

## Jochen Bigus/Andreas Engert

### The law and economics of public companies (Modul: Kapitalmarktrecht und seine ökonomischen Grundlagen)

#### I. Content overview

Listed companies have been at the heart of the corporate governance debate for the past decades. These companies tend to be economically important and well known. But they also raise complex governance challenges because of their broad and diverse shareholder base. The course will look at these major companies and the inherent agency conflicts between company insiders (management, controlling shareholders) and outside shareholders. From a legal perspective, this raises important issues under corporate law and securities regulation. The course will look into both the economic and legal aspects. It is taught jointly by Jochen Bigus (a professor of accounting from the Business School) and Andreas Engert (a professor of corporate and securities law at the Department of Law).

#### II. Technicalities

##### 1. Language, course prerequisites

Language of instruction is English. The only course prerequisite is sufficient command of the English language. The course aims at students who are interested in the law and economics of listed public companies.

##### 2. Credits

The course yields 6 ECTS credits; foreign exchange student in law obtain 7.5 ECTS pursuant to an assessment of the Law Department's International Office. For **students in the FACTS master program**, the course satisfies the requirements of the module "Kapitalmarktrecht und seine ökonomischen Grundlagen". For **law students**, the course fulfills the "Fachsprachenkompetenz A" and "B" module requirements in the state exam study program. For a limited number of law students (and therefore subject to prior admission by Professor Engert), the course can be taken within the module "thematische Vertiefung". Unfortunately, it cannot be used as part of the specialization modules ("Schwerpunkt"). **Foreign exchange students** can earn credit by attending the course and passing the exam.

##### 3. Reading requirements and course participation

We expect students to prepare classes by reading at least the "required readings" in the below syllabus. The required reading for each class amounts to 50–60 pages. Unprepared students will have difficulty following the presentation, participating in classroom discussions and generally in understanding the key ideas of the course. Because there is no standard textbook, performing well in the exam critically depends on the readings and the classroom interaction. All materials will be provided through the Blackboard platform.

#### 4. Exams and grading

Regular attendance is required to obtain credit.

**FACTS master students from Freie Universität need to take an oral exam at the end of the course.** You need to register with Campus Management *before the first class* to receive credit and be graded. Orals can be taken in German but the default language is English. Importantly, you must register for the oral exam by writing to Professor Bigus (jochen.bigus@fu-berlin.de) no later than 9 December 2022; if you wish to have your exam in German, you need to indicate this in your e-mail. The oral exam will take place on 16 December 2022 at 9am–1pm in room 013, Thielallee 73; the catch-up oral exam is scheduled for 31 March 2023, 1pm–4pm, presumably also in room 013, Thielallee 73.

**Law students seeking credit for the module “thematische Vertiefung”** must apply for admission by writing to sekrengert@zedat.fu-berlin.de before 30 October 2022. If admitted, students are expected to attend the full course. Obtaining credit and grades are based on a short thesis of no more (but also not substantially less) than 15 pages. Writing the paper in German is recommended with a view to acquiring the skills needed for the final thesis (“Studienabschlussarbeit”) as part the first exam in law. Accordingly, the thesis should conform to the requirements of a scholarly research paper; see the guidance on Professor Engert’s website (at Lehre/Studienabschlussarbeiten, <https://ogy.de/t7ni>). The course phase until mid-December provides an opportunity for students to develop a topic for their thesis. The choice of topic can be discussed with Professor Engert and must be approved by him. Papers are due on 6 February 2023.

**All other students** (law students outside the module “thematische Vertiefung”, exchange students from business, economics, law or other fields) are required to write two reaction papers each with a total length of 8,000–12,000 characters (including spaces). Reaction papers must be in English and reflect on or further elaborate issues discussed in the course. Students are free to choose the topics of their reaction papers. Reaction papers have to be submitted as text documents from a standard word processor to sekrengert@zedat.fu-berlin.de no later than 18 December 2022. This deadline is *without exception and relentlessly enforced*. The idea is that reaction papers “react” to classes, meaning that they are written shortly after the respective session and during the term, not at the last minute.

