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Gesellschaftsrecht

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Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 2 pages and 4 questions.

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	20 %
Question 2	30 %
Question 3	30 %
Question 4	20 %
Total	100 %

We wish you a lot of success!

Exam questions

1. Discuss the separate legal entity principle and its importance in corporate law. Are there any exceptions to the separate legal entity principle and what is the rationale for these exceptions? Please address how the separate legal entity principle works in the case of corporate groups.

2. Alfu AG is an e-commerce company incorporated in Germany. Beta PLC is an online retail company incorporated in the United Kingdom. Beta PLC operates mainly in Sweden and its 100 equity shares are exclusively listed on the Swedish stock exchange. In an effort to frustrate any unwanted takeover bid, Beta PLC's articles of association provide that the company will automatically issue double the amount of the company's existing shares in response to an unapproved takeover bid. The members of Beta PLC's Board of Directors own 8 equity shares of Beta PLC, which give them multiple voting rights: each of these 8 shares gives 10 votes at the general meeting. The remaining 92 shares are dispersed among small shareholders: each of these 92 shares gives 1 vote at the general meeting. Alfu AG is planning on expanding its business in Sweden by taking over Beta PLC. Abiding by the procedural rules of a takeover bid, Alfu AG has offered £ 18 million to the shareholders of Beta PLC directly. The offer period has already started and will end by the end of February 2015. In the meantime, Beta's PLC's Board has decided that they do not support Alfu's bid. This results in the company automatically issuing double the amount of existing shares.

   a. Please state which Member State law applies to the company law aspects of the takeover of Beta PLC by Alfu AG. Discuss whether the Board of Directors of Beta PLC is required to obtain shareholder approval before the company automatically issues the additional shares in response to an unsupported takeover bid.

   b. If a shareholders' meeting were called to approve the issuance of additional shares, please advise whether the multiple voting rights of the members of Beta PLC's Board of Directors would apply.

   c. Discuss whether the applicable law would lead to the same results under German, UK and Swedish law?

3. D is a Director of Corporation. Through her position, she learns that the company has developed a new product that will most likely increase substantially the sales of the company and that will have the effect of increasing the company's share price within weeks of introducing the new product. D attends a boat racing event with A, a major shareholder in the Corporation. Without knowing about the company's new product, A says that she does not think that the corporation is performing well and that she is seriously considering selling her shares in the company. D says 'Fine, I'll buy all your shares.' The next day A sells her all her shares in the company to D. One week after D purchases A's shares, the company publicly releases the news of its new product. The value of the Corporation's stock triples in one day.

a. Does D's purchase of A's shares in the Corporation violate European Union law? Does it violate Swiss law?

b. D was advised by 'B', a banker, who was advising the Corporation on its capital raising plan to issue new shares and was aware of the company's development of a new product. Before the Corporation released the information to the public about its new product, B sent an email to an investor in Singapore saying 'you might be interested to know that the Corporation is developing a new product that will revolutionize the market.' The investor decided not to buy any shares in the Corporation. Has B violated EU law?

4. 'The defining attribute of the modern day corporation is the "separation of ownership and control".' Do you agree? Please state your reasons for agreeing or disagreeing.

