THE YEAR IN REVIEW
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Europe

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This article updates select aspects of European Union (EU) corporate and financial law, including at the level of its Member States and of Switzerland. It also presents two decisions of the European Court of Human Rights affecting the twenty-eight EU Member States and the broader forty-seven-member Council of Europe.

I. European Union Corporate Law

A. EU Contract Law Development

During 2013, debate on European contract law harmonization began to focus on contracting for cloud-based services, out of concern that "[t]he existing regulatory environment of national contract laws might not be fit for cloud-based services."[1] Developments include (i) the European Commission's establishment of a working group to "assist the Commission in the identification of safe and fair contract terms and conditions for cloud computing services for consumers and small firms"[2] and (ii) European Parliament deliberation to recast a 2011 Commission proposal for a European Sales Law to focus on cloud-

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1. *Cloud Computing Contracts*, European Comm'n, http://ec.europa.eu/justice/contract/cloud-computing/index_en.htm (last updated July 16, 2013).

2. Commission Decision 174/04, of June 18, 2013 on Setting Up the Commission Expert Group on Cloud Computing Contracts, art. 2, 2013 O.J. (C 174) 7.

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based contracting.[3] The still-pending 2011 proposal contemplates a European Regulation to supplement the contract law of the various Member States with a uniform European Sales Law that contracting parties to cross-border transactions might elect.[4] The still-pending 2011 proposal extends beyond the 2008 Rome I Regulation, affording respect to parties' agreements on the choice of law to govern their contract;[5] consumer protection initiatives such as the Consumer Rights Directive;[6] and various discrete initiatives of harmonization relative to contracts, e.g., the directive on combating late payments relative to default interest rates.[7] The 2013 proposed focus on cloud-based services avoids the argument that the ratification of the Vienna Convention on the International Sale of Goods (CISG) by the European Union Member States other than Ireland, Malta, Portugal, and the United Kingdom[8] obviates much of the incentive for an optional uniform sales law, as cross-border sales of cloud-based services do not comprise the sale of goods regulated by the CISG. Further, the focus on cloud-based services would contemplate a mandatory, rather than an optional framework, thus achieving, at least as to the narrow category of contracting for cloud-based services, an aspiration of those who argue that the varying contract law of the Member States should be replaced in its entirety by a uniform body of European Union law.[9]

B. Efficiency in Cross Border Transactions

Following the European Commission's Communication *Europe 2020: A Strategy for Smart, Sustainable, and Inclusive Growth*,[10] the EU 2012 Action Plan on company law and corporate governance identified three priorities: (1) enhancing transparency, (2) engaging shareholders, and (3) supporting companies' growth.[11] Steps taken or to be taken include:

3. *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, at 12, COM (2011) 635 (Feb. 18, 2013), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/pr/927/927290/927290en.pdf; *see also Legal Affairs Committee*, European Parliament, http://www.europarl.europa.eu/committees/en/juri/subject-files.html?id=20121023CDT54280 (last visited Jan. 28, 2014) (concerning September 2013 scheduled vote of European Parliament Legal Affairs Committee vote on amendments to Commission 2011 proposal).

4. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market*, COM (2011) 636 final (Oct. 11, 2011).

5. Commission Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 3, 2008 O.J. (L 177) 10; *see also* Patrick Del Duca, Choosing the Language of Transnational Deals: Practicalities, Policy, and Law Reform 222–29 (2010).

6. Council Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, art. 1, 2011 O.J. (L 304) 72 (Nov. 22, 2011) (EU).

7. Council Directive 2011/7, of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions, art. 1, 2011 O.J. (L 48) 5 (February 23, 2011) (EU).

8. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

9. *See* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) (Christian von Bar et al. eds, 2009), *available at* http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

10. *See Communication from the Commission Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final (Mar. 3, 2010).

11. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan: European Company Law and Corporate Govern-*

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(1) *Transfer of corporate seat*. As the European Court of Justice asserted in its 2012 *Vale* decision,[12] beyond the contemplation of specific legislative instruments of European Law such as Directive 2005/56/EC providing for the merger of limited liability companies from different Member States,[13] the right of freedom of establishment contemplated by the European Treaties is directly applicable to allow a company to move its seat from one Member State to another. As a corollary, any legal provision by a Member State that would frustrate such right is inapplicable. The February 2012 Regner Report[14] declared that a corporate seat transfer should not circumvent national corporate, labor, and tax provisions,[15] and that the transfer should be tax neutral.[16] During the ensuing public consultations, stakeholders supported the proposal of new legislation, a Fourteenth Company Directive.[17] Public consultation concluded in April 2013, but the Commission did not take any actions while conducting a cost-benefit analysis.[18] The summary of the consultation has not yet been published.[19]

(2) *Improving the mechanism for cross-border mergers (CBM)*. The Commission is analyzing a study, not yet published,[20] on five years of application of Directive 2005/56[21] on cross-border mergers with reference to cross-border company mobility. The issue is whether to amend Directive 2005/56 or replace it with a so-called Tenth Company Directive.