To encourage **active participation in class**, grades from the exam or reaction papers will be lifted by 0.3 for the top 20% contributors to classroom discussion.

### **III. Syllabus**

#### **1. Corporate governance I (17 October)**

Topics: theory of the firm, shareholder vs. stakeholder view

Required readings:

- Alchian/Demsetz, Production, Information Costs, and Economic Organization, *Am. Econ. Rev.* 62 (1972), 777 (20 pages)
- Friedman, The Social Responsibility of Business Is to Increase Its Profits, *New York Times Magazine*, 13 September 1970 (7 pages)
- Blair, Corporate Law as a Solution to Team Production Problems, in: Clarke/O'Brien/O'Kelley, *Oxford Handbook of the Corporation*, 2019, 197 (17 pages)
- Hart/Zingales, Serving Shareholders Doesn't Mean Putting Profit Above All Else, *Harvard Business Review* 12 (2017), 2 (5 pages)

Additional readings:

- Coase, The Nature of the Firm, *Economica* 16 (1937), 386
- Jensen, Value Maximisation, Stakeholder Theory, and the Corporate Objective Function, *European Financial Management* 7 (2001), 297
- Tirole, Corporate Governance, *Econometrica* 69 (2001), 1
- Bénabou, Roland, and Jean Tirole. "Individual and corporate social responsibility." *Economica* 77.305 (2010): 1-19. *gesp in GesR/CG/Zielfunktion/Corp Soc Resp*

Legal materials: Aktiengesetz (German Stock Corporation Act) as of 2017

#### **2. Corporate governance II (24 October)**

Topics: agency costs of equity, mechanisms of minimizing agency costs, capital market efficiency

- Armour, Shareholder rights, *Oxford Rev. Econ. Policy* 36 (2020), 314 (22 pages)
- Yen/Lee, Efficient market hypothesis (EMH): past, present and future. *Rev. Pacific Basin Finance Mark. Policies* 11 (2) (2008), 305 (24 pages)

Additional readings:

- Fama, Market Efficiency, Long-Term Returns, and Behavioral Finance, *J. Fin. Econ.* 49 (1998), 283 (23 pages)
- Jensen/Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, *J. Fin. Econ.* 3 (1976), 305
- Rubinstein, Rational Markets: Yes or No? The Affirmative Case, *Fin. Anal. J.* 57 (2001), 15–29
- Spamann, Monetary Liability for Breach of the Duty of Care?, *J. Legal Anal.* 8 (2016), 337
- Spamann, Indirect Investor Protection: The Investment Ecosystem and Its Underpinnings, *J. Legal Anal.*, forthcoming

### **3. Disclosure theory (31 October)**

Topics: Information and decision, comparison of information systems, benefits and costs of voluntary disclosure, mandatory and voluntary disclosure, empirical measures and consequences of disclosure

- Leuz/Wysocki, The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research, *Journal of Accounting Research* 54 (2016), 525—required only sections 1–3, 525–554 (29 pages)
- Christensen/Hail/Leuz, Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review, *Review of Accounting Studies* 26 (2021), 1176, required only 1185–1216 (31 pages)

Additional readings:

- Beyer/Cohen/Lys/Walther, The Financial Reporting Environment: Review of the Recent Literature, *Journal of Accounting & Economics* 50 (2010), 296
- Dye, Some Recent Advances in the Theory of Financial Reporting and Disclosures, *Accounting Horizons* 31(3) (2017), 39
- Enriques/Gilotta, Disclosure and Financial Market Regulation, in Moloney/Ferran/Payne (eds.), *Oxford Handbook of Financial Regulation*, 2015, 512
- Fox/Glosten/Rauterberg, The Social Function of Stock Markets, in: *The New Stock Market: Law, Economics, and Policy*, Columbia University Press (New York), 2019, 33
- Mahoney, The Economics of Securities Regulation: A Survey, *Foundations and Trends in Finance* 13 (2021), 1

