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Feb. 4th 2005

Title of the presentation:

*‘Harmonization of Creditor Protection in the European Union –
Case Study on the example of the Second Company Law Directive’*

within the research project:

‘Community or National Corporate Law for Europe?’

Abstract:

Company Law has long assumed a prominent position in the agenda of the European legislator. The very first regulatory measure in the field of the entire private law was the enactment of the First Company Law Directive back in 1968. Less than decade later the Second Company Law Directive, the so called Capital Directive entered into force. Both directives date from the times when the approach of European legislator was dominated by the idea of total harmonization. The harmonization’s spirit has subsequently weakened and the concept of centralized lawmaking has been increasingly questioned. Particularly the Second Company Law Directive regulating predominantly the financial structure of the public limited company has been exposed to criticism. The critical assessment by legal scholars resulted finally in the Directive being subject to critical analysis by international and national expert groups appointed respectively by the European Commission and national governments to come up with reform proposals. All the expert groups came

to the conclusion that the reform is already overdue. There is however no homogenous view as to the desirable extent of the reform. On the one hand the repeal of the entire legal capital system – the central feature of the directive – is being considered, on the other hand rather modest improvements to the current system are proposed. The European Commission has announced further studies as regards the feasibility and desirability of the switch to the American model based on solvency test and contractual rather than statutory creditor protection. The issue gains significance after the recent European Court of Justice's case law, enforcing the freedom of intra-community cross-border establishment and paving the way for regulatory competition among national company law systems. The statutory financial structure of the corporation and the flexibility in this respect is likely to be among the decisive factors as regards the incorporation decisions within particular jurisdictions.

The paper presents the issues of substantive law in broader legal, economic and historical perspective. This is necessary to understand the intersections and overlaps of company law and other fields of law, particularly insolvency law, securities regulations and accounting standards. It will be argued that in the era of regulatory competition for corporate charters the 'modularized approach' should be taken so as to assure that regulatory vacuum will not come about, which in the Community of different paradigms of national company laws would otherwise be likely to occur due to separate and different conflicts of law rules for corporate law and related fields of law. The study will also take into account the changes to the map of corporate Europe that resulted from the recent EU-enlargement. This on the one hand gives rise to the question of possible new alliances in European lawmaking process and on the other hand raises the special path dependence problem of these countries, i.e. the issue, whether the findings pertaining to the desirable statutory financial structure of the corporation are equally applicable to the post-socialist countries.

Keywords:

legal capital, capital formation, capital maintenance, regulatory competition, creditor protection, Second Company Law Directive, solvency test, limited liability, harmonization, regulatory competition, wrongful trading