Member States insolvency rules, it is easy to notice that national regimes often provide for an intricate web of creditor priorities, which do not respect the pre-insolvency entitlements deriving from bargains between private parties.[64] Such priorities protect specific classes of creditors, such as employees, certain contractual partners or the treasury. These exceptions to the *par condicio creditorum* largely vary across Member States and reflect underlying political options and values. An interesting example of the political relevance of statutory priorities is the protection of employees' claims for wages and contributions that their insolvent employer has not paid. In this regard, no common denominator exists across Member States: while in some countries (in particular, Austria and

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[62] John AE Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests' (2006) 10 *Michigan Law Review* 1899; Federico M Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and its Political Dimension' (2013) 14 *European Business Organization Law Review* 175; Jennifer Gant, 'Social Policy and the Reform of the European Insolvency Regulation', in Stefania Bariatti and Paul J Omar, *The Grand Project : Reform of the European Insolvency Regulation*, (INSOL Europe 2014) 125.

[63] Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986) 21–25; Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2019) 74–75.

[64] Jose M Garrido, 'The Distributional Question in Insolvency: Comparative Aspects' (1995) 4 *International Insolvency Review* 25, 31; Christoph Paulus, 'The Wonderful World of Privileges – The Par Condicio Creditorum vs Closeout-Netting' (2014) 11 *European Company and Financial Law Review* 531.

Germany) creditors' priorities have been completely repealed, in most jurisdictions employees' claims rank in priority over other claims, although the extension of such privileges varies across insolvency regimes.[65] In this complex scenario, the principle of *par condicio creditorum* can be considered as a common standard followed by most jurisdictions, yet its nature of a true general principle is questionable.

The reason for Member States' idiosyncrasies is that insolvency law is a highly sensitive subject, which depends on fundamental political choices, whose legitimacy is rooted in the relationship between citizens and the legislative bodies representing their interests. Insolvency regimes, therefore, at the present stage of integration among Member States, have deep national roots. Nevertheless, the European Commission has put forward specific actions that aim at facilitating the approximation of insolvency regimes across Member States, moving from the assumption that this purpose would benefit the creation of a single market.[66] First of all, the European Commission issued in 2014 a non-binding recommendation,[67] which designs fundamental principles of restructuring procedures that Member States are encouraged to implement into their domestic law. Eventually, as we have seen above, a directive harmonising restructuring and discharge procedures has been recently approved, mirroring the logic of the recommendation. In this regard, it is to be mentioned that over the last years the majority of Member States had already introduced pre-insolvency proceedings.[68] National proceedings, however, differ from each other, so that the directive itself is the outcome of compromises among Member States regarding many crucial issues. The cornerstone of the EU directive is that debtors in financial difficulty, but not yet insolvent, can avail themselves of restructuring and workout proceedings.[69]

Such procedures also have an impact on creditors' interests, as the competent national judicial or administrative authority should order a general stay of individual enforcement actions, although the final version of the directive has introduced a complex number of carve-outs and exceptions.[70] Interestingly, the directive does not address creditors' ranking and priorities, including those protecting secured debts, which fall entirely within Member States'

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[65] See Federico M Mucciarelli, 'Employee Insolvency Priorities and Employment Protection in France, Germany, and the United Kingdom' (2017) 44 *Journal of Law & Society* 255.
[66] Commission, 'Capital Markets Union Action Plan' COM (2014) 1500 final, 24 – 25; Green Paper, 'Building a Capital Markets Union' COM (2015) 63 final.
[67] European Commission, 'Recommendation 12 March 2014 on a new approach to business failure and insolvency', COM (2014) 1500 final.
[68] Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer (eds), *European Insolvency Law. Heidelberg - Luxembourg - Vienna Report* (Beck 2013) 43.
[69] Directive on restructuring and insolvency (n 6) Arts 1(1)(a) and 4.
[70] Ibid Arts 6 and 7.

competence. Eventually, it is to be noted that both notions of 'insolvency' and 'likelihood of insolvency' should be defined by national laws; hence, the fundamental notions upon which the whole directive is based are not common definitions of EU law,[71] which risks generating conflicts of jurisdiction and loopholes.[72]

IV. Conclusions

Companies, as the European Court of Justice has stressed, are a product of national law. The creation of a legal entity separate from their members requires the intervention of the law and is a decision stemming from state sovereignty. Although the EU has enacted several harmonising directives, differences across Member States persist. Nevertheless, as seen above, Member States' company law regimes share a core of fundamental features: shareholders are not liable for the company's debts; companies have a separate legal personality; and the capital investment is commodified through the vehicle of freely disposable shares.

Beyond these fundamental features, it is more uncertain whether other general principles, having legal relevance, exist throughout the EU. By looking at national company law regimes and EU harmonising directives, this work has isolated two principles that might be classified as general principles. The first is the principle of unrestricted powers of directors to act on behalf of the company: this principle is based upon the German tradition and has been extended to public companies of all Member States by the First Company law Directive of 1968. This principle is sufficiently general, common, and fundamental to be classified as a general principle of EU company law. Secondly, we have addressed the duty of equal treatment of shareholders who are in the same condition. This is a general duty that all companies' bodies should respect when they make decisions that affect shareholders. However, this is not a rigid equality rule, as differentiated treatment might still be justified in the interest of the company. In particular, the European Court of Justice has explicitly denied that this duty has the status of a general principle of EU law, with the consequence that it only applies within the scope of the specific provisions entailing a rule of equal treatment. As discussed in the preceding

[71] ibid Art. 2(2). This solution was also the product of a political compromise: see 2016/0359 (COD), Brussels, 16 March 2018 (OR. en) 7150/18, Art. 2(2)

[72] Horst Eidenmüller, 'Contracting for a European Insolvency Regime' (2017) 18 *European Business Organization Law Review* 273, 279; Michael Heese, 'Die Funktion des Insolvenzrechts im Wettbewerb der Rechtsordnungen' (2018) 73 *Juristen-Zeitung* 179, 186.

sections, this statement is at odds with other decisions of the Court, and yet this trait might be grounded on the peculiar nature of shareholders' investment.

Concerning insolvency law, by contrast, it is much more controversial whether general principles exist within the EU legal order. Insolvency proceedings are country-specific, as most of their rules have a re-distributive impact on a broad range of stakeholders of the company, such as employees, creditors, and customers. Therefore, insolvency regimes are strictly related to political balances and national social security policies. To some extent, the only common denominator of Member States insolvency regimes seems to be the duty to treat creditors equally and respect pre-insolvency entitlement and creditor ranking. Nevertheless, there is also an intricate web of exceptions to this principle, which vary broadly across jurisdictions and aim at protecting specific classes of creditors. The situation, therefore, is still in flux and does not seem to be yet settled for us to firmly distil specific general principles of EU insolvency law.

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