### **4. Primary market disclosure and liability (7 November)**

Topics: rationale of primary market disclosure; underpricing; prospectus liability

Required readings:

- Lowry/Michaely/Volkova, Initial Public Offerings: A Synthesis of the Literature and Directions for Future Research, *Foundations and Trends in Finance* 11 (2017)—required only pages 7–16, 73–94, 120–132 (42 pages)
- Verse, Germany: Liability for Incorrect Capital Market Information, in Conac/Gelter, *Global Securities Litigation and Enforcement*, Cambridge, 2019, 364—required only section 2, pages 368–382 (14 pages)

Additional readings:

- Bigus/Dreyer, Country-level Accounting Enforcement and IPO Underpricing, Freie Universität Berlin, August 2021, forthcoming *Abacus*
- Bigus/Schäfer, Die Haftung des Wirtschaftsprüfers am Primärmarkt und am Sekundärmarkt – eine rechtsökonomische Analyse, *Zeitschrift für Betriebswirtschaft* 77 (2007), 19

Legal materials:

- Market in Financial Instruments Directive 2014/65/EU
- Prospectus Regulation (EU) 2017/1129

- Wertpapierhandelsgesetz (Securities Trading Act) as of 2019
- Wertpapierprospektgesetz (Securities Prospectus Act) as of 2020
- Prospectus of TeamViewer AG of 11 September 2019

## **5. Secondary market disclosure and liability (14 November)**

Topics: workings of secondary markets; forms and rationale of secondary market disclosure; rationale of non-financial disclosure; liability

Required readings:

- Fox/Glosten/Rauterberg, The Economics of Trading Markets, in: The New Stock Market: Law, Economics, and Policy, Columbia University Press (New York), 2019, 59–92 (33 pages)
- King/Roell, Insider Trading, *Economic Policy*, 3(6), 1988, 163–193, *but for this class only the appendix (pages 192–193) is required* (2 pages)
- Schmolke, Civil Liability of the Company and Its Directors for False Financial Statements under German Law, in Fleischer/Kanda/Kim/Mülbert (eds.), *Issues and Challenges in Corporate and Capital Market Law*, 2018, 131–157 (26 pages)

Additional readings:

- Busch/Gulyàs, Regulated Markets, Alternative Trading Venues & Systematic Internalisers in Europe, European Banking Institute Working Paper 75 (2020)
- Fox/Glosten/Rauterberg, The Institutions and Regulation of Trading Markets, in: The New Stock Market: Law, Economics, and Policy, Columbia University Press (New York) 2019, 11
- Goncharov/Werner/Zimmermann, Does Compliance with the German Corporate Governance Code have an Impact on Stock Valuation? An Empirical Analysis, *Corporate Governance: An International Review*, 14(5), 2006, 432-445 (13 pages)
- Muntermann/Guettler, Intraday Stock Price Effects of Ad hoc Disclosures: the German Case, *Journal of International Financial Markets, Institutions & Money* 17 (2007), 1-24.
- Payne, Disclosure of Inside Information, in Tountopoulos/Veil (eds.), *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*, Hart (Oxford), 2019, 89–108
- Pietrancosta, Disclosure of Major Holdings in Listed Companies in Tountopoulos/Veil (eds.), *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*, Hart (Oxford), 2019, 109–128

Legal materials:

- Market Abuse Regulation (EU) No 596/2014
- ECJ, A/Autorité des marchés financiers (15 March 2022, C-302/20)
- ECJ, *Geltl* (28 June 2012, C-19/11)
- ECJ, *Lafonta* (11 March 2012, C-628/13)
- Wertpapierhandelsgesetz (Securities Trading Act) as of 2019