Question 1	Points
The separate legal entity principle	
Discussion of the separate legal entity principle	
The company acquires legal personality on registration with the State.	0.5
The company has a legal personality distinct from the people who compose it.	1
Salomon v. Salomon Co. Ltd The separate legal entity principle is referred to as the Salomon principle in the UK. In the Salomon case, the House of Lords established the separate legal entity principle. Mr. Salomon personally owned a boot and shoe company. He turned the business into a limited liability company. It took shares in the company and lent the company money. The company went into liquidation. The liquidator denied that the business was transferred from Mr. Salomon to the company. The House of Lords held that the assets of Mr. Salomon were validly transferred to the company and that the creditors were not allowed to go after Mr. Salomon personally.	2
The importance of the separate legal entity principle in corporate law	
The separate legal entity principle is one of the attributes of the modern corporation.	1
The separate legal entity principle is crucial in corporate law in order to facilitate the efficient management of business. Company is treated as an independent person with rights and liabilities appropriate to itself. Capacity of entering into contracts and owning property, delegating authority to agents, suing and being sued in its own name.	1
Separate personality of the company is crucial to make the limited liability principle work: Limited liability of the company's shareholders is possible only if the separate legal entity principle is recognized.	1
Exceptions to the separate legal entity principle	
Piercing the corporate veil	
In the event of fraud or deliberate abuse of the corporate form – in order to prevent those with fraudulent tendencies from hiding behind the corporate veil	1.5
As a result, the Court will disregard the existence of the company and go after the assets of the person who misused the company	1
Case law: *Jones v. Lipman*: Defendant contracted to sell land to plaintiff. Defendant changed its mind, formed a company that he owned and controlled and transferred its land to the company. Company as a mere façade concealing the true facts. Specific performance was ordered. *Trustor AB v. Smallbone*: Defendant was managing director of Trustor AB. Defendant transferred funds to the company Introcom Ltd. The company was a façade used to misappropriate Trustor's funds. Possible for Trustor to go after defendant personally.	1.5
The rationale for the exceptions to the separate legal entity principle	
Exceptions to the separate legal entity principle needed if the formalistic creation of the company ignores the true facts of the business.	1.5
The separate legal entity principle with respect to corporate groups	
The separate legal entity principle applies to corporate groups. Parent company is a separate legal entity distinct from its subsidiaries.	1
UK: Strict application of the separate legal entity principles in the case of corporate groups. *Adams v. Cape Industries*: A Texan court awarded damages to several hundred employees of the group headed by Cape Industries. The English Court of Appeal held that the awards could not be enforced against Cape even though one of the defendants was a subsidiary of Cape and there was evidence that the group had been restructured so as to avoid liability.	1.5
CH: Separate legal entity principle applies to corporate groups. As compared with the UK, wider application of the doctrine of piercing the corporate veil with respect to corporate groups. A Swiss court would pierce the corporate veil if the parent company misuses the	1.5

group structure in order to escape from liability.	
Structure of the essay – coherence – IRAC or other sound structure followed for formulating the answer	2
Question 2	
Question a	
Applicable law	
It is a takeover case since the acquirer Alfu AG is planning on taking over the target Beta PLC. The EU Takeover Directive applies.	0.5
According to the EU Takeover Directive, for company law matters, the applicable law is the law of the Member State where the target company has its registered office.	1
Beta PLC is incorporated in the United Kingdom. Its registered office is in the UK.	0.5
UK law applies to company law matters because the target Beta PLC has its registered office in the UK.	1
Shareholder approval	
The board neutrality rule applies (Art. 9 EU Takeover Directive). In the EU, there is an option as to whether to apply the board neutrality rule and the UK is one of the EU Member States where the board neutrality rule applies.	1
According to the board neutrality rule, shareholder approval is needed whenever the Board of Directors takes actions which may result in the frustration of the bid, i.e. takes takeover defenses.	1.5
Issuance of poison pills considered as a takeover defense. Poison pills are measures that enable the company to automatically issue large amounts of shares in certain events, e.g. unapproved takeover bids. The issuance of poison pills will make the takeover expensive, i.e. economically unattractive to acquirers.	1.5
Beta PLC has a mechanism in place in its articles of association that enables the company to automatically issue a large amount of shares in the event of an unapproved takeover bid, i.e. poison pills.	1
This mechanism is considered as a takeover defense as it would make the takeover very expensive for Alfu AG, i.e. economically unattractive to Alfu AG.	1.5
According to the board neutrality rule, the Board of Directors of Beta PLC is not allowed to issue poison pills without obtaining shareholder approval. Therefore, The Board is required to obtain shareholder approval.	1
Question b	
Multiple voting rights	
The breakthrough rule applies (Art. 11 Takeover Directive). In the EU, there is an option as to whether to apply the breakthrough rule and the UK is one of the EU Member States where the breakthrough rule applies.	1
According to the breakthrough rule, voting restrictions or multiple voting rights do not apply at a shareholders' meeting to authorize post-bid defenses.	1.5
The members of the Board of Directors of Beta PLC own shares that give them multiple voting rights.	1
A general meeting is invited to decide whether to approve the issuance of poison pills, i.e. takeover defenses.	1
According to the breakthrough rule, the "one share, one vote" principle applies at a general meeting where shareholders are called to approve the issuance of poison pills. Multiple voting rights do not apply.	1.5
Therefore, each of the shares of the members of the Board of Directors of Beta PLC will give them one vote at the general meeting with respect to the approval of takeover defenses. Their multiple voting rights will not apply.	1.5
Question c	
Results under German and Swedish law	
According to the EU Takeover Directive, Member States are allowed to opt out from the board neutrality rule and the breakthrough rule (Art. 12). Germany and Sweden are two	1

