# A Harmonized European Company Law: Are We There Already?

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Abstract

*To what extent is EU company law harmonized? This essay first makes the point that still little progress has been made in the direction of company law uniformity within the EU. It then argues that, even leaving aside the question of whether it would be desirable to have a uniform EU company law, that outcome is simply impossible to achieve, due to interest group resistance and the variety in national meta-rules. Yet the essay concludes that, in a narrow meaning, European company laws have been indeed harmonized: European Member States company laws fit together, which may well be what harmonization, not only etymologically, is all about.*

Keywords: Company Law; Harmonization; Uniformity of Laws; Meta-rules; *Centros*; Regulatory Arbitrage.

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## I. INTRODUCTION: WHAT WE TALK ABOUT WHEN WE TALK ABOUT COMPANY LAW HARMONIZATION

To what extent is EU company law harmonized? Will it become more so in time? Should it? While it would be hard to argue that these are topical questions in the aftermath of the EU referendum in the UK, reflecting upon them provides the occasion for digging deep into issues that are not only key to our understanding of the multi-decade effort to approximate national company laws within the EU, but also at the core of comparative company law. In fact, answering those questions requires one to reflect, *inter alia*, upon the forces that drive or oppose changes in company law and on differences in core features of national (company) law, namely in the 'meta-rules' or 'legal ground rules' that shape company law in action.

After highlighting the polysemic nature of the term harmonization, this essay first makes the point that, even after multi-year efforts to move on with the company law harmonization programme, little progress has been made in the direction of company law uniformity within the EU. Next, it argues that, even leaving aside the question of whether it would be desirable to have a uniform EU company law, that outcome is simply impossible to achieve, due to interest group resistance and the variety in national meta-rules.

This essay finally argues that in a narrow, etymological, but arguably more relevant sense, European company law has been indeed harmonized to a considerable extent: mutual recognition of companies, wherever they conduct their business, is a reality; reincorporations are an option for existing EU businesses; organizational arbitrage, while not unfettered, is also possible; and the fact that a foreign business is incorporated under a different company law is no longer a concern for business people engaged in EU cross-border trade.

As a premise to the analysis that follows, it is worth noticing that there are (at least) three possible meanings[1] of the term 'harmonization' with reference to company law:

1. the literal one: pursuant to Article 50(2)(g) of the Treaty, harmonization can be dubbed as the coordination *to the necessary extent* of 'the safeguards which, for the protection of the interests of members and others, are required by Member States of companies … with a view to making such safeguards *equivalent* throughout the Union';
2. the anti-literal (and extensive) definition: harmonization is most often used as a synonym for uniformity among Member States' company laws, uniformity being, to be sure, an intermediate goal that proponents of this interpretation see as, per se, instrumental to market integration;
3. the etymological one: harmonization can refer to 'fitting together'[2] of Member States' company laws, in the form of a smooth interaction both between the various company law regimes and between company law 'users' from different Member States.

[1] Actually, the possible meanings are six, because 'harmonization' can equally refer to a process and to the outcome of the same process. See e.g. EJ Lohse, 'The Meaning of Harmonization in the Context of European Union Law: A Process in Need of Definition' in M Andenas and C Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Elgar 2011) 313. In the following, unless otherwise made clear, the term harmonization will be used to refer to the outcome.

[2] The Greek word *ἁρμονία* comes from the verb *ἁρμόζειν*, which means 'to fit together'. See eg *Dictionary of Derivations of the English Language* (Collins 1931) 173.



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These three definitions[3] are not necessarily mutually exclusive: they can be seen as different facets of the phenomenon we generically refer to when we talk about (company law) harmonization. Let us now answer the question of the title for each.

## II. IS EU COMPANY LAW *LITERALLY* HARMONIZED?

A both functional and literal interpretation of the concept of harmonization can be drawn from Article 50(2)(g), which provides the legal basis for much of the company law harmonization measures that have been enacted so far. Harmonization in this sense shares a trait with the concept of beauty: in the same way as beauty is something that by definition elicits positive perceptions, so may everyone settle with the general idea that *required* safeguards for the protection of the interests of members and others should be coordinated *to the necessary extent* with a view to making such safeguards *equivalent* (not necessarily uniform) throughout the Union. But if one moves from this abstract idea of harmonization to precise harmonization measures, the concept becomes elusive and we enter the reign of subjectivity: beauty, after all, is in the eye of the beholder.

It is therefore impossible to answer the question of whether European company law is harmonized in the literal, Article 50(2)(g), sense: that depends on necessarily subjective evaluations of what the *necessary* extent of the coordination should be,[4] what measures do work across jurisdictions as effective 'safeguards' for the protection of the interests of members and others, who the 'others' are that company law should include in its purview,[5] when it is justified to introduce safeguards protecting a given category of stakeholders, especially when that comes at the cost of prejudicing the interests of other stakeholders, and what it means for such safeguards to be equivalent: for example, is it necessarily about convergence of form or is convergence of function enough?[6]

Reasonable minds will thus differ on what needs to be done at the EU level to 'harmonize' company laws according to this highly ambitious meaning of the word and, of course, on the question of whether enough has already been done to achieve this kind of company law harmonization within the EU.

## III. ARE EU MEMBER STATES' COMPANY LAWS ALREADY UNIFORM?

The prevailing, anti-literal and extensive interpretation of the term harmonization refers to making the company laws across the EU *uniform*.[7] In this meaning, harmony can only be

[3] One could add a spatial meaning of the term harmonization as expressed in Art 114 TFEU, ie the idea of 'approximation', where more similarity would appear to be a goal in itself. Note, however, that in Art 114 approximation is functional to the internal market. So, this should draw us either to the etymological meaning of the word or to the extensive one (if one takes the view that market integration requires uniformity of laws).

[4] V Edwards, *EC Company Law* (Clarendon Press 1999) 8.

[5] ibid.

[6] See generally RJ Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 American Journal of Comparative Law 329.

[7] See eg S Weatherill, *Cases and Materials on EU law* (Oxford University Press 2014) 521 (dubbing harmonization 'as a process of replacing diverse national rules with common rules for a common market'); C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2013) 656



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achieved by getting rid of differences, a tedious proposition indeed from a musical or, more generally, an aesthetic perspective. Yet, this anti-literal use of our word, as anticipated, is very frequent among EU law scholars, including those who focus on company law.[8]

Note, incidentally, that uniform rules can also be 'beautiful': they can also serve the function described in Article 50(2)(g), that is, to provide 'adequate safeguards etc'. However, in corporate law it is seldom the case that the need for uniformity (standardization) trumps substance, that is, that a rule's benefits stem from the fact per se of applying across jurisdictions. Accounting law is one of the very few areas where this can frequently be the case. But few other corporate law rules do display similar features.[9]

The question of whether EU company law is already harmonized, if one reads it as asking whether EU company law has reached uniformity, is very easy to answer. To be sure, assessing uniformity is like measuring the perimeter of a territory: in the latter case, the larger the scale, the smaller the perimeter; in the former case, the more one looks into the details, the lower the degree of uniformity. Yet, no one in his or her right mind would seriously answer this question in the positive. The most one can say is that there has been approximation in *some* areas, that is, that harmonization has been partial at best.[10]

Both bottom-up and top-down harmonization has indeed taken place in the last five decades on various issues; and if one were to judge merely from the quantity of measures adopted in the last ten years alone, it would be hard to dispute that the lawmaking in this area has become intense.[11] In addition, following *Centros* and *Überseering*,[12] bottom-up harmonization of company law rules addressing legal forms that are typically used by start-ups has been a remarkable development in the same period. But a closer look allows for the conclusion that, weighed for relevance, harmonization has achieved little in terms of uniformity.

### *A. Top-down harmonization*

Ten years ago, I asked the very similar question of what impact the EU company law harmonization programme had had on European company law and corporate governance. My answer was that the progress towards uniformity had been modest and the outcome overall

('harmonization involves replacing the multiple and divergent national rules on a particular subject with a single EU rule').

[8] See eg S Stolowy and N Schrameck, 'The Contribution of European Law to National Legislation Governing Business Law' (2011) Journal of Business Law 615-16.

[9] This argument is developed by L Enriques and M Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union' (2006) 27 University of Pennsylvania Journal of International Economic Law 962-4.

[10] See e.g. J Carruthers and C Villiers, 'Company Law in Europe – Condoning the Continental Drift?' (2000) European Business Law Rev 95-6; M Blauberger and RU Krämer, 'Europeanisation with Many Unknowns: National Company Law Reforms after *Centros*' (2014) 37 West European Politics 794-800.

[11] See text following note 15.

[12] Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919.

trivial: with the exception of a few sparse rules, accounting law (to some degree) and securities law, EU company law rules could all be classified as optional, market-mimicking, unimportant, or avoidable.[13] One may question whether the analysis back then had been complete and/or convincing.[14] Nowadays, however, the same analysis would need no additional qualifications, were it to include also the measures taken since 2005.

While some new measures have indeed been enacted in the last ten years, not much has changed: despite the number and volume of green papers, action plans, reflection groups' reports and advisory groups' studies,[15] the catch of the last ten years has been decisively scant. Sure, no less than 95 new directives and regulations in the area of company law broadly defined. But 58 of them are implementing measures of the IFRS regulation, 7 are in the area of financial information, 18 are part of issuer securities regulation and 9 are 'housekeeping'

[13] L Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?' (2006) 27 University of Pennsylvania Journal of International Economic Law 2.

[14] For a critique, see KJ Hopt, 'Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance' (2015) ECGI Law Working Paper 296 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644156>.

[15] See the European Corporate Governance Forum website where nine statements are available (<http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm>); European Commission, 'Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union-Summary Report' (2006) <http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf>; Sherman and Sterling, ISS and ECGI, 'Report on the Proportionality Principle in the European Union' (2006) <http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf>; European Commission, 'Study on Administrative Costs of the EU Company Law Acquis - Final Report' (2007) <http://ec.europa.eu/internal_market/company/docs/simplification/final_report_company_law_administrative_costs_en.pdf>; European Business Test Panel (EBTP), 'European Survey on European Private Company' (2007) <http://ec.europa.eu/yourvoice/ebtp/docs/epc_report_en.pdf>; European Commission, 'Communication from the Commission on a Simplified Business Environment for Companies in the Areas of Company Law, Accounting and Auditing' COM(2007) 394 final (2007) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0394&from=EN>; RiskMetrics Group, 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (2009) <http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf>; Mazars, 'Transparency Directive Assessment Report - Prepared for the European Commission Internal Market and Services DG Final Report' (2009) <http://ec.europa.eu/finance/securities/docs/transparency/report-application_en.pdf>; European Commission, 'Green Paper - The EU Corporate Governance Framework' (2011) <http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf>; Directorate General for the Internal Market and Services, 'Consultation on the Future of European Company Law' (2012) <http://europa.eu/rapid/press-release_MEMO-12-119_en.htm?locale=en>; Marccus Partners, 'The Takeover Bids Directive Assessment Report' (2012) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>; European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Application of Directive 2004/25/EC on Takeover Bids' COM(2012) 347 final (2012) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf>; European Commission, '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 Governance - A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies' COM/2012/0740 final (2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0740&from=en>; K Gerner-Beuerle, Paech and EP Schuster, 'Study on Directors' Duties and Liability' (2013) <http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf>.

measures, amending or recasting previously enacted company law directives with a view to simplify them.[16]

Three new pieces of legislation are left that may escape the triviality label: the first has had a measurable impact in various Member States; the second has facilitated regulatory arbitrage, thereby making the pressure for bottom-up harmonization stronger; the third appears to be an important innovation, but there are doubts it will prove so in practice as well.

The Shareholder Rights Directive[17] has undeniably had an impact on some of the Member States companies' internal governance: attendance at shareholder meetings significantly increased, for instance, at Belgian and Italian companies after measures implementing it came into force.[18] While doing nothing to remove the obstacles to cross-border voting,[19] the Directive importantly mandated the record date, thereby ruling out the deposit of shares as a requirement for voting, whether mandatory or optional, at various Member States' companies meetings.

The second important piece of (enabling) legislation is the Cross-Border Merger Directive.[20] While it would be hard to qualify cross-border mergers as a core area of company law, from a dynamic perspective, the Cross-Border Merger Directive makes regulatory arbitrage easier[21] and, therefore, potentially enhances bottom-up harmonization. A well-known example of a company that engaged at the same time in a cross-border merger and in regulatory arbitrage is Fiat's combination with U.S. company Chrysler to create Fiat Chrysler Automobiles ('FCA') in 2014: the choice was made to incorporate the resulting company in the Netherlands, one of reasons for that choice being that Fiat's controlling shareholders could take advantage of the absence of a ban on 'loyalty shares' in Dutch company law (unlike in Fiat's incorporation state, Italy, until then) and hence reinforce their grip on the company.[22]

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[16] See J Armour and WG Ringe, 'European Company Law 1999-2010: Renaissance and Crisis' (2011) 48 CML Rev 151-2.

[17] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184/17.