## **6. Insider trading (21 November)**

Topics: insider regulation in European Union; costs and benefits of insider trading; empirical evidence

Required reading:

- Bhattacharya, Insider Trading Controversies: A Literature Review, *Ann. Rev. Fin. Econ.* 6 (2014), 385–403 (18 pages)
- Ventoruzzo, Comparing Insider Trading in the United States and in the European Union: History and Recent Developments, *European Company and Financial Law Review* 2014, 554, 555–582 (27 pages)

Additional readings:

- Fox/Glosten/Rauterberg, The Economics of Informed Trading, in: *The New Stock Market: Law, Economics, and Policy*, Columbia University Press (New York), 2019, 131–161
- Fox/Glosten/Rauterberg, The Regulation of Informed Trading, in: *The New Stock Market: Law, Economics, and Policy*, Columbia University Press (New York), 2019, 162–199
- King/Roell, Insider Trading, *Economic Policy*, 3(6), 1988, 163, 165–192 (27 pages)
- McVea, Supporting Market Integrity, in Moloney/Ferran/Payne (eds.), *Oxford Handbook of Financial Regulation*, 2015, 632–655

Legal materials:

- ECJ, 23/12/2009, C-45/08 (Spector Photo Group)
- ECJ 22/11/2005, C-384/02 (Grøngaard and Bang)

## **7. Market for corporate control (28 November)**

Topics: takeover law and economics; shareholder activists

Required reading:

- Burkart/Panunzi, Takeovers, ECGI Finance Working Paper 118/2006 (22 pages)
- Engert, Shareholder activism in Germany, in Fleischer/Kanda/Kim/Mülbert (eds.), *German and East Asian Perspectives on Corporate and Capital Market Law: Investors versus Companies*, Mohr Siebeck (Tübingen) 2019 (30 pages)

Additional readings:

- Appelbaum/Batt, A Primer on Private Equity at Work: Management, Employment, and Sustainability, *Challenge* 55 (2012), 5–38
- Habersack, Non-frustration Rule and Mandatory Bid Rule—Cornerstones of European Takeover Law?, *Eur. Comp. & Fin. L. Rev.* 15 (2018), 1–40
- Kaplan/Strömberg, Leveraged Buyouts and Private Equity, *J. Econ. Persp.* 23 (2009), 121
- Renneboog/Vansteenkiste, Leveraged Buyouts: Motives and Sources of Value, *Annals Corp. Gov.* 2 (2017), 291–389

Legal materials:

- Takeover Directive 2004/25/EC
- ECJ 20/7/2017, C-206/16 (Marco Tronchetti Provera/Consob)

### **8. Going private (5 December)**

Topics: Types of and motives for going private; legal techniques (delisting, freeze-out); minority protection; empirical evidence

Required readings:

- Macey/Pompilio, Down and Out in the Stock Market, *J. Law & Econ.*, 51 (2008), 683 (30 pages)
- Croci/Del Giudice, Delistings, Controlling Shareholders and Firm Performance in Europe, *European Financial Management* 20 (2014), 374 (28 pages)

Additional readings:

- Croci/Ehrhardt/Nowak, The corporate governance endgame—an economic analysis of minority squeeze-out regulation in Germany, *Managerial Finance*, 43 (2017), 95–123

### **9. Wrap-up (12 December)**

This session will be devoted to Q&A and repeating or expanding topics from earlier classes.

Only if time permits, we will also touch upon “Legal determinants of capital market development”.

Topics: Empirical evidence on law and capital market development, legal origins, public and private enforcement

Additional readings:

- Jackson/Roe, Public and Private Enforcement of Securities Law: Resource-Based Evidence, *Journal of Financial Economics*, 93 (2009), 207 (31 pages).
- La Porta/Lopez-de-Silanes/Shleifer/Vishny, Law and Finance. *Journal of Political Economy*, 106 (6), 1998, 1113 (42 pages).