examples of countries that decided to opt out from the board neutrality rule and the breakthrough rule.	
Member States that opt out from the board neutrality rule and the breakthrough rule are Member States that give more discretion to the Board of Directors with respect to takeover defenses.	1
If the board neutrality rule did not apply, the Board of Directors would not be required to obtain shareholder approval before taking takeover defenses.	1
Under German and Swedish law, the Board of Directors of Beta PLC would not be required to obtain shareholder approval before enabling the company to automatically issue poison pills.	1
If the breakthrough rule did not apply, multiple voting rights would apply.	1
Under German and Swedish law, each of the shares of the members of the Board of Directors of Beta PLC would have multiple voting rights at a general meeting with respect to the approval of the issuance of poison pills.	1
Therefore, the applicable law would lead to a different result under German and Swedish law because these two Member States do not apply the board neutrality rule and the breakthrough rule.	1
Structure of the essay – coherence – IRAC or other sound structure followed for formulating the answer	2

Question 3	**Points**
This question is about whether or not D's purchase of shares in the Corporation violates EU market abuse/insider dealing law, and whether it violates Swiss insider dealing law; and whether B's leak of information to an investor in Singapore was a violation of EU insider dealing and market abuse law. Also it is fine to mention some discussion whether the leak would violate Swiss insider dealing law (extra credit 1 pt).	1.5 1 X
To answer sub-questions a and b, it is necessary to define insider information under EU and Swiss law and to define who ‚insiders' are under EU and Swiss law and discuss the policy rationale behind insider dealing and market abuse laws.	
Preliminary discussion of the rationale and/or theory of Insider dealing and/or market abuse based on the fiduciary duty-based or the misappropriation theory. Some discussion of these theories and any related theories. Market-Driven Approach Looks at the wider securities markets and the impact that trading on the basis of insider Information has on the efficiency of price formation, market liquidity and on market development. Insider information is prohibited to preserve investor confidence about market egalitarianism, equal opportunity to access information. If investor confidence is compromised, it is argued, liquidity can be damaged and the cost of capital will increase as investors price in the risk of trading against insider information. Also important to promote market integrity Define insider information under European Union law. "information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments."	1 .5 .5 1
Define insiders as Primary Insiders MAD Article 2 Any person who possess inside information…	1

a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or b) by virtue of his holding in the capital of the issuer; or c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or d) by virtue of his criminal activities. Secondary Insiders Article 4 - Any person, other than the persons referred to in those Articles, who possesses inside information while that person knows, or ought to have known, that it is inside information.	
Swiss law defines inside information as information that is *confidential information, the knowledge of which will have a substantial and foreseeable influence on the price of listed or pre-listed shares, other securities or corresponding book entry securities, or options on any of the aforementioned securities traded on a Swiss stock exchange* **Defines Insiders:** Board of Directors, management, auditors (internal), mandatee of the listed corporation (AG), authorities, officials, auxiliary person **Dealing in inside information:** 1) using and 2) disclosing to a third person (tipping) **Financial instruments:** shares or derivatives/options traded on regulated market **Financial advantage** for the insider or a third person (make a profit or avoid a loss)	.5 1 1 .5 X
Discuss Mad prohibitions on primary and secondary insiders. Art. 2 MAD - States must prohibit a primary insider who possesses insider information from… **Dealing**: using insider dealing information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial information to which that information relates **Disclosing** inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties **Recommending or inducing** another person, on the basis of inside information to acquire or dispose of financial instruments to which that information relate (i.e. "tipping") Article 4 MAD extends prohibitions to persons who possess insider information and know or ought to have known that it is insider information.	1.0X .5 X .5X .5X .5X
Ongoing duty of issuers to disclose - as soon as possible – inside information which directly concerns the company issuer	.5 X
Discuss criminal sanctions for intentional commission of insider dealing under EU law. • Market Abuse Directive 2003 (civil offence) and Market Abuse Regulation 2011 defines insider dealing and market manipulation as criminal offences. • EU law treats inciting, aiding and abetting these offences as criminal offences • Attempts at insider dealing and market manipulation are also criminal offences • Criminal sanctions should be effective, proportionate and dissuasive • Extends liability to legal persons (companies). Is the corporation liable in this question (1 extra credit) Criminal sanctions under 1988 Swiss act as amended and criminal/civil offence under SESTA	1 .5X .5X 1 X .5 X