[18] For Belgium, see C Van der Elst, 'Shareholders as Stewards: Evidence of Belgian General Meetings' (2013) Financial Law Institute Working Paper 2013-05 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270938>. For Italy, see Gargantini, 'Oltre la record date. Gli ostacoli al voto transfrontaliero dopo il recepimento della direttiva sui diritti degli azionisti', in L Schiuma (ed), *Governo societario ed esercizio del diritto di voto* (Cedam 2014) 71.

[19] See J Winter, '*Ius Audacibus*; The Future of EU Company Law' in M Tisonet al (eds), *Perspectives in Company Law and Financial Regulation* (Cambridge University Press 2009) 50 (stating that 'the directive is precisely not doing that'). See also MC Schouten, 'The Political Economy of Cross-Border Voting in Europe' (2009) 16 Columbia Journal of European Law 1.

[20] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L 310/11.

[21] See below n 46-8.

[22] See e.g. M Ventoruzzo, 'The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat' (2015) Bocconi Legal Studies Research Paper.

Finally, the new provisions requiring companies to provide non-financial disclosures[23] are, at least on paper, an important innovation in the area of companies' disclosures. They *may* arguably have an impact not only on disclosures but, because of their implications, on companies' behaviour. Yet, because the rules will apply only to annual accounts published after 1 January 2018, it is far too early to tell whether in practice companies are indeed going to provide substantial new contents in the newly required disclosures.[24] And commentators have raised doubts about whether the new disclosures will go much beyond a box-ticking exercise.[25]

These proven or possible exceptions aside, the core areas that were identified as still the exclusive domain of national company laws ten years ago, such as the internal organization of the company, directors' duties, conflicts of interest between dominant and minority shareholders, shareholder remedies and so on, largely remain so, with the exception of mostly procedural aspects relating to shareholder voting rights.[26]

### *B. Bottom-up harmonization*

The post-*Centros* phenomenon of start-up cost-based regulatory arbitrage has arguably led to more uniformity among Member States' company laws,[27] prompting some states to react by changing their laws affecting the costs of setting up new companies.[28]

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[23] Art 19a and 29a, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

[24] Art 4, Directive 2014/95/EU.

[25] See DG Szabó and KE Sørensen 'New EU Directive on the Disclosure of Non-Financial Information (CSR)' (2015) Nordic & European Company Law Working Paper 15-01 <http://ssrn.com/abstract=2606557>.

[26] In the area of directors' duties and liability, divergence among Member States' laws is perhaps not as big as it was in the past, but still the rules and their enforcement can hardly be said to be uniform. See eg K Gerner-Beuerle and EP Schuster, 'The Evolving Structure of Directors' Duties in Europe', (2014) 15 European Business Organization Law Rev 191.

[27] M Ventoruzzo, 'Cost-Based and Rules-Based Regulatory Competition: Markets for Corporate Charters in the US and in the EU' (2006) 3 New York University Journal of Law & Business 91.

[28] M Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press forthcoming). To be sure, not in all countries was the repeal of minimum capital provisions and other measures of the same kind a response to regulatory arbitrage (which, incidentally, in its main manifestation as the choice of UK private limited companies to do business in continental Europe, proved short-lived even in countries experiencing it in relevant numbers: WG Ringe, 'Corporate Mobility in the European Union–a Flash in the Pan? An Empirical study on the Success of Lawmaking and Regulatory Competition' (2013) 10 European Company and Financial Law Rev 230. For instance, in Italy, where UK-formed pseudo-foreign companies never gained any traction (M Becht, L Enriques and V Korom, '*Centros* and the Cost of Branching' (2009) 9 Journal of Corporate Law Studies 174, one reason for that being the high cost of having the company registered in the companies register: ibid, 174), they were rather attempts at gaining a better ranking in the highly influential *Doing Business Report*.

## IV. AND *CAN* THEY BE UNIFORM?

After almost 50 years since the first action was taken in the area of top-down company law harmonization, divergence is thus still there and the programme has failed to reach its (admittedly ambitious) goal of making company laws across the EU uniform. There are many reasons for this failure,[29] but two stand out and are so substantial as to warrant the prediction that no meaningful progress will ever be made in the direction of a uniform EU company law via top-down harmonization.

### *A. Interest group resistance*

First of all, the forces that push against that goal are always strong and powerful when the Commission dares to be ambitious in any core area of corporate law and to do more than just Europeanize existing popular measures already present at the Member States level.

A good recent illustration of this is provided by the recent attempt by the European Commission to impose a single set of EU rules on related party transactions ('RPTs') for listed companies: the original proposal was watered down significantly under the pressure of a number of Member States, not necessarily by making it laxer,[30] but for sure uniformity-wise.

More precisely, the European Commission's proposal identified larger RPTs by using a quantitative threshold and required that they be subject to both disclosure and approval by a majority of the shareholders other than the related party.[31]

The Council text waters down (uniformity-wise) these provisions in its own version of the draft Directive.[32] The dilution does not affect disclosure itself, but the criteria to

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See E Brodi, 'Svolgere attività d'impresa senza capitale di rischio: brevi note sulla nuova fisionomia della società a responsabilità limitata', (2014) Analisi giuridica dell'economia 206.

[29] See also Armour and Ringe (n 16) 129, for an additional explanation based upon the varieties of capitalism literature's view of the role of corporate law within the set of complementary institutions that shape a country's corporate governance framework.

[30] See L Enriques, 'Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)' (2015) 16 European Business Organization Law Rev 1 (criticizing a number of features in the Commission proposal that made it little effective in terms of minority shareholder protection).

[31] See European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, Art 9c <www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:213:FIN>.

[32] See Council of the European Union, Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement <http://data.consilium.europa.eu/doc/document/ST-7315-2015-INIT/en/pdf >. The European Parliament's own text closely tracks the Council's. See European Parliament, Amendments adopted by the European Parliament on 8 July 2015 on the proposal for a directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement (COM(2014)0213 – C7-0147/2014 – 2014/0121(COD)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0257+0+DOC+XML+V0//EN>.

identify larger RPTs and the company's internal approval process. The Council text grants Member States much wider discretion on how to define material related party transactions and when to grant exemptions from the rule. In addition, according to the same text, RPTs have to be 'approved by the general meeting *or* by the administrative or supervisory body of the company *according to procedures which prevent a related party from taking advantage of its position and provide adequate protection for the interests of shareholders who are not related party, including minority shareholders'*, with the only condition that the director or the shareholder on the other side of the transaction will have to be excluded from voting.

It is only slightly unfair to summarize the Council's text on RPTs as requiring Member States to provide at least for *some* disclosure and *some* kind of approval procedure for *some* related party transactions. That contrasts quite sharply with the idea of uniformity. What is worse, incidentally, is that it may provide a precious opportunity for dominant shareholders to successfully lobby against the more stringent rules on related party transactions currently in place in individual Member States.[33] The previous experience with the Takeover Bids Directive's optional board neutrality rule, is sufficiently telling in this respect: as Paul Davies and his co-authors have shown, some of the Member States moved from a board neutrality rule to one allowing board defences against takeovers when they implemented the Takeover Bids Directive:[34] that is, the market for corporate control within those countries moved exactly in the opposite direction than the Directive had envisaged.

One may wonder whether things may change after Brexit. That could well be the case, if any evidence existed either of interest group resistance to harmonizing measures coming predominantly from the UK or of UK interest groups having opposing interests to those prevailing in continental Europe, so that, with the former out of the way, the latter could successfully coalesce to push for a given uniform legislative outcome. Yet, resistance to harmonizing measures is definitely not a British-only tradition, as the generalized opposition at the Council level against many of the proposals put forth by the European Commission in the field of shareholder rights exemplifies. And while one may expect pro-institutional investors, and therefore pro-shareholder pressures, to come more from the UK than from elsewhere, given its comparatively large asset management and insurance industry, continental European dominant shareholders and insiders appear historically to have had little appetite for advocating for an increase in harmonized rules. Rather, they have opposed EU legislation.[35] It would be surprising if that will no longer be the case in the future.

### *B. The insurmountable divergence in legal ground rules*

Assume that it were indeed possible to reach an agreement on harmonization measures that made the body of EU company law overall uniform. Would uniformity in the law on the books translate into uniformity in the law in action? There are many reasons for being doubtful about it in an environment characterized in each Member State by scant litigation in

[33] Enriques (n 30) 31.

[34] PL Davies, EP Schuster and E Walle de Ghelcke, 'The Takeover Directive as a Protectionist Tool?' in U Bernitz and WF Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010) 139.

[35] See Enriques (n 13) 61-2.

corporate law matters or, at most, by highly focused litigation, such as Germany's focus on suits challenging the validity of shareholder meeting resolutions.[36]

Where formal private enforcement plays a secondary role, how corporate law is complied with (and therefore, for all practical purposes, interpreted) will crucially depend on who provides legal advice to corporations and under what market conditions. Differences in the various professions' role in company law advice will easily lead to differences in interpretation. For instance, whether public notaries (a category of professional broadly protected from competition) rather than law firms or corporate secretaries (who operate in a market with lower barriers to entry) play a key role in ensuring compliance with corporate law is bound to have an impact on how rules are interpreted and evolve over time: *ceteris paribus*, the former may be more inclined to provide solutions that are less deferential to contractual freedom than the latter.

It goes without saying that such players and the courts that are called to decide upon corporate law issues will be aware of the principle of harmonious interpretation as enshrined in the WCJ case law.[37] But differences in legal ground rules, or meta-rules,[38] across EU jurisdictions will likely act as a covert but steady centrifugal force. While the differences within continental European countries in legal ground rules may not be as stark as between them and those of countries with a common law tradition, civil law countries have each their own idiosyncrasies. In addition, the indirect effect doctrine requires a national court to do anything in its power ('*está obligado a hacer todo lo posible*') to achieve the result laid down by EU legislation.[39] But, whether for explicit rules on statutory interpretation or for one country's own meta-rules, the discretion to do anything in its power will vary and possibly lead to different results.

More significantly, national meta-rules may lead courts to inadvertently give divergent interpretations of harmonized rules, simply because a given outcome, which might be what best corresponds to the EU legislator's purposes, is plainly impossible to conceive of under national meta-rules, making it harder for national lawyers and courts to perceive that a violation of the obligation of harmonious interpretation has taken place. Given the scarcity of litigation, a non-adversarial environment for company law interpretation is unlikely to lead to the emergence of inconsistencies with EU law.

Finally, if uniformity itself becomes the goal to achieve by way of harmonized rules, individual Member States' legal professionals and courts will find the principle of harmonious interpretation itself of little assistance in interpreting company law provisions: the only way to obtain uniformity will be to refer the question to the ECJ; and yet, only the study of comparative company law will allow practitioners to envisage the need for ECJ's intervention on the interpretation of a given company law provision. While that sounds intuitively good

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[36] See eg M Gelter, 'Why do shareholder derivative suits remain rare in continental Europe?' (2012) 37 Brooklyn Journal of International Law 881-7.

[37] See Case C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfal* [1984] ECR 1891; Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

[38] See eg, respectively, P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 57; K Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford University Press 2005) 249.

[39] Case C-106/89, *Marleasing* (n 39) para 8 (in the official English translation, the wording is even weaker: 'the national court called upon to interpret it is required to do so, as far as possible, …').

from the perspective of comparative legal scholars, it is unlikely to increase the demand for their services to a point that will ensure uniformity in EU company law in action.

## V. DO THEY ALREADY FIT TOGETHER?

There is one meaning of the word harmonization that warrants a positive answer to the question of whether EU company laws are harmonized, and that's the etymological one. Admittedly, the 'fitting together' of EU company laws is not what we usually talk about when we talk about company law harmonization;[40] yet, this meaning has itself a legal basis in the Treaty, and precisely in Articles 26 and 49 thereof:[41] if the aim of the harmonization programme generally is to ensure the functioning of the internal market and the right of establishment, then what is necessary and arguably sufficient for that purpose is that national Member States' company laws fit together. To achieve that goal, both negative harmonization and positive harmonization are needed: on the one hand, unjustified legal obstacles to free movement of companies in the various markets should be removed. In addition, rules must be put in place to make sure, firstly, that national company laws work together smoothly and, secondly, that its users do not face high company-law related transaction costs when they engage in cross-border trading.

EU company laws do fit together if a positive answer can be given to the following four questions:

1. Are companies from one Member State recognized as such in other Member States without being subject to its company law provisions, whatever (part of their) business they conduct there (mutual recognition)?
2. Can an existing company seamlessly move to another jurisdiction, that is, convert into a company of a different jurisdiction without having to liquidate at the border (freedom of reincorporation)?
3. Can an existing company restructure its business across borders without changing its legal form, that is, without having to reincorporate as a new entity (organizational arbitrage)?
4. Can market participants conduct business with companies from a different Member State without prohibitive transaction costs (familiarity)?