(3) *Cross Border Divisions*. A company seeking to split itself into parts to be headquartered in separate Member States would typically undertake steps including creation

ance—A Model Legal Framework for More Engaged Shareholders and Sustainable Companies, COM (2012) 740 final (Dec. 12, 2012).

12. *See* Case C-378/10, Vale Építési kft, 2012 E.C.R. 00000 (July 20, 2012), *available at* http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-378/10&td=ALL#.

13. Council Directive 2005/56, of the European Parliament and of the Council of 26 October 2005 on Cross-Border Mergers of Limited Liability Companies, art. 1, 2005 O.J. (L 310) 3 (Nov. 25, 2005) (EC) [hereinafter Council Directive 2005/56].

14. *Report With Recommendations to the Commission on the 14th Company Law Directive on the Cross-Border Transfer of Company Seats (2011/2046 (INI))*, at 7 (Jan. 9, 2012) [hereinafter *Cross-Border Report*], *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0008+0+DOC+PDF+V0//EN; *see also Report 9 January 2012With Recommendations to the Commission on the 14th Company Law Directive on the Cross-Border Transfer of Company Seats (2011/2046 (INI))*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2012-8&language=EN] [hereinafter *Cross-Border Report*] (last updated Jan. 19, 2012).

15. *Cross-Border Report*, *supra* note 14.

16. *Id.*

17. *See Feedback Statement: Summary of Responses to the Public Consultation of the Future of European Company Law*, (July 2012), *available at* http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf.

18. *Consultation on the Cross-Border Transfers of Registered Offices of Companies: Consultation by DG Markt*, *available at* http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/docs/consultation-document_en.pdf.

19. *See Consultation on the Cross-Border Transfers of Registered Offices of Companies*, EUROPEAN COMMISSION, http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm (last visited Jan. 28, 2014).

20. Publication will be available on the European Commission website. *See DG Internal Market and Services*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/internal_market/studies/index_en.htm (last updated Dec. 31, 2013).

21. Council Directive 2005/56, *supra* note 13.

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of a new company, transfer of assets, transfer of seat, and a public consultation. The Commission may choose to propose a framework for such division as part of reform of the cross-border merger Directive.

(4) *Enhancement of European Company (SE) and European Cooperative (SCE) Charters*. The number of new European businesses under SE (Regulation 2157/2001)[22] and SCE (Regulation 1435/2003)[23] charters is encouraging. On July 1, 2013, there were 1865 SEs and approximately twenty-five SCEs.[24] The Commission has no current plans to amend these Regulations but rather seeks to educate entrepreneurs about their advantages.[25]

(5) *Management of Group of Companies*. During public consultation, stakeholders favored the introduction of a legislative framework aimed at improving group management in cross-border operations.[26] An EU proposal is anticipated to recognize an "Interest of the Group," intended as the possibility for a holding company to manage, supervise, and coordinate in the best interest of all the component parts of the group.[27] A second line of action advocated is European legislation to promote simplified communication to investors,[28] although the Commission has yet to take any action.

C. Securities Fraud and Whistleblowers

The European Union has continued its progress on: (1) unifying its securities regulatory framework and (2) protecting whistleblowers. A key foundation for the most recent progress in the securities area with respect to protection of whistleblowers is a 2011 ruling of the European Court for Human Rights in *Heinisch v. Germany*.[29]

On September 10, 2013, the European Parliament and the Council of the European Union came to a provisional agreement on Proposal for Regulation 2011/0295, which would replace Directive 2003/6/EC.[30] The Regulation seeks to give regulators sufficient information to deter and punish market abuse, manipulation, and insider dealing,[31] and

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22. Council Regulation 2157/2001, of 8 October 2001 on the Statute for a European Company (SE), 2001 O.J. (L 294) (Nov. 10, 2001) (EC).

23. Council Regulation 1435/2003, of 22 July 2003 on the Statute for a European Cooperative Society (SCE), 2003 O.J. (L 207) (Aug. 18, 2003) (EC).

24. *See Europages European business directory*, EUBusiness (Apr. 29, 2013) http://www.eubusiness.com/europages.

25. *See The European Company–Your business opportunity?*, European Comm'n, http://ec.europa.eu/internal_market/company/se/index_en.htm (last visited Mar. 30, 2014).

26. *See Modernisation of Company Law and Enhancement of Corporate Governance*, European Comm'n, http://ec.europa.eu/internal_market/company/modern/ (last visited Mar. 30, 2014).

27. *See id.*

28. *See id.*

29. Heinisch v. Germany, 2011 Eur. Ct. H.R. ¶ 45, 93-95 (holding that freedom of expression under the European Convention on Human Rights protects whistleblowing).

30. *Texts Adopted at the Sitting of Tuesday 10 September 2013*, at 416, COM (2013), (Sept. 10, 2013).

31. *Id.* at 419.