Factual analysis of the law and facts as set forth in the question. D as director of the corporation is a primary insider under EU law; and also a primary insider under Swiss law. The information that D learns as insider of the company concerns a new product that is likely to increase revenues substantially. Such information is 'precise and specific' as it relates to the company's future increase in sales and probable increase in share price. This is information that belongs to the company and cannot be traded upon unless previously disclosed to the market. Mention fiduciary and/or misappropriation theories. D is a fiduciary of the Corporation. Under EU MAD, corporation can be subject to civil sanctions if failed to report insider information, and under MAR corporation can be held liable for criminal sanctions. A, a major shareholder, is arguably not a primary insider, but because A is a 'major shareholder' in the company there is the possibility that it is consulted by the Board and/or officers prior to deciding major company actions and that it might have access (but simply has not chosen to obtain the inside information from the other insider, D. But in this answer probably more correct to say that A was not a primary or secondary insider and therefore D had a duty to disclose to A and/or to the market before offering to buy A's shares. Alternatively, an equally strong argument could be made that A was a primary insider because of its role as a 'major shareholder' in the company. But not the key part of the answer.	a. 1 2 1 .5 1.0 X 1 X .5 X .5 X
Under EU MAD/MAR, B is a primary insider who leaked insider information to an investor in Singapore (a 'tippee'). The rationale for making the lawyer (third party professional adviser) a primary insider. What public policy objective – third party adviser has a fiduciary duty. Should third party adviser not be subject to insider trading offence because the tippee (the investor in Singapore) did not trade or take advantage of the insider information (ie., trade on the basis of inside information). The tippee is therefore not liable for insider/market abuse because simply just receiving insider information. Should this have any effect on the liability of B (the third party adviser) However the lawyer advising the company was a primary insider who leaked insider information to a tippee investor. The leak was a breach of fiduciary duty and facilitating a misappropriation of property.	b. 1 2 1 1 .5 2
EU MAD/MAR provides that disclosing or leaking inside information, if not done for an authorised purpose, is 'dealing' or 'trading' on the basis of inside information	1
The rationale for imposing liability on the leaker (even though no profit or avoiding a loss was made) can be discussed in the context of the fiduciary and misappropriation theories and whether it serves broader public policy objectives.	2
Any arguments imposing liability B as third party adviser for leaking inside	1

information.	
Structure of the essay – coherence – IRAC or other sound structure followed for formulating the answer	2
Question 4	
Discuss some aspects or attributes of the corporation/company and the design of corporate law that support or facilitate the separation of ownership and control. Mention the separation of ownership and control first mention by Berle and Means	1 0.5x
Pick 2 or more of the following as facilitating separation of ownership and control: • separate entity, legally distinct from owners and managers • Limited liability – 'greatest advantage of the corporate form' • Corporate shareholders are its owners – issuance of stock • Board of directors are the managers – contrast partnership • Transferability of shares, taxes on profits/dividends, and/or • Corporate funding – equity/shareholders, debt/creditors	2
Discuss one or two applicable theories of the company – 'economic theory', 'legal theory', and/or 'contractualism' (Coase), entity theory, concession theory or other theories. Necessary only to discuss two theories, or one theory in depth.	2
Does the separation of ownership and control adequately address the Contractual model ('aggregate theory') where management acts in best interest of company, interests of shareholders equated with 'interests of the company'. But shareholders can have different interest	1x
The role of shareholders should be addressed: 1) exit, 2) monitor, and 3) loyalty Which role best represents the separation of ownership and control? Exit is best answer, but other roles can be argued as well.	2
Discuss each role and which one fits the separation of ownership and control the best	1
Discuss the phenomenon of the rise of the institutional investor and how this is changing the traditional model of the 'separation of ownership and control'. In this discussion mention the Bebchuk v Lipton debte	2
Elaborate on Bebchuk v Lipton debate	1
Does separation of ownership and control phenomenon represent an adequate distribution of powers between shareholders and the board?	0.5
Mention that the separation of ownership and control is an important development for listed public companies, but not for privately-held companies (ie., gmbh). Is the separation of ownership and control necessary for wealth maximisation and enhanced company performance? Should the concept also apply to private or closely-held companies. Are other models of the company more effective – for example, the rise of institutional shareholders and their influence on public companies erodes the traditional model of separation of ownership and control. Institutional shareholders (according to Bebchuk) are having a beneficial impact on governance and performance of listed (public) companies? Which model is more effective for dealing with agency problems (ie., principal-agent problem) in the company	0.5 0.5 1.5 1 1
Structure of the essay – coherence – IRAC or other sound structure followed for formulating the answer	2
Total	90