### *A. Mutual Recognition*

After *Centros* and *Überseering*, mutual recognition is no longer a concern for European companies. The real seat doctrine cannot be applied as against corporations set up in another Member State, who have their real seat in the host jurisdiction: even if they exclusively conduct their business there, the host jurisdiction may not deny them legal personality. And *Inspire Art* has seriously curtailed attempts to impose domestic rules on pseudo-foreign corporations by striking down Dutch rules that aimed to protect the interests of creditors by

[40] See M Andenas, C Baasch Andersen and R Ashcroft, 'Towards a Theory of Harmonisation', in *Theory and Practice of Harmonisation* (n 3) 577.

[41] According to Art 26 of the Treaty on the Functioning of the European Union, '[t]he 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'. Art 49 spells out the freedom of establishment.

imposing minimum capital requirements, ie a legal doctrine that European company law itself has traditionally appeared to hold as important.[42]

Of course, there are plenty of grey areas: company law rules applying to foreign companies as such are still consistent with the Treaty if they pass the *Gebhard* test. Yet, it is astonishing to note that after *Inspire Art* (a test case like *Centros* itself) no additional case has been brought to the court to test the legitimacy of company law rules applying to pseudo-foreign entities.[43] No matter how low litigation levels are within the EU, this would appear to imply that Member States do not try or manage to impose and/or enforce meaningful domestic corporate law rules to pseudo-foreign companies.

### *B. Freedom of Reincorporation*

When it comes to free movement of companies, there is no doubt that an existing company can achieve the outcome of reincorporating under the laws of a different Member State, subject, it goes without saying, to the latter's own company and private international law rules.[44]

The absence of any positive harmonization instrument making it possible for companies to transfer their legal seat or, which is the same, to engage in a cross-border conversion, is in fact no serious obstacle to reincorporations.[45] At least two EU-wide legal

[42] See Art 6, Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of Members and others, are required by Member States of companies within the meaning of the second paragraph of Art 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2012] OJ L 315/74.

[43] One important exception may be found in the European case law extending insolvency courts' jurisdiction, now pursuant to Art 6(1) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015 ] OJ L 141/19, to liability suits against directors of insolvent corporations (see C-295/13, *H v H.K.* [2015] OJ C 46/9): behaviour by directors of foreign entities before they entered insolvency proceedings in their host ('centre of main interest') Member State will in fact be subject to the host state's directors' liability rules, which are otherwise an integral part of company law functionally defined. See also *Kornhass* (Case C-594/14, *Simona Kornhaas v Thomas Dithmar als Insolvenzverwalter über das Vermögen der Kornhaas Montage und Dienstleistung Ltd* [2016] OJ C 48/5), which is in line with the cases cited above, but frames its holding in terms that appear to cast doubt on the implications of *Centros* and its progeny. While some commentators have been quick to see *Kornhass* as a first sign that the ECJ is ready to put *Centros* behind it, others have warned that it would be a mistake to read too much into that opinion. See WG Ringe, '*Kornhaas* and the Limits of Corporate Establishment', Oxford Business Law Blog, 25 May 2016 <https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/kornhaas-and-limits-corporate-establishment>.

[44] In the light of *Cartesio* (Case C-210/06, *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, para 110), a company may not reincorporate in a real-seat-doctrine Member State without also moving its 'real seat' there (whatever real seat means according to that Member State's law), which may obviously discourage the choice of reincorporating in *that* Member State.

[45] Note, incidentally, that *Cartesio* (ibid) falls short of negatively harmonizing cross-border conversions, because, in para 112, it grants the Member State of destination a mere option to grant entry and change of applicable law to companies engaging in cross-border conversions. Yet, as later clarified by *Vale* (Case C-378/10, *Vale Építési kft*, EU:C:2012:440), no such option exists if the Member State of destination allows domestic companies to engage in 'intra-border' conversions. See also AW Wiśniewski and A Opalski, 'Companies' Freedom of Establishment after the ECJ Cartesio Judgment' (2009) 10 European Business

mechanisms exist to move from one jurisdiction to another:[46] companies may set up a *Societas Europaea* ('SE') in the country of destination or engage in a cross-border merger with a company established there. In either case, a reverse merger with a shell company especially set up in the destination jurisdiction will let the company reincorporate there, in the case of a cross-border merger with no further impact on its operations stemming from the move itself.[47] Of course, the procedures a company has to go through in order to create an SE or to execute a cross-border merger are cumbersome and costly and could well be simplified.[48] Yet, the tools are there and they do not seem to impose insurmountable obstacles to well-motivated (and reasonably large and/or well-resourced) market participants.[49] The transaction costs of such a move appear in fact to be small, also in light of the US experience: there, businesses engage in regulatory arbitrage either at the incorporation stage (when, on this side of the Atlantic, *Centros* allows for cheap and almost unfettered choice) or, later on, when a significant transaction, such as an IPO or a genuine cross-border merger (think, again, of FCA[50]), is to be executed that usually entails costs much higher than those arising from cross-border merger rules themselves.[51] Even more importantly, tax obstacles in the form of exit taxes have at least been made surmountable via negative and positive harmonization in recent years.[52]

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Organization Law Rev 615; O Mörsdorf, 'The Legal Mobility of Companies Within the European Union Through Cross-Border Conversion' (2012) 49 CML Rev 652.

[46] Member States may provide for additional tools. See eg E Ferran, 'Corporate Mobility and Company Law', (2016) 79 MLR 814-15.

[47] If the SE statute is used, the resulting European Company will have to have its administrative seat in the country of incorporation. The same is true, in the case of cross-border mergers, when the state of destination follows the real seat doctrine, which therefore acts as a curb on reincorporations to certain destinations (but cannot be used to prevent migrations from real seat Member States to registered seat Member States).

[48] See European Company Law Experts Group, 'Response to the European Commission's Consultation on the Future of European Company Law' (2012) Columbia Law and Economics Research Paper 420, 8-9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2075034>; L Enriques 'A New EU Business Combination Form To Facilitate Cross-Border M&A: The Compulsory Share Exchange' (2014) 35 University of Pennsylvania Journal of International Law 541.

[49] See contra GJ Vossestein, 'Transfer of the Registered Office: The European Commission's Decision not to Submit a Proposal for a Directive' (2008) 4 Utrecht Law Rev 60.

[50] See text preceding n 22.

[51] See eg JR Macey and G Miller, 'Toward an Interest Group Theory of Delaware Corporate Law' (1987) 65 Texas Law Rev 481-2.

[52] See C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam,* EU:C:2011:785. See also Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34.

### *C. Organizational Arbitrage*

When it comes to cross-border restructurings without a corresponding change in applicable law, an obstacle may be found, again, in the international private law of companies: *Cartesio* clarifies that real seat doctrine Member States may prevent companies from moving their real seat to another Member State while at the same time maintaining incorporation in the original home state.

That may have implications for choices unrelated to company law, namely those pertaining to tax law and insolvency law, in that it may create a barrier to moves instrumental to changing the tax and/or insolvency law applicable. That will be the case, in practice, if the connecting factors that are sufficient to hold that a company has its centre of main interests in a given country according to the EIR or to hold that it has the fiscal domicile there are such as to also warrant the finding that the company also has its real seat there, pursuant to the individual Member State's real seat doctrine. When that is the case (and it will not necessarily be the case), the only way to move the headquarters will be by also reincorporating, for example via a cross-border merger. Because the costs of reincorporating will be trivial compared to the cost of relocating headquarters, this should be no serious obstacle to organizational arbitrage.

### *D. Familiarity*

Finally, it would seem that, also thanks to positive harmonization (and chiefly to the First Company Law Directive's rules on companies' invalidity and authority,[53] despite the latter's incompleteness and optionality[54]), businesses are nowadays finding it straightforward to trade cross-border with entities qualified as companies by other jurisdictions. Whether this is more thanks to positive harmonization or to improvements in information and communication technologies and the sheer increase in cross-border trade within the EU, which itself facilitates verification of information, would be an interesting question to explore, but not a relevant one for the purposes of the present section.

## VI. CONCLUSION

EU company laws are not uniform, despite half a century of harmonization measures, and will most likely never be. Yet, they do fit together well, if that means that private parties may set up companies that will be recognized as such across the EU to do business anywhere within the EU, reincorporate midstream in a different Member State at reasonable cost (possibly with the exception of the few countries of destination that adopt the real seat doctrine), reorganize their business across EU Member States' borders without the need for reincorporating (again, with the exception of companies set up in real state doctrine Member States) and do business with companies from other Member States without facing unreasonable company-law related transaction costs.

[53] See Art 10-13 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of Members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L 258/11.

[54] Enriques (n 13) 30.

In a less ambitious meaning, thus, the long quest for a harmonized European company law has been successful. More, of course, can be done to make diverse national company laws fit even better together, such as by simplifying the tools for mid-stream reincorporations, namely the rules on cross-border mergers. It goes without saying that attempts to make European company laws more uniform and more 'beautiful' will never stop. But it is comforting to think that, if they fail, much has already been achieved in the field of company law that is instrumental to the Treaty's goal of market integration.

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# EU Company Law Harmonization between Convergence and Varieties of Capitalism

Law Working Paper N° 355/2017
June 2017

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## Abstract

This chapter sketches the history of EU Company Law, from its beginnings in the 1960s until today. Throughout all periods, EU company law harmonization was largely a top-down, technocratic project that was considered imperative to realize the common market. In other words, it was promoted mainly by the European Commission and experts advising it without any particular business or investment interest group pushing for harmonization. Scholars are divided about the success of the project, with opinions ranging from it being a great success story to the claim that EU company law harmonization is largely trivial.

This chapter suggests that that the development of EU company law can be understood as reflecting two distinct periods of convergence in corporate law, even if that convergence has often been limited to specific issues and sometimes remained restricted to the formal level. Company law harmonization efforts mirror prevailing fashions about what is considered good corporate law. Each of these periods is roughly linked to the success of a particular model of capitalism that seemed to be on the ascendancy at the respective time. This first period was characterized by a dominance of the German model, and a vision of corporate law that one could characterize as belonging to a "coordinated" variety of capitalism, when shareholder value maximization was not yet the prime directive of corporate law. The second period began in the late 1990s and partly coincides with the "convergence in corporate governance" debate. Harmonization efforts focused on enabling choice for shareholders based on transparency and information. This period was dominated by liberal capitalism oriented toward shareholders and increasingly the stock markets. Germany's position as the model jurisdiction was increasingly taken over by the UK.

EU Company law harmonization has always been in the balance between top-down proposals coming from the center and national resistance. In the early period, when company law harmonization was influenced mainly by Continental models, the UK stepped on the brakes after joining the EEC in 1973 whereas since the 2000s Germany and other Continental jurisdictions have been the main source of resistance. Because of Member State options and the ability to avoid company rules, convergence has remained formal and superficial, but not entirely irrelevant.



Keywords: Freedom of Establishment, European Company Law, Harmonization, European Court of Justice, Company Law Directives, History of Corporate Law, Varieties of Capitalism, Convergence, Corporate Governance

JEL Classifications: K22



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## 1. Introduction

The European Union (EU) came into being as a result of the Maastricht Treaty, which came into force in 1993.[1] However, its history can be traced back to the formation of the European Coal and Steel Community (1951), the European Atomic Energy Community (1957), and most importantly the European Economic Community (EEC), which was created by the Treaty of Rome, which was signed by the original six Member States on March 25, 1957, and came into force on January 1, 1958.[2] The transition period, after which all of the rules relating to the internal market came into full force, ended on December 31, 1969. Corporate law (or company law, as it is usually

[1] Treaty on European Union, signed at Maastricht on 7 February 1992, 35 O.J. (C 191) 1.

[2] Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 54(3)(g).

called in the European context) has largely remained a prerogative of the Member States, which retained their own company laws. Starting in the early years, company law became one of the areas that the European Community (EC) sought to harmonize between the Member States. Since then, the EEC/EC/EU has passed a large number of directives, i.e. supranational legislation directed at Member States and requiring implementation in national laws, as well as a number of regulations, which are directly applicable. The latter relate mainly to supranational legal forms. While practitioners tend to pay relatively little attention to EU Company Law, given that it typically impacts corporations only indirectly through its national implementations, it is a prominent subject in academic literature.

This state of affairs looks somewhat unusual from overseas. Generally, with a few exceptions, most countries outside the EU have their own, formally independent national company laws. In the United States, by contrast, each constituent State has its own corporate law, in spite of the country's integrated national economy, without any national harmonization effort as such (leaving aside the Model Business Corporation Act). Yet, it is often thought that regulatory competition between the States has contributed to the relative uniformity of corporate law in the US. There is no uniform assessment of company law harmonization in the European Union; views vary between characterizing company law as a "success story of European efforts to regulate" (Kalss & Klampfl 2015, ¶ 1), and the claim that EU Company law is "trivial" (Enriques 2006).