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would protect whistleblowers revealing securities fraud.[32] Because the European Parliament has approved the Regulation, the European Council is likely to make it law.[33]

The proposed Regulation would (1) protect whistleblowers from retaliation, (2) introduce an incentive system, and (3) strengthen the confidentiality of the reporting system.[34] Its Article 29, § 1 mandates Member States to institute "effective mechanisms," including processes that acknowledge complaints and provide follow-up, "appropriate" legal protections of whistleblowers, protection of personal data, and a right to due process.[35]

(1) *Retaliation*: The specifics of the protections against retaliation remain undrafted in 2013.[36]

(2) *Incentive System*: Article 29, § 2 proposes a financial incentive program that recommends, but does not require, Member States to provide financial incentives for eligible whistleblowers who offer new and "salient" information about "potential breaches," if the information leads to an imposition of administrative or criminal sanctions.[37] Unlike similar provisions in the U.S. Dodd-Frank Act,[38] there is no requirement of a minimum amount of legal or administrative sanctions,[39] "independent knowledge," or the element of good will.[40] In its October 2012 Committee Report, the Rapporteur of the Committee on Legal Affairs welcomed this optional provision and emphasized that the Regulation should balance encouraging and protecting whistleblowers with consideration for legal traditions in Europe.[41]

Confidentiality: The Regulation also would protect the secrecy of "any confidential information received, exchanged, or transmitted pursuant to this Regulation."[42] Authorities must comply with the framework of the Data Privacy Regulation, which further protects the personal information of the communicant.[43] The information shall, at most, be deleted after five years.[44]

32. *Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)*, COM (2011) 651 final (Oct. 20, 2011) [hereinafter *Proposal*].

33. *See* Legislative Powers, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/aboutparliament/en/0081f4b3c7/Law-making-procedures-in-detail.html (last visited Jan. 28, 2014).

34. *Proposal*, *supra* note 32, at § 3.4.5.2.

35. *Id.* art. 29.

36. On October 22, 2012, the European Parliament amended the proposal to contemplate a whistleblower's anonymity. Proposal, *supra* note 32, art. 29. The Parliament also applied these rights against private employers. *Id.* art. 29(1)(d). Previously, the Regulation had required only "adequate measures." *Id.* art. 36. It also required "appropriate protections" to protect whistleblowers from retaliation. *Id.* art. 29(1)(b).

37. Proposal, *supra* note 32, art. 29(1)(2).

38. Dodd-Frank Act § 922(h)(1)(A), 15 U.S.C. § 78u-6 (2012).

39. *Id.* § 21F(a)(1); *see also* Thomas C.R. Reynolds, *Securing Protections for Whistleblowers of Securities Fraud in the United States and the European Union*, 13 Chi.-Kent J. Int'l & Comp. L. 201, 210 (2013).

40. *Contra* 17 C.F.R. § 240.21F(a)(3) (2013).

41. *Report on the proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)*, A7-0347/2012 (Oct. 22, 2012).

42. Proposal, *supra* note 32, art. 21.

43. *Id.* art. 22.

44. *Id.*; *see also* Thomas C.R. Reynolds, *supra* note 39.

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D. Market Abuse

The first Market Abuse Directive (MAD)[45] established a general framework that Member States were to transpose into national law to help strengthen investor confidence in EU financial markets by providing sanctions against market abuse (i.e., insider trading and market manipulation). Under the MAD, Member States were to maintain an effective administrative oversight of financial markets capable of identifying authors of operations affecting the integrity of the market and of imposing sanctions.[46]

An assessment carried out by the European Commission stressed discrepancies in the implementation of the MAD by Member States including in the definitions of offenses and sanctions, and in difficulties encountered by enforcement authorities.[47] This assessment, together with the subprime and subsequent sovereign debt and liquidity crises, has led to proposals for a new MAD and a Regulation on market abuse.

To provide a brief background, in October 2011, the European Commission proposed a Directive and a Regulation on market abuse to harmonize and update the rules in force in Member States.[48] In July 2012, following the revelations concerning LIBOR manipulations, the European Commission amended the proposals to extend market abuse to the manipulation or attempted manipulation of benchmarks.[49] In December 2012, the European Union Ministers of Justice approved the Commission's proposal to provide sanctions of benchmark manipulations.[50]

In September 2013, the European Parliament ratified the agreement concerning the Regulation on insider dealing and market manipulation. The proposal for a Directive to deal with criminal sanctions has been agreed in principle by the Council, and discussions between the Parliament and the Member States on the issue should commence in October 2013.[51] Adoption of the regulation will occur when a political agreement is reached on the Markets in Financial Instrument Directive II,[52] which presents a series of measures to

45. Council Directive 2003/6/EC, of the European Parliament and of the Council of January 28, 2003 on insider dealing and market manipulation (market abuse), art. 12, 2003 O.J. (L 96/16) (EC).

46. *Id.* arts. 38-39.

47. *See* Commission Staff Working Paper Executive Summary of Impact Assessment, SEC (2011) 1227 final (Oct. 20, 2011), *available at* http://ec.europa.eu/internal_market/securities/docs/isd/mifid/SEC_2011_1227_en.pdf.

48. Proposal, *supra* note 32.

49. Press Release, European Commission, Libor Scandal: Commission proposes EU-wide action to fight rate-fixing (July 25, 2012), *available at* http://ec.europa.eu/internal_market/securities/docs/abuse/SEC_2011_1218_en.pdf.