This chapter sketches the history of EU Company Law, from its beginnings in the 1960s until today. While I do not take a strong position on the triviality thesis, I argue that the development of EU company law can be understood as reflecting two distinct periods of convergence in corporate law, even if that convergence has often been limited to specific issues and sometimes remained

restricted to the formal level. Company law harmonization efforts mirror prevailing fashions about what is considered good corporate law. Each of these periods is roughly linked to the success of a particular model of capitalism that seemed to be on the ascendancy at the respective time. The first one began with the formation of the European Economic Community, when the goal was minimum harmonization and the prevention of a European Delaware. Harmonization decelerated and was almost brought to a halt by the accession of the UK to the European Union. This first period was characterized by a dominance of the German model, and a vision of corporate law that one could characterize as belonging to a "coordinated" variety of capitalism, when shareholder value maximization was not yet the prime directive of corporate law.

The second period began in the late 1990s and partly coincides with the "convergence in corporate governance" debate. This period was dominated by liberal capitalism oriented toward shareholders and increasingly the stock markets. Germany had lost its position as the model jurisdiction for what was considered good corporate law, a role that was increasingly taken over by the UK. Harmonization projects tended to shift to issues more strongly associated with capital markets. Even where capital markets were not involved, harmonization focused less on minimum substantive standards, and more strongly on transparency and interaction with informed shareholders. Compromise had to be reached on traditional "regulatory" projects, and the European Court of Justice's case law forced the hands of the Member States.

This chapter traces these two periods and attempts to sketch their historical development. Section 2 surveys the objectives of harmonization. Section 3 situates European corporate law harmonization in the convergence and varieties of capitalism debates, and seeks to categorize specific examples of harmonization into the two periods. Section 4 summarizes and concludes.

## 2. Objectives of company law harmonization: From Rome to *Centros*

### 2.1. "Equivalent safeguards"

EU Company Law began to emerge during the 1960s. The Treaty of Rome gave authority to the Council and the Commission to coordinate "to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms […] to making such safeguards equivalent throughout the Community."[3] The raison d'être for this provision was the fact that the Treaty extended the freedom of establishment to "[c]ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community."[4] The larger goal was that shareholders, creditors, and other third parties interacting with firms across intra-European borders should be able to rely on a single set of minimum standards. The First Directive, which was passed in 1968,[5] provides an example. Applying both to Public Limited Liability Companies[6] and Private Limited Liability Companies[7], it required certain disclosures (such as the company's statutes, the names of individuals authorized to represent it, as well as accounting

[3] EEC Treaty, art. 54(3)(g). Today this provision can be found in the current Consolidated Version of the Treaty on the Functioning of the European Union art. 50(2)(g), 2008 O.J. (C 115) 47 [hereinafter TFEU].

[4] EEC Treaty, art. 58 [now TFEU art. 54].

[5] First Council Directive of 9 March 1968 (68/151/EEC), 1968 O.J. (L 65) 8. The Directive has since been recodified as Directive 2009/101/EC, 2009 O.J. (L 258) 11.

[6] This includes the *Aktiengesellschaft* (AG), *société anonyme* (SA), and *società per azioni* (spa).

[7] This includes the *Gesellschaft mit beschränkter Haftung* (GmbH), société à responsabilité limitée (SARL), and società à responsabilità limitata (srl).

information).[8] To protect third partyies reliance, it stipulated that contracts could not be repudiated on grounds of being *ultra vires,* and it limited circumstances under which the nullity of a corporation, which may only have prospective effects, could be declared by a court (see e.g. Houin 1965, p. 14: Drury 1991, p. 250-253).[9]

From the US perspective, this rationale might seem unusual. After all, the closest equivalent to company law harmonization in the US is the Model Business Corporation Act, on which the corporate law of a number states is based. However, unlike EU directives, it is in no way mandatory. Even if one accepts the rationale for harmonization, the rationale might not apply with full force in the US primarily because greater homogeneity in the legal culture and shared language makes harm to third parties less likely in the first place.

## 2.2. Preventing regulatory arbitrage

A second rationale for harmonization was the fear of what we would today call corporate law arbitrage and a possible race to the bottom. At the time of the Treaty, of the six original Member States, all but the Netherlands applied the real seat rule to determine the law applicable to a corporation (e.g. Houin 1965, p. 22; Stein, 1971, p. 29-31). According to this conflict of laws principle, a corporation is governed by the law where its head office (the center of its actual commercial and financial operations) is located, unlike the incorporation theory (or the American "internal affairs rule") where all that matters is the place of incorporation. The real seat theory serves mainly the

[8] Directive 2009/101/EC, art. 2.

[9] Directive 2009/101/EC, art. 9 (regarding ultra vires), art. 10-12 (regarding nullity). In the recodified version of 2009 art. 10 governs ultra vires, and art. 11-13 govern nullity.

protectionist purpose of shielding a particular corporate law system from the incursion of foreign firms governed by different laws. Generally, under this rule the State of incorporation and the location of the real seat must match. Otherwise, a jurisdiction applying it might deny a firm's legal capacity or treat it as a partnership (see e.g. Enriques & Gelter 2007, pp. 585-586; Menjucq 2016, p. 65).

Obviously, this rule was in tension with the freedom of establishment for companies. The contemporary understanding of the Treaty seemed to lean toward the view that, with respect to companies maintaining both a registered office and a real seat within the Community (Stein 1971, p. 28-29), the Member States would effectively have to switch to the incorporation theory (e.g. Houin 1965, p. 24: Drobnig 1966, pp. 101-102: Großfeld 1967, p. 18; Doralt 1969, p. 196; Conard 1973, pp. 56, 58; but see Leleux 1967, p. 149). During the negotiations, the French delegation was particularly concerned that the Netherlands, whose law was the most permissive at the time, might become the Delaware of Europe (Timmermans 1984, p. 13; Timmermans 1991, p. 132). While the Treaty did not formally make company law harmonization a prerequisite to the freedom of establishment for companies, it was during the negotiations considered a *quid pro quo* (Timmermans 1984, p. 12-14; Timmermans 1991, p. 132; see also Conard 1991, p. 2190).

In practice, the Member States attempted to use the fact that harmonization proceeded slowly as a justification to retain restrictions. While early on many assumed that harmonization would cover "all provisions concerning structure and organs of companies, formation and maintenance of its capital, the composition of the profit and loss account, the issue of securities, mergers, conversions, liquidations, guarantees required in cases of company concentrations, etc." (Wouters 2000, p. 268), some expected company law to be comprehensively harmonized by the end of the

transition period of the EC Treaty in 1969 (Houin 1965, p. 13-14). Following a two-year standoff between the Commission and the German government about the government's authorization for foreign firms to do business (Stein 1971, p. 37-41; Johnston 2009, p. 117) and only one directive having been passed in 1968, the EEC fell far short of this goal. Several early writers argued that Member States could maintain restrictions until a comprehensive harmonization had been accomplished (Everling 1964, ¶ 312; Großfeld 1967, p. 20-21; see also Stein 1971, 162-163). The Member States signed a "Convention on the Mutual Recognition of Companies and Bodies Corporate" in 1968,[10] but it did not come into force because the Netherlands did not ratify it (Timmermans 1991, p. 149; Conard 1991, p. 2161; Ebke 2000, p. 636 n. 83). Those defending restrictions thus felt that Member States were justified in retaining the protectionist conflict of law rules (see Behrens 1988, p. 512; Ebke 2000, p. 649).

This changed only with three cases handed down by the ECJ between 1999 and 2003. In *Centros*[11], Danish nationals had incorporated the firm in England and Wales with the full intention of using it only for business purposes in Denmark. The Danish authorities refused to register a branch office, given that the English registration was obviously a sham. In *Überseering*[12], the shares of a Dutch firm had been bought by German nationals, and the firm gradually shifted its business to Germany. German courts denied the existence of the firm as a legal entity as a corporation in line with the real seat theory. Finally, in *Inspire Art*[13] the court tested the compatibility of

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[10] Convention on the Mutual Recognition of Companies and Bodies Corporate, February 29, 1968, E.C. Bull. Supp. 2-1969, at 7.

[11] Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, Case C-212/97, 1999 E.C.R. I-1459.

[12] Überseering BV v. Nordic Construction Company Baumanagement GmbH, Case C-208/00, 2002 E.C.R. I-9919.

[13] Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., Case C-167/01, 2003 E.C.R. I-10155.

a Dutch law the imposed domestic legal capital rules on "formally foreign companies" (De Kluiver 2004, p. 123-125) with the Treaty. In all cases, the ECJ found the national restrictions on these firms' activities to be in violation of the Freedom of Establishment. After *Überseering,* it was clear that the real seat theory was dead, at least within the European Union (e.g. Bachner 2003, p. 49). On top of this, *Inspire Art* precludes the Member States from passing laws analogous to the pseudo-foreign incorporation statutes that New York and California have.[14]

The major issue at stake here was legal capital. The Second Company Law Directive,[15] which was a centerpiece of the early harmonization program, required that Member States establish a minimum capital, establish limitations on dividends and other returns of capital to shareholders as well as preemptive rights, and set up protective procedural requirements for capital increases and reductions as well as preemptive rights. The catch, however, was that the directive only applied to public limited liability companies but not private ones. In fact, the directive induced some Member States, notably the Netherlands, UK and Ireland, to introduce or emphasize a distinction between these two legal forms more strongly in the first place (see Department of Trade 1977, p. 6;

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[14] Cal. Corp. Code § 2115; N.Y. Bus. Corp. L. §§ 1317-1320. For Details about the Dutch law and its relatively recent vintage origins, see De Kluiver (2004).

[15] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 1977 O.J. (L 26) 1. The directive has been recodified as Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 2012 O.J. (L 315) 74.

Schmitthoff 1978, p. 45-46; Edwards 1999, p. 53; Grundmann 2012, p. 207). While the Second Directive was initially proposed in 1970,[16] it was not adopted until 1976, by which time British and Irish company law experts had, to some extent, influenced it. While an extension to private limited companies had originally been envisioned in 1970 (Grundmann 2012, p. 208), it was formally studied in a report only in 1993 (Commission 1993). Many continental European legal scholars, particularly Germans would likely have welcomed it (Edwards 1999, pp. 54-55; Grundmann 2012, p. 208; see also Lutter 1995, p. 207). Minimum capital requirements were the main issue in the debate about regulatory arbitrage in the 2000s (see Enriques & Gelter 2007, pp. 600-602).

## 2.3. Fostering economic integration

Finally, EU Company Law harmonization was also intended to serve purposes of industrial policy. Some of the earlier documents and statements express a concern that European firms were prevented by national borders from consolidating on a Continental scale, which is why the European Commission saw a need to facilitate cross-border amalgamations (Colonna di Paliano 1965, pp. 3-5; European Community 1966, pp. 6-7; Pipkorn 1972, p.503). The Commission pursued this objective through two avenues. First, it attempted to achieve some level of harmonization in M&A law, in particular with the Third and Sixth Directives on mergers and divisions respectively.[17]

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[16] Proposal of 9 March 1970, O.J. 1970 (C 48) 5, COM (70) 232 final.

[17] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, 1978 O.J. (L 295) 36. It has now been replaced with Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, 2011 O.J. (L 110) 1.

Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, 1982 O.J. (L 378) 47.

While these applied only to transactions involving companies governed by the laws of a single Member State, not all Member States at that time even had rules permitting both mergers and divisions (Edwards 1999, p. 92). It was expected that a directive on cross-border mergers would soon follow, as harmonization of domestic rules would make it easier to achieve compromise (Edwards 1999, p. 92). In fact, such a directive was enacted only in 2005,[18] and there is still no directive governing a cross-border transfer of seat.

The second pathway for economic integration was to be the European Company Statute or *Societas Europaea* (SE), which initially intended to provide a uniform company law across state borders. It was first proposed in 1959 (Sanders 1959), and a pre-proposal was on the table by 1966 (Sanders 1966). The Commission issued formal proposals in 1970[19], 1975[20], 1989[21] and 1991[22], but the final regulation[23] and directive[24] were passed only in 2001 (see in detail Edwards 2003, pp. 443-450). The idea had always been that an SE would come into existence only as the result of a

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[18] Council Directive on Cross-Border Mergers of Limited Liability Companies, No. 2005/56, 2005 O.J. (L 310) 1.

[19] Proposal for a Council Regulation embodying a Statute for European Companies (submitted to the Council on 30 June 1970). COM (70) 600 final.

[20] Proposal for a Council Regulation on the Statute for European Companies. Amended proposal presented by the Commission to the Council on 13 May 1975, pursuant to the second paragraph of Article 149 of the EEC Treaty, COM (75) 150 final.

[21] Statute for a European Company. Proposal for a Regulation on the Statute for a European Company. Proposal for a Directive complementing the Statute for a European Company with regard to the involvement of employees in the European Company (presented by the Commission to the Council on 25 August 1989), COM (89) 268 final.

[22] Amended proposal for a Council Regulation (EEC) on the Statute for a European Company, COM (91) 174 final.

[23] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), 2001 O.J. (L 294) 1.

[24] Council Directive Supplementing the Statute for a European Company with Re-gard to the Involvement of Employees, No. 2001/86, 2001 O.J. (L 294) 22.

cross-border transaction, such as a merger of companies from different Member States, or the foundation of a joint subsidiary. As a federal alternative to national incorporation with a merger procedure governed by supranational law, the SE would thus facilitate economic integration.

# 3. Discordance between varieties of capitalism in two periods of formal convergence

## 3.1. Convergence and EU Company Law

The question for this chapter, however, is whether EU company law was rather an obstacle or a vector for convergence in corporate governance. When discussing convergence in corporate law, we would typically think about in the context of the (late) 1990s and the 2000s. Capital markets were becoming more important for large firms, and various forces led to an increased orientation towards the interests of investors in corporations around the world. Observers of corporate governance have noted that corporate law has become more focused on shareholders, specifically outside investors. In this view, the idea of shareholder primacy as the prevailing goal of corporate governance radiated from the US and the UK. One prominent example is the spread of the corporate governance movement, inspired by the British "comply or explain" model across Europe in the form of corporate governance codes (e.g. Siems 2008, pp. 56-59; Aguilera & Cuervo-Cazurra 2009, p. 377-379). A number of legal reforms are also usually thought to fit that mold, including the German Control and Transparency Act of 1998, the French "Nouvelles régulations économiques" of 2001, and the Italian reforms of 2004 (see e.g. Clift 2007, pp. 553-557; Enriques & Volpin 2007, pp. 127-137; Pargendler 2012, p. 2952). Institutional investors that diversified their holdings internationally (e.g. André 1998, 76-83) as well as legal academics (Klages 2013) played a role in pushing for shareholder-oriented reforms.

Hansmann & Kraakman (2001, pp. 450-453) argue not only that the force of logic and example dictate the supremacy of the shareholder model, but also that larger trends such as more widespread share ownership and greater openness toward trade and competition across border have helped to spread the gospel. The extent of convergence was and is subject to extensive debate. Inefficient institutions may inhibit convergence to optimal rules (Milhaupt 1998), and the forces of competition may be stifled by path dependence, for example of vested interest groups with political power that seek to protect their rents (Bebchuk & Roe 1999; Bebchuk 2003, p. 843). Moreover, it is widely acknowledged that "convergence of form" and "convergence in function" do not always go hand in hand (Gilson 2001). Functional but non-formal convergence means that institutions adjust without any formal change in the rules, e.g. because more shareholder-oriented practices are adopted without a compelling legal requirement. Formal but non-functional convergence refers to the situation where rules change, but the actual practice or outcome remains largely unaffected.

EU (or EC) company law fits into the convergence model in various ways. First, as is clearly evident, it has provided a vector for convergence far longer than the time period usually discussed in the convergence literature. However, as we will explore in the subsequent section, its original model was not the shareholder model espoused by the convergence literature. To the extent that EU rules diverge from this model, EU law helped to entrench rules that many scholars would likely consider inefficient (e.g. legal capital) and not in line with the shareholder model.

Second, in line with the triviality critique of the directives, one could argue that often the directives only led to formal convergence. For example, the Fourth and Seventh Directives,[25] which governed accounting, left so many options that they allowed the Member States to largely leave their own accounting cultures as they were. The introduction of International Financial Reporting Standards for the consolidated accounts of publicly traded firms by the IFRS Regulation of 2002[26] was most strongly driven by the critique that financial statements across Europe were still not comparable after decades of accounting harmonization (Gelter & Kavame Eroglu 2014, p. 134).

However, at a certain level, EC/EU harmonization also has helped "modern" convergence. Arguably, the 2002 report of the Winter group, which set the subsequent corporate law agenda, espoused a shareholder perspective,[27] as did the subsequent 2007 Shareholder Rights Directive.[28] Nevertheless, Hansmann and Kraakman (2001, p. 454), in their influential polemic regarding the "End of History of Corporate Law" consider EU company law harmonization only a "weak force for convergence", in part because harmonization has been difficult where there were considerable differences between the Member States, as we will explore in the subsequent section.

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[25] Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC), O.J. (L 222) 11,; Seventh Council Directive of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts (83/349/EEC), O.J. (L 193) 1,. In 2013, both directives were re-codified as a single Accounting Directive. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related re-ports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, O.J. (L 182) 19.

[26] Regulation (EC) 1606/2002 of 19 July 2002, 2002 O.J. (L 243) 1.

[27] Report of the High Level Group of Company Law Experts on a Modern Frame-work for Company Law in Europe, Brussels, November 4, 2002.

[28] Directive 2007/36/EC, 2007 O.J. (L 184) 17.

Another lens through which we can look at company law harmonization is the theory of different "varieties of capitalism." This literature originates in economic sociology (Hall & Soskice 2001), but has also been applied to (comparative) corporate law (Milhaupt & Pistor 2008). This literature distinguishes between liberal market economies, such as those of the English-speaking countries, and coordinated market economies, which includes Continental European ones. While the former are mainly based on competition and individual market transaction, the latter rely on strategic coordination through aggregated interest groups interacting with a long-term perspective (see also Johnston 2009, p. 143). In the corporate governance context, this distinction is linked to the more broadly accepted one between "arm's length" or "outsider" systems of finance on one hand, or "control-oriented" or "insider" financial systems on the other hand. While outsider systems rely on investors whose contributions are collected through a capital market, insider systems rely more strongly on concentrated relational investors, including controlling shareholders and bank lenders (e.g. Berglöf 1997, pp. 159-164; Dignam & Galanis, 2009, p. 43-44).

While at least some of the earlier steps of EU harmonization proved to be relatively innocuous, widely accepted changes in some jurisdictions, in other areas the process got caught up in a "clash of capitalisms" (on the different models in the context of EU harmonization, see Dean 2012). On one level, if we look beyond company law harmonization, the EEC/EC/EU as a whole has helped to foster free trade, open markets and competition. Openness to trade often has the consequence of upsetting national socio-economic arrangements and bargains between interest groups because of the introduction of foreign competition. Openness to competition tends to erode corporate rents, which, among other things, reduces the portion captured by employees (Roe 2001). European integration generally is often seen as a market-oriented project, and a good case can be made

that the EU, as a whole, has helped convergence in corporate governance by fostering open markets, trade and competition. This is evident from the case law rooted in primary EU law, namely the freedom of establishment cases discussed above (section 2.2 above) as well as the cases on Golden Shares (discussed below in section 3.3), which made it harder for national governments to influence the economy through corporate ownership. While primary law sought to eliminate national barriers, secondary law in the form of the directives often was intended to mitigate the effects of market forces. In the "clash of capitalisms", while primary law tended to promote aspects of liberal capitalism, the initial harmonization program sought to preserve elements of coordinated capitalism, in some cases by raising them to the European level. The following sections will thus explore the two main periods of convergence and harmonization. In the first period, harmonization efforts largely had this effect, but increasingly faced resistance from liberal Britain. In the second period, the situation reversed. Liberal capitalism and financial markets were on the ascendancy, and harmonization increasingly served that purpose, while pockets of resistance by capitalism's coordinated variety remained.

## 3.2. Krautrock: Stakeholders, Coordinated Capitalism, and the German Model in Traditional EU Company Law

As we have seen, the early EU company law harmonization project was partly driven by practical considerations, such as firms interacting with third parties. The more regulatory aspects on the agenda were at the time characterized by a typically Continental vision of the law, for which the Second Directive (discussed above in section 2.2) provides a good example. Conceptually, law could attempt to protect creditors from shareholder opportunism in a number of ways. It could set up ex ante safeguards, of which legal capital would be an example (even if many argue that it is

not particularly effective in this capacity) (e.g. Armour 2000; Enriques & Macey 2001). Specifically, minimum capital could be called a form of merit regulation, i.e. only firms that are able to surmount that barrier are permitted to enter the market. This contrasts with disclosure-oriented creditor protection (see below section 3.3) or ex post liability for directors or shareholders (e.g. veil piercing).

The handwriting of the Continental regulatory approach can also be seen in operation in service of the goal of economic integration and cross-national mobility, namely the Third and Sixth Directives. These directives also exhibited the characteristic ex ante regulatory approach of EU Company Law in the form of disclosure and auditing requirements, and supermajority voting requirements for shareholders. The directives do not establish procedures for appraisal or revaluation, except that under certain circumstances a court or administrative body must be able to revalue compensation,[29] and creditors must be able to demand adequate safeguards.[30] The directives met resistance in the 1970s already, and lengthy negotiations ended only after specific protections for employees were dropped (Grundmann 2012, p.671). One peculiar aspect is that the UK could formally implement the directive, but it has in practice provided other transactional forms that largely obviate the new firms from making use of the harmonized law (Enriques 2006, p. 42). Consequently, the operations governed by the directives are "relatively unfamiliar" to UK lawyers (Edwards 1999, p. 91).

[29] Directive 2011/35/EU, art. 28(c).

[30] Art. 13.

Maybe the clearest example is how the EEC struggled for harmonizing boards of directors of public limited companies, both in the SE (see 2.3 above), but even more so in the planned Fifth Directive, which would have mandated a particular board structure and a distribution of powers between boards and shareholders across the Continent. The first draft for the directive was proposed in 1972[31] and amended in 1983,[32] 1990[33] and 1991. The proposal was formally withdrawn by the Commission in 2001.[34] The Fifth Directive would have actually addressed corporate governance issues, a few aspects of which are now governed by the Shareholder Rights Directive of 2007[35] and the new Audit Directive of 2014,[36] but it stood out in its rigid German-inspired approach, which it shared with early drafts for the SE. In both cases, a two-tier board structure coupled with mandatory employee representation would have been required. Apparently, the Commission's goal at the time was to introduce labor representation in large companies across Europe (Pipkorn 1972, pp. 499-500). While the original SE and Fifth Directive drafts may have been viable proposals in the original 6-member EEC, the UK opposed them most fervently, but not after contributing to a domestic

[31] Proposal for a fifth Directive to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, as regards the structure of sociétés anonymes and the powers and obligations of their organs. COM (72) 887 final, 27 September 1972.

[32] Amended proposal for a Fifth Directive founded on Article 54(3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs. COM (83) 185 final.

[33] Second amendment to the proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs, COM (90) 629 final.

[34] Communication from the Commission – Withdrawal of Commission Proposals which are no longer topical, COM (2001) 763 final.

[35] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, 2007 O.J. (L 184) 17..

[36] See Art 37 of the Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts with EEA relevance, 2014 O.J. (L 158) 196 (requiring a shareholder vote for the appointment of the auditor).

debate. The Labour government of the 1970s commissioned a report on employee representation that actually recommended employee participation (Bullock 1977). However, with only lackluster, if any support from the unions (Marsh & Locksley 1983, p. 50; Wedderburn 1986, p. 837) it was not enacted before the Conservative Thatcher government came into power in 1980, which took the UK off the map in terms of employee representation. Generally, UK resistance against employee representation on boards is cited as a reason for the failure of the Fifth Directive (see generally Temple Lang 1975; Schneebaum 1982, pp. 308-317; Murphy 1984; Dine 1989; Johnston 2009, p. 137). Another corporate governance project based heavily on German law, the Ninth Directive on Corporate Groups, never made it past the stage of unofficial draft proposals (in 1974/75 and 1984) (Andenas & Woolridge 2009, p. 449-450; Grundmann 2012, p.763).

30 years of gridlock regarding the SE came to a conclusion after lengthy negotiations only after compromise was reached on governance structure in 2001. First, the final SE Regulation largely abandoned the idea of providing a comprehensive corporate statute. The regulation touches upon only a few issues and refers to the national law of the State of registration to fill the gaps[37] (on the limited scope of regulation e.g. Enriques 2004, p. 77). Second, as to the contentious issue of board structure, Member States, which generally needed to pass implementing laws on SEs registered under their respective laws (even if the Union legislation took the form of a regulation), had to permit "their" SEs to choose either a single-tier or a two-tier board structure. Arguably, this was a bigger leap of faith for Member States requiring two-tier boards for their domestic SEs such as

[37] SE Regulation, art. 9.

Germany and Austria. Third, regarding employee participation, there is no one-size-fits-all solution for employee participation. When two companies merge to form an SE, the Directive on the Involvement of Employees[38] requires that employees elect a "special negotiating body" to negotiate employee representation rights in the future SE on their behalf.[39] If no compromise is reached, default rules provide for employee participation provided that a certain minimum number of employees previously enjoyed such rights. While at first glance this system would seem to result in an expansion of participation rights in the case of international combinations, the fact that the SE is used mainly in jurisdictions that have employee participations rights belies this fact (Eidenmüller et al. 2009). In practice, the negotiated mechanism freezes employee participation at a particular level (regardless of whether a national size threshold is subsequently exceeded), and it apparently has allowed a number of German firms to switch to a one-tier system while slightly reducing the percentage of employee representatives. Finally, it may even be possible to eliminate employee representation entirely by merging the SE with a firm without employee representatives after a number of years (Gelter 2010, pp. 810-818).