50. Memorandum from the European Commission, Libor Scandal: Commission proposes EU-wide action to fight rate-fixing (July 25, 2012), *available at* http://europa.eu/rapid/press-release_MEMO-12-963_en.htm?locale=en.

51. Press Release, European Parliament, Tougher sanctions for financial markets manipulation (Oct. 9, 2013), *available at* http://www.europarl.europa.eu/news/en/news-room/content/20130906IPR18863/html/Tougher-sanctions-for-financial-markets-manipulation.

52. Memorandum from the European Commission, Statement by Commissioner Michel Barnier on the endorsement by European Parliament of the political agreement on new European rules for market abuse (Sep. 10, 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-773_en.htm?locale=en.

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address the issues highlighted by the financial crisis, including improving investor protection and G20 commitments.[53]

On October 10, 2013, the Commission turned to the European Securities and Market Authority (ESMA) for "advice on possible delegated acts concerning the regulation on insider dealing and market manipulation."[54]

II. European Union Financial Law

A. Swiss Public Company Transparency

During 2013, milestones in Swiss corporate governance reform towards transparency included:

(1) the Swiss Business Federation's publication of its Swiss Code of Best Practice for Corporate Governance for public and private companies;[55]

(2) the 2008 adoption by the SIX Swiss Exchange of its Directive Corporate Governance requiring public company disclosure concerning the board of directors and senior management;[56] and

(3) the political debates on amending the Swiss Code of Obligations to increase transparency in accounting and compensation.[57]

The March 3, 2013 amendment, pursuant to the 68 percent referendum vote on the so-called *Fat Cat Initiative*,[58] adds Article 95(3)[59] to Switzerland's federal constitution and represents a new high watermark with respect to transparency. Article 95(3) seeks to limit excessive executive salaries by subjecting executive compensation to shareholder approval. The amendment applies solely to Swiss public companies; companies incorporated in Switzerland and listed either on the Swiss or a foreign stock exchange.[60] The Federal Office of Justice accordingly prepared a preliminary draft of the Interim Ordinance

53. *Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council*, COM (2011) 656 final (Oct. 20, 2011).

54. ESMA, *Request to ESMA for technical advice on possible delegated acts concerning the regulation on insider dealing and market manipulation*, Oct. 10, 2013, *available at* http://www.esma.europa.eu/system/files/esma_ssr_review_mandate_20121012.pdf.

55. *See* Karl Hofstetter, Corporate Governance in Switzerland (2002), *available at* www.economiesuisse.ch/de/PDF%20Download%20Files/Studie_CorpLaw_20020701_e.pdf.

56. *Corporate Governance*, SIX Exchange Regulation, http://www.six-exchange-regulation.com/obligations/governance_en.html (last visited Jan. 11, 2014).

57. *See* Obligationenrecht [OR] [Code of Obligations] March 30, 1911, art. 663bbis (art. 663b), art. 961(a) (Switz.).

58. Sometimes referred to as the "Minder Initiative." Sonia Fenazzi, *Voters Solicited Over Executive Pay*, swissinfo.ch (Jan. 8, 2013, 11:00), http://www.swissinfo.ch/eng/swiss_news/Voters_solicited_over_executive_pay.html?cid=34665044; Chantal Britt, *Minder Vote Sends Clear Signal to Executives*, swissinfo.ch (March 4, 2013, 11:23), http://www.swissinfo.ch/eng/business/Minder_vote_sends_clear_signal_to_executives.html?cid=35132460; Medienmitteilungen, Der Bundesrat, Abzocker Initiative wird rasch umgesetzt (March 26, 2013) [Press Release, Rip-Off Initiative to Be Implemented Rapidly], *available at* www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2013/2013-03-261.html.

59. Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 95 (Switz.).

60. *Id.* art. 95(3).

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against Excessive Remuneration (VgdA).[61] The VgdA closely tracks the Fat Cat Initiative, but also takes into account existing corporate law. On November 20, 2013, the Federal Office of Justice adopted the final version of VgdA, now called VegüV.[62] Effective January 1, 2014, it will mandate Swiss public companies to comply as follows:

(1) Such companies must conform their executive compensation agreements within one year, and revise their charter documents within two years. Shareholder general meetings for business year 2014 must implement the executive compensation measures.[63]

(2) The shareholder general meeting must annually and individually elect the members of the board of directors, including the chair, and of the compensation committee. Terms of office are accordingly limited to run until the next shareholder general meeting, although re-election is allowed. Pension fund representatives must vote in the interest of their beneficiaries. Abstention is admissible, if it is in the interest of beneficiaries. Proxy voting for deposited shares and voting rights for organizations are eliminated.[64]

(3) Aggregate executive board, advisory board, and management compensation must be approved annually by the shareholder general meeting. Specifically, the meeting must approve a remuneration report provided by the board of directors specifying compensation to the board of directors, advisory board, and management, as well as loans or credit lines extended to them or closely-related parties.[65]

(4) Severance payments, pre-payments, and commissions for takeover or divestiture of companies are prohibited, as is performance-related compensation not contemplated by the corporate charter. Corporate charter contemplation of compensation to executive board members and third parties as well as of incentive and pension arrangements for board directors and executives is a prerequisite to their validity. But the absolute amounts of board or executive pay remain unregulated.[66] Premium payments for commencement of work remain permissible. In contrast to pre-payments, it constitutes compensation to executive board members for the loss of claims towards their former employer.[67]