Between 1984 and 2001, EC (EU) Company Law Harmonization almost came to a halt. Only two relatively technical directives (on branch offices[40] and single-member private limited

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[38] Council Directive Supplementing the Statute for a European Company with Re-gard to the Involvement of Employees, No. 2001/86, 2001 O.J. (L 294) 22.

[39] SE Employees Directive, art. 3-4.

[40] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclo-sure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State 1989 O.J. (L 395) 36.

companies[41]) were adopted in 1989. In this period, European company law harmonization came to be seen to be in crisis or even as a failure. The recognition of the principle of subsidiarity in the Treaty of Maastricht may have further undercut the legitimacy of top-down harmonization (Grundmann 2004, p. 607). Several of the more controversial proposals were shelved, at least for a time, including Cross-Border Mergers and Transfers of Seat, the SE, and not least the 5th Directive on Company Structure.

While EU Company Law harmonization thus led to some convergence in corporate law within the Union, it was not the kind of convergence associated with the "convergence in corporate governance" period of the late 1990s and 2000s. At the time of the directives, German corporate law carried the greatest prestige, and at the very least, would have been the endpoint of convergence. If anything, European harmonization led to some convergence toward a Continental model for a time.

While the initial six Member States shared a relatively similar outlook toward law and the economy, the accession of the UK, Ireland and Denmark to the EEC in 1973 changed the trajectory of company law harmonization. The UK, now one of the largest and most vocal Member States, had at least some influence on EU law harmonization, but more importantly became a hindrance in a number of projects. Overall, fundamental differences in the outlook toward corporate law and governance between Member States had become too great (Armour & Ringe 2010, p. 128-129). A

[41] Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies, 1989 O.J. (L 395) 40, now re-cast as Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies, 2009 O.J. (L 258) 20.

last hurrah for German prestige in corporate law came in the early 1990s with the collapse of the Soviet Union and the disintegration of the Warsaw Pact. The newly capitalist countries looked toward the West for inspiration in developing corporate law, and here the German model proved to be influential, in part because countries in the Eastern Central Europe reverted to pre-communist traditions. Moreover, it should not be overlooked that Portugal and Spain had joined the EC in 1986, and Austria, Finland and Sweden were newly admitted to the EU in 1995, which collaterally led to a geographic expansion of the application of the directives, even if these countries did not bring fundamentally different corporate law traditions to the table.

## 3.3. The New Wave: The Second Wave, Capital-market orientated and convergence in corporate governance

### 3.3.1. The ECJ and capital markets reinvigorate European Company Law

A number of developments helped propel EU Company Law harmonization back into action during the 2000s. First, the case law on the freedom of establishment (section 2.2) induced various important policy debates. It fueled the debate about legal capital, which started to come under increasing criticism during the 2000s. As is evident from cases such as *Centros* and *Inspire Art,* the ECJ considered the benefits to creditors questionable, as did many scholars (e.g. Armour 2000; Enriques & Macey 2001) and the influential Rickford report, a British initiative against legal capital (Rickford 2004a). Among scholars, the cases led to a debate about regulatory competition, which was no longer only seen as a danger but also as an opportunity, at least by some, given the favorable view among some scholars (e.g. Armour 2005). In practice, it led to a temporary boom of the formation of pseudo-foreign private limited companies in England and Wales and eventually some "defensive" regulatory competition regarding minimum capital, in particular a reduction of minimum capital to € 1 at least in certain forms of business organization (e.g. Roth & Kindler 2013,

p. 39; Conac 2015a, p. 149-150). A number of Member States maintained restrictions that clearly violated or disregarded the case law, while in others, foreign incorporations became a viable practical option (Becht et al. 2009). Logically, there would have been two steps for the EU to respond. One choice would have been to reaffirm confidence in the Second Directive's scheme and eventually extend it to private limited companies, since this is where regulatory arbitrage was happening; given that legal capital is ostensibly intended to protect creditors first, there is no reason to treat public and private limited companies differently in the first place. The other policy choice would have been to give in to the criticism and repeal the Second Directive. However, the commission did neither but proposed a re-codified version of the directive, which was enacted in 2012.[42]

Second, from the mid-1990s onward, the Commission had begun to challenge the so-called "Golden Share" arrangements as violations of the free movement of capital. Golden Shares constituted legal or statutory rights for national or subnational governments to interfere in the governance of specific companies, e.g. through veto rights in privatized companies in key industries. In most cases, the court found them to be in violation of free movement of capital because of their effect of supposedly discouraging investment across borders (see Ringe 2010).[43]

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[42] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 2012 O.J. (L 315) 74.

[43] Commission v. France, Case C-483/99, 4 June 2002; Case C-503/99, Commission v Belgium, Case C-503/99, 4 June 2002 (only case where the national measure , which provided merely for a veto in specific circumstances, was upheld); Commission v Portugal, Case C-367/98, 4 June 2002; among others, see also the subsequent "Volkswagen" case of Commission v Germany, Case C-112/05, 23 October 2007.

The Golden Share case law, however, helped reinvigorate another controversial topic, namely the Thirteenth Directive on Takeovers, which had been an old project serving the objective of consolidating European industry across borders. Takeover Law had first been taken up in the Pennington Report of 1974 and in the commission's white book of 1975, and proposals were issued in 1989 and 1990, 1996 and 1997. Finally, the Member States almost reached an agreement in June 2000 under German presidency and would have implemented a non-frustration rule that prohibited boards of target companies from adopting defensive actions without shareholder consent (Hopt 2002, p. 9). Representatives of a number of German firms, particularly Volkswagen, personally intervened with Chancellor Schröder, which caused Germany to change its position. As the European parliament also opposed the directive in its then draft form, the compromise, which the German Council presidency had previously carefully brokered, was off the table (Hopt 2002, p. 10). The commission subsequently rebooted the process by introducing a "High Level Group of Company Law Experts" (Winter et al. 2002) that in addition to the non-frustration rule proposed the breakthrough rule, which invalidates structural takeover defenses such as restrictions on the transfer of shares and differential voting rights in hostile bids. However, the final compromise reached by the Member States – against the opposition of the Commission (Davies et al. 2010, p. 107) – made both the non-frustration rule and the mandatory bid rule optional for the Member States. They are permitted to allow firms subject to the non-frustration or breakthrough principle (either because of the country's law or charter) to apply the "reciprocity" principle, according to which firms may avoid applying these principles vis-à-vis bidders that are themselves not subject to these rules. Thus, besides procedural and disclosure requirements, only the mandatory bid rule is mandatory in the final directive.

Another development that propelled the Takeover Directive forward was the Financial Services Action Plan of 1999,[44] which, given the practical prevailing fragmentation of securities markets, had four objectives: "(i) developing a single European market in wholesale financial services; (ii) creating open and secure retail markets; (iii) ensuring financial stability through establishing adequate prudential rules and supervision; and (iv) setting wider conditions for an optimal single financial market" (Armour & Ringe 2001, p. 152). In doing so, the EU passed a set of measures harmonizing in part substantive law, and in part conflict of law rules (Enriques & Gatti 2008, p. 48). Besides the Takeover Directive, which had already been on the program for company law decades earlier, this program included in particular the Market Abuse Directive[45], the Prospectus

[44] Communication of The Commission, Financial Services: Implementing The Framework For Financial Markets: Action Plan, COM (1999) 232 final.

[45] Directive 2003/6/EC of the European Parliament and of the Council of 28 Jan. 2003 on insider dealing and market manipulation (market abuse), O.J. 2003, (L 96) 16. It has since been repealed and replaced by Regulation (EU) No 596/2014 Of The European Parliament And Of The Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the Eu-ropean Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. (L 173) 1; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), 2014 O.J. (L 173) 179.

Directive[46], the Directive on Markets in Financial Instruments (MiFID)[47], and the Transparency Directive.[48]

A further important related project was the overhaul of EU Accounting Law. The original Fourth and Seventh Directives were part of the company law harmonization program, and unlike financial reporting in US securities law, their objectives were not entirely oriented toward the capital market. Especially the Fourth Directive was closely connected to the First and Second company law directives and the idea of "equivalent safeguards" for legal entities within the common market. By requiring all limited liability companies to disclose at least a limited set of financial statements, it implemented the UK idea of mandatory disclosure as the "price" for limited liability (see Edwards 1999, p. 123 n. 41; Rickford 2004, p. 408; Schön 2006, p. 264), which met considerable resistance in some parts of the Continent, where initially large proportions of firms failed to file their statements (Edwards 1999, pp. 22-23; Enriques 2006, p. 14; Schön 2006, pp. 260-262) until the ECJ compelled Member States to enforce the requirement more effectively.[49] At the same time,

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[46] Directive 2003/71/EC of the European Parliament and of the Council of 4 Nov. 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, O.J. 2003, (L 345) 64.

[47] Directive 2004/39/EC of the European Parliament and of the Council of 21 Apr. 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, O.J. 2004 (L 145) 1. It has been replaced by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349; Regula-tion (EU) No 600/2014 of the European Parliament and Of The Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, 2014 O.J. (L 173) 84.

[48] Directive 2004/109/EC of the European Parliament and of the Council of 15 Dec. 2004 on the harmonization 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, O.J. 2004 (L 390) 38.

[49] Daihatsu Deutschland v. Verband deutscher Daihatsu-Händler, Case C-97/96, 1997 E.C.R. I-6843; Commission of the European Communities v. Germany, Case C-191/95, 1998 E.C.R. I-5449. The court also had to deal with the question of whether mandatory disclosure was a violation of fundamental rights. Axel Sprin-ger AG v Zeitungsverlag Niederrhein, Case C-435/02, 2004 E.C.R. I-8663.

because the Second Directive tied amount distributable as dividends to accounting, the harmonized accounting principles were shaped by the central purpose of not allowing excessive distributions (see Haller 1995, p. 236; Ferran 2006, pp. 200-201, 208-209, Enriques & Gelter 2007, p. 603; Gelter & Kavame Eroglu 2014, p. 139). Together with strongly developed book-tax conformity in some Member States, this led to a strong influence of accounting conservatism on financial results and a contamination of information objectives crucial to the capital market (Gelter & Kavame Eroglu 2014, p. 146-147).

In the 1990s, the harmonization scheme of the two directives came to be widely perceived as a failure because financial statements from different Member States were still not comparable, and thus did not provide an "adequate safeguard" for third parties interacting with companies. The Daimler-Benz 1993 cross-listing in New York and the firm's parallel use of US GAAP exposed that German accounting standards were maybe not as reliably conservative as one previously had thought, and pressure mounted for the EU to help firms to internationalize their financial statements, which eventually led to the IFRS Regulation in 2002.[50] Publicly traded firms must now use International Financial Reporting Standards in their consolidated financial statements. However, this did not result in a complete displacement of the directives, as Member States may allow or require non-publicly traded firms to apply harmonized domestic accounting legislation for both

[50] Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards, art. 5, 2002 O.J. (L 243) 1.

entity-level and consolidated accounts, and publicly traded firms for entity-level financial statements.

### 3.3.2. Shareholder rights and new legal forms

In the core areas of company law, the 2003 Company Law Action Plan (CLAP) set the agenda for the next decade.[51] Firmly rooted in a shareholder vision of corporate law and governance and clearly exhibiting the handwriting of the corporate governance movement (Dean 2012, p. 473), its first major objective was creating minimum standards for shareholders in publicly traded firms. Citing the British Cadbury report, a number of the issues it raises are directly out of the "good corporate governance" playbook, including stronger shareholder rights and "shareholder democracy". Regarding the board of directors, the model espoused by the Commission is no longer the two-tier system of the proposed Fifth Directive of yesteryear, but freedom of choice between different board models, combined with independent directors populating the nomination, remuneration and audit committees typical of publicly-traded firms in the US and the UK.

The major product of the ensuing process was the Shareholder Rights Directive of 2007.[52] Applying to publicly traded companies only and intended to facilitate the exercise of voting rights across borders, among other things, it establishes the record date system favored by institutional investors, proxy and correspondence voting, and includes a number of other provisions intended to facilitate voting in other jurisdictions.

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[51] Communication from the Commission to The Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM (2003) 284 final.

[52] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, 2007 O.J. (L 184) 17.

Other CLAP items include the Directive on Cross-Border Mergers, which was passed in 2005, and the Directive on the Transfer of Seat, which is still outstanding (on French resistance because of the fear of losing tax revenue, see Conac 2015, p. 224; on the plan generally see Wymeersch 2007). Beyond that, the Commission planned additional supranational legal forms, particularly the European Private Company or *Societas Privata Europaea* (SPE), which the Commission proposed in 2008[53] but withdrew in 2013 due to conflicts regarding employee participation, as well as the high degree of flexibility and possible absence of a minimum capital (Davies 2010, pp. 482-483, 487-489; Roth & Kindler 2013, p. 23; Teichmann & Fröhlich 2014, p. 537; Conac 2015, p. 221). The commission followed up with a proposal for a European single-member company (*Societas Unius Personae* or SUP).[54] Based on the Commission's 2012 Action Plan[55], the SUP mainly serves the purpose of facilitating the establishment of subsidiaries in other Member States (Conac 2015a; on the action plan see Hopt 2015, pp. 151-153). The relative lack of formalities, which might be its strength by making the SUP an appealing legal form, is again a weakness of this proposal, given the opposition from Member States favoring a more regulatory corporate law (Teichmann & Fröhlich 2014, p. 537; Hopt 2015, p. 160).