The VegüV contemplates penalties of up to three years of imprisonment and fines of six years of annual compensation for board of directors, executive board, and advisory board members who infringe its provisions, notably by intentional receipt or payment of compensation unpermitted or without shareholder general meeting approval.[68]

61. VERORDNUNG GEGEN DIE ABZOCKEREI [VGDA], [REGULATION AGAINST THE RIP-OFF] Nov. 22, 2013 (Switz.).

62. Medienmitteilungen, Der Bundesrat, Umsetzung der Abzocker-Initiative: Verordnung tritt am 1. January 2014 in Kraft (Nov. 20, 2013) [Press Release, Implementation of the Rip-Off Initiative: Regulation Enters into Force on January 1, 2013], *available at* www.ejpd.admin.ch/content/ejpd/de/home/dokumentation/mi/2013/2013-11-20.html.

63. VGDA, *supra* note 61, art. 27.

64. *Id.* arts. 3, 7, 11, 18, 22, 27.

65. *Id.* art. 13.

66. *Id.* art. 12(2), 20, 21.

67. ENTWURF ZUR VERORDNUNG GEGEN UBERMASSIGE VERGU [VEGUV] [REGULATION AGAINST EXCESSIVE COMPENSATION] Oct. 8, 2013 (Switz.), *available at* http://www.ejpd.admin.ch/content/dam/data/wirtschaft/gesetzgebung/aktienrechtsrevision/voabzockerei/erl-vo-d.pdf.

68. *Id.* art. 24f.

Subsequently, on November 23 and 24, 2013, a referendum to limit the highest salary in any enterprise to an amount equaling twelve times the lowest salary (the 1:12 referendum) was rejected by approximately a two-thirds majority of the voters.[69]

B. Danish Corporate Governance

In May 2013, Denmark's Committee on Corporate Governance published its revised recommendations on corporate governance.[70] The recommendations are "simplified without relaxing corporate governance requirements," reduced from seventy-nine to forty-seven, "and are divided into five categories."[71] The categories on compensation and financial reporting were left unchanged. The following categories are significantly revised:

(1) *The company's communication and interaction with its investors and other stakeholders*: Under the new recommendations, the company is to encourage shareholder exercise of ownership and shareholder confidence through transparency and openness.[72] The company is to "ensure an ongoing dialogue between the company and its shareholders," specifically with respect to shareholder familiarity concerning the company's prospects and policies and board awareness of shareholder views.[73] The dialogue "may be summarized in an investor relations strategy," identifying the type of information to be communicated between the company and its shareholders and when, how, and to whom it is to be communicated.[74] The company should identify the types of investors it seeks to attract in its investor relations strategy.

(2) *Tasks and responsibilities of the board of directors*: The Committee's recommendations focus the board's role on value creation and strategy.[75] The board of directors should allot time "to discuss the company's overall strategic goals and value creation." The strategy discussions should result in a value creation plan to prompt a discussion about the response of the company's strategy to its short- and long-term opportunities and challenges.

(3) *Composition and organization of the board of directors*: The board of directors is tasked with the responsibility of ensuring value creation in the company through its management. The Committee recommends that the board of directors be assembled "so as to ensure effective performance of its tasks in a constructive and qualified dialogue with the executive board."[76] The board nomination process should be "thoroughly transparent," while still taking into account the need for incorporating new talent and diverse backgrounds in the board's composition. The Committee

69. *See* Vorlage Nr. 575 [Bill No. 575], Volksinitiative 1:12 [Initiative 1:12] Nov. 24, 2013 (Switz.), *available at* http://www.admin.ch/ch/d/pore/va/20131124/det575.html.

70. Comm. on Corporate Governance, Recommendations on Corporate Governance (May 2013), *available at* http://corporategovernance.dk/file/371640/commitee_on_corporate_governance_recommendations_on_corporate_governance.pdf.

71. *Recommendations on Corporate Governance*, Corporate Governance, http://corporategovernance.dk/english (last visited Jan. 11, 2014).

72. Comm. On Corporate Governance, *supra* note 70, at 9.

73. *Id.*

74. *Id.*

75. *Id.* at 11.

76. *Id.* at 15.

newly recommends that the board of directors establish an appropriate procedure for its own members' annual evaluations.[77] Previously, the board's chair was to have presided the evaluation.[78] The evaluation should include an assessment of the board's "composition, work and results"; need for and benefits of a committee structure; organization of the board's work; and the quality of the material employed by the board.[79] Material changes deriving from an evaluation should appear in the annual report's management commentary, referenced on the company's website.[80] The Committee recommends the appointment of audit, nomination, and remuneration committees, as well as temporary *ad hoc* committees as needed.[81]

Listed companies will need to report implementation of the new recommendation with the 2013 annual report, as part of the management commentary linked to their website.[82] Listed companies must "comply-or-explain."[83]

For non-listed companies, the recommendations provide guidelines that are designed to contribute to a company's long-term success through value creation and accountable management.[84] These non-listed companies are not, however, bound by the recommendations, and no explanation is required should they choose not to comply.[85]

C. Financial Transactions Tax

The Financial Transactions Tax (FTT) would be levied on all transactions on financial instruments between financial institutions when at least one party to the transaction is located in the EU.[86] The FTT originates from a European Commission proposal to introduce such a tax "to "mak[e] the financial sector pay its fair share."[87] As several Member States already impose a form of such a tax, the proposal would in effect introduce new minimum tax rates and harmonize different existing taxes on financial transactions in the EU.[88] The European Commission welcomed the European Parliament's vote in favor of

77. *Id.* at 21.

78. Comm. on Corporate Governance, Recommendations on Corporate Governance 15 (Aug. 2011), *available at* http://corporategovernance.dk/file/291825/committee_recommendations_august_2011.pdf.

79. Comm. On Corporate Governance, *supra* note 70, at 21.

80. *Id.*

81. *Id.* at 19–21.

82. *See* NASDAQ OMX Copenhagen A/S, *Rules for Issuers of Shares* (Jan. 6, 2013), http://www.nasdaqomx.com/digitalAssets/85/85436_rulesforissuersofshares-final06052013clean.pdf.

83. Comm. On Corporate Governance, *supra* note 70, at 6.

84. *Id.* at 3.

85. *Id.* at 5.

86. *European Union financial transaction tax*, Wikipedia, http://en.wikipedia.org/wiki/European_Union_financial_transaction_tax (last visited Mar. 29, 2014).

87. Press Release, European Comm'n, Financial Transaction Tax: Making the Financial Sector Pay Its Fair Share (Sept. 28, 2011), *available at* http://europa.eu/rapid/press-release_IP-11-1085_en.htm?locale=en.

88. *European Union financial transaction tax*, Wikipedia, http://en.wikipedia.org/wiki/European_Union_financial_transaction_tax (last visited Mar. 29, 2014).

the FTT proposal.[89] But the European Commission has postponed the target FTT introduction date from January 2014 to mid-2014.[90]

The European Central Bank (ECB) has entered the debate on the proposed FTT.[91] The ECB's stated concern is that the cost of the FTT on iterative short-term repurchase agreements might deprive central banks of a useful policy instrument and increase the cost of sovereign borrowing. In April 2013 the European Commission asserted the concern to be unfounded, however.[92] Benoit Coeuré, an ECB executive board member, has said that the bank is willing to "engage constructively with governments and the European Commission to ensure that the tax has no negative impact on financial stability."[93]

D. EU Budgetary Regulation Update

The current Regulation on the EU budgetary process, effective January 1, 2013,[94] appears to meet stakeholder needs. The 2014-2020 Multiannual Financial Framework (MFF),[95] laying out EU expenditure programs, is grounded on the budgetary Regulation.[96]

In its efforts to modernize financial procedures, the EU's current Regulation prioritizes:

simplification: cutting red tape, expediting procedures, and shifting the focus from paperwork to performance;

accountability: ensuring enhanced financial management and protection of the EU's financial interests; and

innovation: introducing financial mechanisms to enable mobilization of third-party funds as leverage for EU funds.

Implementing devices include: shorter payment deadlines, lighter administrative requirements for a larger group of low-value grants, simplification and flexibility in grant rules, greater Member State responsibility for management of EU funds, adjusted provi-

89. Press Release, European Comm'n, Commissioner Šemeta Welcomes European Parliament's Strong Support for the Financial Transactions Tax (May 23, 2012), *available at* http://europa.eu/rapid/press-release_MEMO-12-375_en.htm?locale=en.

90. Taxation and Customs Union, *Taxation of the Financial Sector*, European Comm'n, http://ec.europa.eu/taxation_customs/taxation/other_taxes/financial_sector/index_en.htm (last updated Jan. 3, 2014).

91. Ralph Atkins, *ECB Offers to Help Rethink EU Plans on 'Robin Hood Tax,'* The Fin. Times, May 26, 2013, http://www.ft.com/cms/s/0/c3121802-c480-11e2-9ac0-00144feab7de.html#axzz2qDyN1bOh.

92. European Comm'n, FTT – Non-Technical Answers to Some Questions on Core Features and Potential Effects, *available at* http://ec.europa.eu/taxation_customs/resources/documents/taxation/other_taxes/financial_sector/faq_en.pdf (last visited Jan. 12, 2014); European Comm'n, How the FTT Works in Specific Cases and Other Questions and Answers 36, *available at* http://ec.europa.eu/taxation_customs/resources/documents/taxation/other_taxes/financial_sector/ftt_examples.pdf (last visited Jan. 12, 2014).

93. Atkins, *supra* note 91.

94. 2012 O.J. (L 298) 1, 16.

95. *Proposal for the 2014-2020 Multiannual Financial Framework*, COM (2011), *available at* http://ec.europa.eu/budget/library/biblio/publications/2011/mff2011/KV3112884ENN-web.pdf (last visited Jan. 12, 2014).