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[53] Proposal for a Council Regulation on the Statute for a European Private Company, COM (2008) 396/3.

[54] Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, COM (2014) 212 final.

[55] 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 governance – a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final.

At the time of writing, the most talked about topic is the adoption of major revisions to the Shareholder Rights Directive, which have been accorded between the Council and the Parliament and are currently passing through the legislative process.[56] The amendments include a requirement for institutional investors and asset managers to disclose shareholder engagement policies as well as transparency requirements for asset managers and proxy advisors, as well as for companies' remuneration policies. Member States must provide for a say-on-pay vote, although it can be merely advisory. Maybe most interestingly, art. 9c of the text requires that material related-party transactions shall be publicized, subject to a report by an independent third party, and approved by either shareholders or the supervisory or administrative body. Previous drafts for the amendment would have gone further and provided mandatory shareholder approval. Evidently, the final version was again the result of a compromise that took criticism into account according to which the rule was hardly compatible with German corporate governance, where outside shareholders can hardly be expected to be disinterested arbiters of related party transactions (e.g. Hopt 2015, p. 155; Tröger 2015, p. 187-190).

Overall, the renewed activity in EU company law in the 3rd millennium took an entirely different flavor than the original harmonization project. While compromises on a few "traditional" projects were finally reached, most of the new measures are linked to capital market development.

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[56] European Parliament legislative resolution of 14 March 2017 on the proposal for a directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM (2014) 213.

This is clearly true for the Takeover Directive, the Shareholder Rights Directive and the IFRS Regulation, all of which apply only or primarily to publicly traded firms, as well as the Audit Directive of 2006 with its enhanced requirements for publicly traded companies.[57] The issue animating the new directives was corporate governance, which, as a movement, swept Europe in the late 1990s (see generally Pargendler 2016, pp. 380-381). Most of the requirements came directly out of the emerging "good corporate governance" playbook, in which the UK was de facto often seen as the model jurisdiction. While the UK did not, for example, actively promote takeover harmonization, the Commission's proposal clearly took it as a model. One might be tempted to suggest that the new model is characterized by attention to disclosure – in line with a capital markets vision – as well as decision-making by informed shareholders. This contrasts to some extent with the earlier attempts to impose a two-tier board system, when the influence of large shareholders was taken for granted and little attention was paid to outside investors. At least where publicly traded firms are concerned, it would probably be wrong to say that the new model is less regulatory than the old one. The Shareholder Rights Directive, for example, similarly attempts to establish minimum standards, but simply with a different orientation and purpose; the UK approach is not necessarily less regulatory than the German one, even if it regulates differently. Arguably, agreement on issues related to capital markets was easier to achieve than in core corporate law, given that in most Member States few firms actually tapped the capital markets and thus might have opposed reform (Armour & Ringe 2010, p. 157). This may help to explain why the current reform of the Shareholder

[57] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC 2006 O.J. (L 157) 87.

Rights Directive was enacted. However, in the end, the reform is only relatively minor and again a watered-down compromise. Moreover, even in Germany, confidence about the desirability of measures proposed in the first wave of company law harmonization, such as the two-tier board and the German law of corporate groups and codetermination is far lower than in the 1970s or 1980s.

Regarding privately held firms, it is probably correct to say that a less regulatory, Anglo-Saxon approach is on the ascendancy. The contractual vision of the business organization, which is also evident in LLCs in the United States, has been gaining ground in part because of *Centros* and its progeny. So far, the EU has done little to de-regulate its corpus of harmonized company law (with the exception of relaxed financial disclosure requirements for "micro entities"[58]). For example, there has been no serious movement to follow the US lead in simplifying some requirements of the Second Directive that empower shareholders relative to the board, such as approval requirements for capital increases and decreases, or to eliminate preemptive rights. However, given the development of the past decades, it is at least unlikely that proposals to expand mandatory legal capital to private limited companies will ever be taken up again.

We can say, however, that Germany and the UK have reversed their roles with the advent of the new wave in European company law. In both periods, harmonization was typically a top-down project promoted by the Commission and company law experts seeking to fulfil the promise of a fully developed common market. There was usually no particular interest group or Member

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[58] Directive 2012/6/EU of the European Parliament and of the Council of 14 March 2012 amending Council Directive 78/660/EEC on the annual accounts of certain types of companies as regards micro-entities, 2012 O.J. (L 81) 3.

State that pushed for harmonization,[59] but the source of inspiration (i.e. the model that would be used to achieve this goal) changed. Whereas the old harmonization was largely based on Continental ideas that the UK resisted, the new, capital market-oriented projects were based on UK ideas that Continental European countries tended to resist, although not always with the same motivation. This can be seen most clearly in the Takeover Directive. Germany opposed the non-frustration rule because it would have shifted power away from boards (and employees) toward shareholders, in particular, in firms that might have been open to a takeover bid. In the Nordic countries, if the breakthrough rule had been made mandatory, it would have been hard to sustain a system where controlling (family) shareholders are traditionally seen as guarantors of good corporate governance (Hansen 2012, p. 39).

## 4. Conclusion

Throughout all periods, EU company law harmonization was largely a top-down, technocratic project that was considered imperative to realize the common market. In other words, it was promoted mainly by the European Commission and experts advising it without any particular business or investment interest group pushing for harmonization.[60] However, that does not mean that it has been entirely without effect on national corporate laws. Hansmann and Kraakman (2001, p.

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[59] An exception may be International Financial Reporting Standards, which were very desirable for large firms seeking to internationalize their shareholder base, as well as large accounting firms that sought to expand their share in the audit and consulting markets.

Among the Member States, clearly the UK provided the model for the Takeover Directive, but the UK government was not particular enthusiastic about the directive because it meant that the previously self-regulatory panel would have to put on stronger legal foundations (Clarke 2007, p. 384).

[60] Arguably, an industry of lobbyists, technocrats and advisors (including lawyers and legal academics) may thus have benefited most from harmonization (Enriques 2006, pp. 55-59).

454), in their influential polemic regarding the "End of History of Corporate Law" consider it only a "weak force for convergence", in particular because it often does not always conform to the shareholder-oriented model, but also because harmonization has been difficult where there were considerable differences between the Member States.

We have seen that EU Company law harmonization has always been in the balance between centralized top-down proposals coming from Brussels, and varying national resistance. In the early period, when company law harmonization was influenced mainly by Continental models, the UK stepped on the brakes after joining the EEC in 1973 (e.g. Johnston 2009, p. 139), whereas since the 2000s, when the UK law dominated as the model, Germany and other Continental jurisdictions have been the main force of resistance. This change was driven largely by which model of corporate law was considered preferable. Because of Member State options and the ability to avoid company rules, in many areas, convergence has remained formal and superficial, but not entirely irrelevant.

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# Unification, Harmonisation and Competition in European Company Forms

RICCARDO GHETTI*

**Abstract**

The main tools for the convergence of company law are full legal unification, mere harmonisation, and regulatory competition. The article uses this framework to study both the existing and the proposed European company forms (ECFs): the European Company, the European Cooperative Company, the European Private Company and the Single Member Company.

All ECFs aim at legal unification, but none of them are endowed with comprehensively unified legal regimes; their regulation is patchy and stratified and suffers from heavy referencing to national law in crucial areas such as corporate governance and corporate groups. It is therefore no surprise that ECFs have failed to win the favour of European entrepreneurs, and the data on the diffusion of ECFs are not encouraging: a large proportion of the few registered ECFs are in fact only shell companies, and most of the operating ECFs are found only in selected parts of central Europe. This failure is the result of high setup, legal and reputational costs, not offset by sufficiently important benefits. The roots of the fiasco go deeper, however, as regulatory protectionism impedes the adoption of attractive supranational company forms.

While acknowledging that forcing further cooperative convergence could be not only costly but also ineffective, it must be noted that to some extent non-cooperative convergence is already occurring, at least with reference to national company forms suitable for small companies. Here, in contrast with the cooperative/supranational level, the non-cooperative mechanism of regulatory competition needs not inevitably turn into regulatory protectionism but can instead be a positive source of emulation, causing the diffusion of effective national company forms and leading ultimately to spontaneous legal convergence without supranational intervention.

EU company law makers should consider that in the field of ECFs no law might be better than bad law, thus avoiding the path of cooperative adaptation and trusting the uniforming force of regulatory competition instead.

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## 1. The Problem of European Company Forms

The emergence of new European company forms (ECFs)[1] has gained considerable momentum. After the European Economic Interest Grouping,[2] the European Union gave birth to the *Societas Europaea*[3] and the *Societas Cooperativa Europaea*,[4] and planned to adopt a new *Societas Privata Europaea*.[5] The latter suffered an early demise,[6] and the Commission is now pushing for a *Societas Unius Personae*[7] in its stead.

The Latin names point to the shared heritage of the peoples of Europe, with a view to enabling the forms to overcome the linguistic and cultural divides that still interfere with exchanges among member States.[8]

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[1] The term is not widely employed because ECFs are seldom referred to as a class. For similar usages see Michel Menjucq, *Droit International et Européen des Sociétés*, 147 (3rd ed., Paris: Montchrestien, 2011), where a chapter appears under the name 'Les personnes morales Européennes'; this term, however, is broader than 'European company forms', as explained in section 3. See also Ulrich Ehricke, *Die Überwindung von Akzeptanzdefiziten als Grundlage zur Schaffung neuer supranationaler Gesellschaftsformen in der EU* 64 Rabels Zeitschrift Fuer Auslaendisches und Internationales Privatrecht 497 (2000) and Stefan Grundmann, *European Company Law*, 803 (2nd ed., Cambridge: Interesentia, 2011) referring to 'supranational company forms'.

[2] Council Regulation (EEC) n. 2137/85 of the 25 July 1985 on the European Economic Interest Grouping, in *O.J.E.C* n. L 199 of 31 July 1985, 1-9 (EEIG Regulation). See Daniel T Murphy, *The European Economic Interest Grouping (EEIG): A New European Business Entity* 23 Vanderbilt Journal of Transnational Law 65-84 (1990) and Dirk van Gerven and Carel AV Aalders (eds.), *European Economic Interest Groupings* (Deventer: Kluver, 1990).

[3] Council Regulation (EC) n. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), in *O.J.E.C.* n. L 294 of 10 November 2001, 1-21 (SE Regulation) and Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, in *G.U.C.E.* n. L 924 of 10 November 2001, 22 ff. (SE Directive). See Section 5.1.

[4] Council Regulation (EEC) 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (ECS), in *O.J.E.C.* n. L 207 of 18 August 2003, 1-24, (ECS Regulation) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, in *U.J.E.U.* n. L 207 of 18 August 2003, 25-36 (ECS Directive), on which see Section 5.2.

[5] European Commission, *Proposal for a Council Regulation on the Statute for a European Private Company*, COM(2008) 396/3 (SPE Proposal). See Section 5.3.

[6] European Commission, *Regulatory Fitness and Performance (REFIT): Results and Next Steps*, Brussels, 2 October 2013, COM(2013) 865 final, 8, available at ww.ec.europa.eu. The project for a *Fundatio Europaea* has also been repealed: see *infra* nt. 41.

[7] European Commission, *Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies*, Brussels, 9 April 2014, COM(2014) 212 final, available at www.ec.europa.eu (SUP Proposal). See para. 5.4.

[8] A Latin denomination helped to solve the problem of different names in different European jurisdictions (as with the EEIG). Nonetheless the European Commission is not very consistent in the use of the Latin forms: see for instance the website available at http://ec.europa.eu/-internal_market/company/societas-europaea/index_en.htm opened with a view to 'launch an information campaign to increase awareness of the European Company (SE) statute' (European Commission, *Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies*, Strasbourg, 12 December 2012, COM(2012) 14, available at www.ec.europa.eu). The website is significantly titled The European company – Your business opportunity?', referring to it as a 'European company', a 'société européenne' or an 'Europäischen Gesellschaft' in the

The European Union also seems prepared to offer entrepreneurs a complete menu of autonomous legal entities, in order to create a full-fledged alternative to national company forms. On the one hand, this modus operandi is consistent with the Commission's frequent use of optional measures,[9] and meshes well, at least apparently, with the liberalising efforts of the *Centros* jurisprudence.[10] On the other hand, this situation could engender two premature and dangerous conclusions: first, that introducing new ECFs is cost-free (all it does is widen the spectrum of entrepreneurial choice); and second, that designing new legal forms is in any case preferable to inaction. Such an attitude on the part of EU lawmakers was fuelled by the legislative frenzy following the financial crises[11] and by the wisdespread notion that 'innovation should never be punished'.[12]

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three languages in which this website is available to date. The content of the site is poor, and it's hard to think that such a measure can be effective in inducing more entrepreneurs to set up a SE. Layout and content, however, are not the only issue here. The SE is a company form which can be freely chosen by entrepreneurs: the very idea of promoting it, on the theory that the reason why it's not widely employed is ignorance, would appear to be seriously faulty. If, as we will see, the SE is a company form suited for large businesses and with high setup costs, it would be naive to think that a firm in a position to consider this option (or rather its legal advisors) would not adopt it out of ignorance, and their interests would be better served by a website.