96. *Id.* at 3 ("The ([MFF], formerly 'financial perspectives') is not the budget of the EU for seven years. It is a mechanism for ensuring that EU spending is predictable and at the same time subject to strict budgetary discipline. It defines the maximum amounts ('ceilings') available for each major spending area ('heading') of the Union's budget. Within that framework, the European Parliament and the Council, which are the 'budgetary authority' of the Union, have to agree each year on the budget for the subsequent year."). *Id.*

sions on conflict of interests and whistle-blowing, parity for EU and Member State claims in bankruptcy proceedings, public-private partnership enhancements, and new tools for EU trust funds.[97]

Pursuant to Article 312 of the Treaty on the Functioning of the European Union (TFEU),[98] the MFF sets out, in relation to each major area of EU spending, the appropriations ceiling for the 2014-2020 period.

The EU's "own resources" are collected by or through Member States.[99] Pursuant to Article 311 of the TFEU, unanimous Council decision, following consultation of the European Parliament, establishes the nature of, and cap on, the EU's "own resources" for the same time period covered by the MFF.[100]

In July 2012, the European Commission proposed for the 2014-2020 period a maximum budget of _1033 million in commitment appropriations and of _987 million in payment appropriations.[101] In February 2013, a European Council agreement contemplated a lesser maximum budget for the period of _959.988 million in commitment appropriations and _908.4 billion in payment appropriations.[102] The budget for the 2007–2013 period was _975.8 billion in commitment appropriations, and _925.6 billion in payment appropriations, corresponding to 1.06 percent of the EU GNI.[103] Relative to the Commission's proposal, the Council's cuts concentrated on agricultural and cohesion policies. The amounts proposed for the "Connecting Europe" initiative to finance energy infrastructure, digital networks, and transport, fell from the _50 million proposed by the European Commission to _29.3 million.[104] On November 19, 2013, the European Parliament voted in favor of the MFF for 2014 to 2020.[105]

III. European Court of Human Rights

A. Presidential Dignity and Free Speech

On March 14, 2013, in *Eon v. France*,[106] the European Court of Human Rights (ECHR) held that France had violated Article 10 of the European Convention of Human Rights[107]

97. *Id.*
98. Consolidated Version of the Treaty on the Functioning of the European Union art. 312, March 30, 2010, 2010 O.J. (C 83) 47, 182 [hereinafter TFEU].
99. European Comm'n, Public Finance 305 (4th ed. 2008), *available at* http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf#page=233.
100. *See* TFEU, *supra* note 98, art. 311.
101. *Amended Proposal for a Council Regulation Laying Down the Multiannual Financial Framework for the Years 2014-2020*, at 16, COM (2012) 388 final (July 6, 2012).
102. Council Conclusions 37/13, Multiannual Financial Framework, art. 6 (Feb. 8, 2013), *available at* http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2037%202013%20INIT&r=Http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F13%2Fst00%2Fst00037.en13.pdf.
103. European Comm'n, *Financial Framework 2007-2013* (Mar. 19, 2013), http://ec.europa.eu/budget/figures/fin_fwk0713/fwk0713_en.cfm#cf07_13
104. Council Conclusions 37/13, *supra* note 102, art 17.
105. Press Release, European Comm'n, One Trillion Euro to Invest in Europe's Future—the EU's Budget Framework 2014-2020 (Nov. 19, 2013), *available at* http://europa.eu/rapid/press-release_IP-13-1096_en.htm.
106. Eon v. France, App. No. 26118/10 ¶ 13 (Eur. Ct. H.R. Mar. 14, 2013), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-117742#{"itemid":["001-117742"]}.
107. European Court of Human Rights, *European Convention on Human Rights*, art. 10 (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

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protecting the right to freedom of expression. Hervé Eon had been arrested as he was holding a placard which read "*casse toi pov' con*" ("Get lost, you sad prick," as translated by the Court), alluding to an insult uttered by Nicolas Sarkozy, then the President of France, at a man who had refused to shake hands with him. Mr. Eon was found guilty of having offended the President of the Republic, a criminal offense under the July 29, 1881, French Press law[108] and sentenced to a _30 fine. The Court of Appeals confirmed the judgment. The French Civil Supreme Court, the *Cour de cassation*, declined to review the case.[109]

Mr. Eon then filed a complaint with the ECHR, arguing a violation of his right to freedom of expression as protected by Article 10 of the European Convention on Human Rights.[110] Article 10 allows a public authority to interfere with freedom of expression, but only if such interference is prescribed by law, is necessary in a democratic society, and pursues one of the legitimate goals enumerated by Article 10(2), among them the protection of the reputation of others.[111]

The European Court of Human Rights found that fining Mr. Eon was an intrusion on his freedom of speech.[112] The intrusion on freedom of speech was established by statute, Article 26 of the French Press Law that incriminates insulting the head of State, *offense au chef de l'État*. The ECHR found that the legitimate interest protected was the reputation of the President, not public order.[113]

Under the ECHR's case law, the intrusion must be "relevant and sufficient" and the issue must be "proportionate to the legitimate aim pursued."[114] The ECHR noted that Mr. Eon's actions did not target the President's "private life or honour."[115] Instead, the plaintiff had the intent "to level public criticism of a political nature at the head of State."[116]

Therefore, sentencing Mr. Eon constituted a restriction to freedom of speech in the field of political debate, "where freedom of expression is of the utmost importance."[117] The ECHR did not go as far as to state that Article 26 is contrary to the European Convention on Human Rights, which would have obliged France to abrogate it. Nevertheless it was abrogated on August 5, 2013.[118]

108. Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on Freedom of the Press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 30, 1881, p. 4201.
109. *Eon v. France*, No. 26118/10 ¶ 13.
110. *Id.* ¶ 1.
111. *Id.* ¶ 47 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . . 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . or the protection of the reputation or rights of others . . . .").
112. *Id.* ¶ 47.
113. *Id.* ¶ 49.
114. *See, e.g.*, Lindon, Otchakovsky-Laurens, and July v. France, App. Nos. 21279/02 and 36448/02 (Eur. Ct. H.R. Oct. 22, 2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82846#{"itemid":["001-82846"]}.
115. *Eon v. France*, No. 26118/10 ¶ 57.
116. *Id.* ¶ 58.
117. *Id.* ¶ 59.
118. Loi 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France [Law 2013-711of August 5, 2013 adapting various provisions in the field of justice under the law of the European Union and

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B. Christianity, Sexual Orientation, and Wearing Religious Symbols

The ECHR recently decided *Eweida and Others v. The United Kingdom*,[119] upholding anti-discrimination rules in the workplace in a case involving four applicants.

The first applicant, Ms. Eweida, a British Airways employee, desired to wear her cross in a visible way rather than under her uniform. The Court was clear that Ms. Eweida's manifestation of her religious belief is a fundamental right[120] and that there was no real encroachment on the interests of others.

In the next case, Ms. Chaplin, a nurse, had been advised by her employer her that protection of health and safety in a ward was incompatible with allowing her to wear her chain and cross, in case a patient seized it or it fell into a wound. The Court decided "interference with [Ms. Chaplin's] freedom to manifest her religion was necessary in a democratic society."[121]

Another applicant, Ms. Ladele, was a registrar who believed same-sex unions were contrary to God's will and that it would be wrong for her to participate in them. The Court had some sympathy for Ms. Ladele in that when she first became a registrar, civil partnerships did not exist. It was evident though that her employer, the London Borough of Islington, was committed to promoting an equal opportunities policy that protected all employees and the public who used its services, including those who wanted civil partnerships. The Court acknowledged that the consequence for Ms. Ladele of losing her job was serious, but the Borough's aim was to secure the rights of others who were also protected under the Convention.[122] The Court referred to existing case law[123] that held that "differences in treatment based on sexual orientation require particularly serious reasons by way of justification" Using wording that makes it clear that a different outcome to Ms. Ladele's complaints against her employer and the British Courts may have been acceptable to the Court as well, the Court emphasized that it generally allows a wide margin of appreciation when it comes to striking a balance between competing Convention rights. The Court concluded that Islington Council and the various British courts that rejected her discrimination claims did not exceed the wide "margin of appreciation available to them."[124]

France's international commitments] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 6, 2013, p. 13338.

119. *See* Case of Eweida and Others v. the United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10 (Eur. Ct. H.R. Jan. 15, 2013), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115881#{"itemid":["001-115881"]}.

120. *Id.* ¶ 94.

121. *Id.* ¶ 100.

122. European Court of Human Rights, *European Convention on Human Rights*, art. 34 (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

123. *Case of Eweida and Others v. United Kingdom* App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10 ¶ 105 (citing Karner v. Austria, App. No. 40016/98 ¶ 37 (Eur. Ct. H.R. July 24, 2003), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263#{"itemid":["001-61263"]}; Smith and Grady v. the United Kingdom, App. Nos. 33985/96 and 33986/96 ¶ 90 (Eur. Ct. H.R. Sept. 27, 1999), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58408#{"itemid":["001-58408"]}; Schalk and Kopf v. Austria, App. No. 30141/04 ¶ 97 (Eur. Ct. H.R. June 24, 2010), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-99605#{"itemid":["001-99605"]}).

124. *Id.* ¶ 106.

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Finally, Mr. McFarlane was a counselor who had been reluctant to offer psychosexual counseling to same-sex couples as such relationships were contrary to his Christian beliefs. His employer, Relate, did not want him to be able to cherry pick the couples he saw as a means of avoiding counseling same-sex couples, and he was dismissed. Unlike the *Ladele* case, there was less sympathy to his plight given that his job had not changed. Mr. McFarlane had enrolled on the Relate psychosexual counseling course knowing that Relate had an equal opportunities policy that would not allow filtering of clients on the grounds of sexual orientation. Again, the Court had to consider a fair balance between competing interests and acknowledged that losing employment was a high price to pay. Nevertheless, for the Court, the most important factor was that the employer's action was intended to secure the implementation of its policy to provide counseling to everyone without discrimination.

In all four cases, the Court avoided making definitive rules, instead showing respect for the competing claims and thereby avoided creating an undue sense of "victory" or "triumphing" of one right over another. Further application to appeal was refused.

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