[9] The preference for optional measures is a constant feature of the Commission's activity in the last fifteen years, and is apparent from European Commission, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, Brussels*, 21 May 2003, COM(2003) 284, available at www.ec.europa.eu. For a comment see John Armour and Wolf Georg Ringe, *European Company Law 1999-2010: Renaissance and Crisis* 48 Common Market Law Review 126, 130 (2011).

[10] ECJ, 9 March 1999, *Centros Ltd v. Erhvervs olg Selskabsstyrelsen*, C-212/ 97, ECR I-1459, available at www.curia.europa.eu, on which see Eddy Wymeersch, *Centros: A Landmark Decision in European Company Law*, Ghent FLI Working Paper no. 1999-15, October 1999, available at www.ssrn.com. Many important decisions followed Centros. The first is ECJ, 5 November 2002, *Überseering BV v. Nordic Construction Company Baumanagement GmbH*, C-208/00, ECR I-9919 (*Überseering*), on which Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, ECGI Law Working Paper n. 8/2003, available at www.ecgi.org. The second is ECJ 30 September 2003, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, C-167/01, ECR I-10155 (*Inspire Art*) on which John Armour, *Who Should Make Corporate Law? EC Legislation versus Regulatory Competition* 58 Current Legal Problems 369-413 (2005). See also ECJ, 16 December 2008, *Cartesio Oktató es Szolgáltató bt*, C-210/06, ECR I-9641 (*Cartesio*), on which Carsten Gerner-Beuerle and Michael Schillig, *The Mysteries of Freedom of Establishment after Cartesio* 59 International and Comparative Law Quarterly 303-323 (2010). For more on this jurisprudence see Section 9.

[11] See Armour and Ringe (nt. 9), 169 ff. (linking financial regulation reforms to financial crisis); for a general analysis of the incidence of the financial crisis on lawmaking see Francesco Vella, *Le regole della finanza. Il futuro tra rischio e fiducia* (Bologna: Il Mulino, 2011).

[12] This is the opinion of a European Commission official at the *Ninth European Company and Financial Law Review Symposium* on *The New Single Member Company*, held in Berlin on 7 November 2014. These words call to mind Luca Enriques, *EC Company Law Directives and Regulations: How Trivial Are They?* 27 University of Pennsylvania Journal of International Economic Law 58 (2006), who says that EU officials 'usually share a genuine belief in the virtues of harmonization of EU corporate laws, seeing it as a tool both to achieve the objective of market integration and to have better corporate laws in place across the EU', but 'also have an interest in keeping an active lawmaking process going and, even more, in expanding the areas covered by EC corporate law, whatever its content'.

We should discuss these assumptions carefully and examine the legal structure of ECFs with an eye to cost-benefit analysis.[13] Legislative inactivity does not necessarily belie laziness, but could well signal confidence in the quality of the rules already in place. In other words, 'doing [almost] nothing'[14] could be the best course.

ECF regulation has a long enough history to form an autonomous field of study, but no established theoretical framework has yet been developed to explain the workings of the various forms and evaluate their success.[15] This reflects both their hybrid nature[16] and the fact that they are, at least in Europe, a first-time experiment.[17] The expert groups that assessed existing and proposed ECFs produced starkly divergent

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[13] The EU lawmaking process requires an impact assessment for legislative proposals (see for instance the assessment for the SPE in European Commission (nt. 5), 4-5), and also a periodic review of the legislation in place based on an ex post impact evaluation (such as that provided for by Article 69 of the SE Regulation, on which see Section 5.1).

[14] These words are attributed to Gerard Hertig by Luca Enriques, *Company Law Harmonization Reconsidered: What Role for the EC?*, ECGI Law Working Paper n. 53/2005, 22, available at www.ecgi.org (proposing to repeal all company law directives as not useful). These are indeed 'opponents' of European corporate law 'who place their trust solely or primarily in the market and competition': Klaus Hopt, *Corporate Governance in Europe. A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance*, ECGI Law Working Paper n. 296/2015, 21-22, available at www.ecgi.org (opposing the so-called triviality argument, on which more in Section 2). It must be acknowledged, however, that in its preliminary evaluation of proposals, the Commission tends to simply dismiss the option of non-intervention (European Commission (nt. 5), 5).

[15] The need to build a comprehensive framework to study ECFs has been acknowledged only recently: Holger Fleischer, *Supranational Corporate Forms in the European Union: Prolegomena to a Theory on Supranational Forms of Association* 47 Common Market Law Review 1671-1717 (2010).

[16] See Section 6.

[17] On the difference between supranational and international companies see Holger Fleischer (nt. 15), 1680-1682. A 'federal' company type is provided by Canadian law, which designed it as an alternative to provincial corporate law: see *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (CBCA). Three main features of the Canadian federal company form seem worth mentioning here. First of all, the aim of Canadian law resemble that of European law: Article 4 CBCA is geared to enterprises wishing to engage in cross-regional activity, as one of its aims is to 'advance the cause of uniformity of business corporation law in Canada'. This uniformation exercise is thus conscious of both its objectives and of the regulatory techniques it employs (see Section 2). Secondly, companies incorporated under federal law tend to enjoy a complete and detailed regulation, and offer significative advantages compared to regional company forms; moreover, the practical impact of federal company forms seems significant (for an analysis of the diffusion of supranational company forms in Europe see Sections 7 and 8). Thirdly, the regulation of companies incorporated under federal law seems to be more keen on shareholder protection than that of companies incorporated under the law of a province (Narjess Bourbaki, Yves Bozek, Claude Laurin and Stéphane Rousseau, *Incorporation Law, Ownership Structure, and Firm Value: Evidence from Canada* 8 Journal of Empirical Legal Studies 358-383 (2011) and some of its more radical features give them a substantial edge over other company forms, such as online incorporation and a freedom of office transfer unknown to other jurisdictions. These features affect regulatory competition, and it has been argued that regional company law has been amended following federal law: Douglas J Cumming and Jeffrey G Mcintosh, *The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law* 20 International Review of Law and Economics 141-186 (2000). The high degree of cohesion allowed by a federal structure seems to be the secret of Canada's success; such a situation can hardly be compared to the state of political integration reached in the European Union to date. On this issue see Section 9.2 and nt. 192.

opinions,[18] but they did all agree on one point: new corporate forms should be introduced only after careful assessment of their likely impact. Besides, they recognised that the EU agenda has far more pressing problems and advised postponing discussion of further ECF projects.[19] The Commission nevertheless accorded quite high priority to the ECF project.[20]

This paper considers European company forms organically, examining their aims, structure, operation and diffusion in the light of the effects of unification, harmonisation and competition between Member States. Section 2 describes different types of legal adaptation mechanisms; Section 3 considers the role ECFs play in the realm of European company law; Section 4 identifies the European supranational entities that can be considered ECFs and the interests they are designed to protect. Section 5 considers individual ECFs, examining the aim, legal structure, strengths and weaknesses of each, and Section 6 assesses them critically. Section 7 describes the lack of diffusion of ECFs, and Section 8 explores possible explanations for these poor results. In Section 9 the entire ECF phenomenon is considered, more broadly, in the light of the effects of regulatory competition. Section 10 concludes.

## 2. Legal Adaptation Mechanisms: Unilateral Amendment, Harmonisation and Unification

There are three ways for national laws to converge.[21] The first is unilateral amendment, whereby one state adopts a law already in force in another jurisdiction. Such a choice usually stems from a comparative study of law and requires no cooperation with the country that originated the rule: we can call this 'non-cooperative adaptation'.

A second path to legal convergence is harmonisation. Two or more Member States transfer part of their sovereignty to a supranational body,[22] enabling it to lay down

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[18] E.g. Reflection Group, *Report on the Future of European Company Law*, Brussels, 5 April 2001, 29, available at www.europa.eu, comprising scholars supporting ECFs and more sceptical counterparties. See nt. 171 and accompanying text.

[19] The SE, for instance, should not have had priority over other projects: see High Level Group of Company Law Experts, *Report on a Modern Regulatory Framework for Company Law in Europe*, Brussels, 4 November 2002, at 118.

[20] European Commission (nt. 9), 23-24 (choosing to anticipate, instead of postponing, the – eventually failed – SPE project).

[21] Within international law see Martin Gebauer, *Unification and Harmonization of Laws* in Rüdiger Wolfrum (dir.), *Max Planck Encyclopedia of Public International Law* (Oxford, 2009), available at www.opil.ouplaw.com. More critically Paul B Stephan, *The Futility of Unification and Harmonization in International Commercial Law* 39 Virginia Journal of International Law 743-789 (1999) (reconsidering the importance of legal harmonization and unification, linking the failure of these processes to difficulties in the political process).

[22] This happens in the EU, where member States 'confer competences to attain objectives they have in common' (Art. 1 TEU). On how a thorough comparative law analysis is needed before intervention at EU level, and how this practice is unfortunately declining, see Klaus Hopt, *Comparative Company Law* in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 1174 (Oxford: Oxford University Press, 2008).

binding principles for the drafting of national legislation. An example of harmonisation is EU directives.

The third approach is unification, whereby a multilateral treaty or a supranational body establish a single, detailed rule applicable in all the jurisdictions. Unification may result from an international treaty or directly from legislation by a supranational authority. This is typically the case of European regulations.

Harmonisation and unification differ from unilateral amendment by their necessarily cooperative nature. The three methods can be ranked by the stringency of the restrictions placed on national legislative autonomy: non-cooperative unilateral amendment entails no interference whatsoever; harmonisation reduces the degree of autonomy of national legislatures; unification imposes upon countries (with, to be sure, their implied previous consent) both the objective of the legislative measure and the means for attaining it. The legal policy mechanism thus moves gradually from autonomy to heteronomy.

For the moment let us leave unilateral amendment aside[23] and focus on the way in which harmonisation tolerates genericity and even vagueness much better than unification. Leaving national law no room for manoeuvre, unified measures have to be precise and specific, so that they can be applied directly in a national jurisdiction with maximum certainty.[24] As a consequence, political agreement on harmonisation and unification measures will be increasingly complex and hard to achieve, depending on the adaptation mechanism chosen. One might well expect that is easier for a country to export a domestic legal rule of its own than to be forced to import a foreign one.[25]

## 3. European Company Law and Supranational Company Forms

European company forms are part of the broader realm of European company law.[26] Given the difference between harmonisation and unification, we need to understand the exact relationship between the two. European company law, in its most modern

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[23] See Section 9.

[24] The position of so-called maximum harmonisation directives falls somewhere in between: in order to be effective, they need to be more detailed than minimum harmonisation, but not as specific as unification measures. In capital markets regulation see Carsten Gerner-Beuerle, *United in Diversity: Maximum Versus Minimum Harmonization in EU Securities Regulation* 7 Capital Markets Law Journal 317-342 (2012).

[25] This situation could give rise to protectionist behaviour: see further, Section 9.1 and Emanuela Carbonara and Franco Parisi, *The Paradox of Legal Harmonization* 132 Public Choice 367-400 (2007) (analysing the costs stemming from harmonisation and unification processes); similarly see Pierre Legrand, *The Impossibility of Legal Transplants* 4 Maastricht Journal of European and Comparative Law 111-124 (1997).

[26] The idea of European company law is part of the common parlance of legal and institutional literature, even though 'there is no codified European company law as such' (European Parliament, *Fact Sheets on the European Union*, 1, available at www.europarl.europa.eu): not having a comprehensive piece of legislation on the matter has contributed to blurring its boundaries, as we shall see. For a first comprehensive work on European company law see Vanessa Edwards, *EC Company Law* (Oxford: Oxford University Press, 1999).

meaning,[27] consists chiefly of norms originated by the European Union. These norms are enacted according to articles of the TFEU on freedom of establishment,[28] and, more broadly, freedom to conduct business.[29] They are secondary EU legislation[30] and their purpose is cooperative adaptation of the applicable national laws.[31]

Regulatory competition is outside the perimeter of European company law (at least formally),[32] as it leaves no formal trace in the texts of directives and regulations, but it is still important to an understanding of the dynamics behind the making of EU law, and we will need to consider it to make sense of the broad picture.

European company law constitutes positive supranational law whose purpose is to facilitate cross-border trade and to create a European single market. Directives and regulations serve to hasten the progressive convergence of company law. Within this perimeter we have two kinds of rules, with different objects.[33]

First are directives to modify national rules in particular areas of company law: they operate horizontally, by subject matter,[34] leaving national legislatures discretionary power on their enactment,[35] the so-called harmonization. The efforts at harmonisation of EU company law suggest two propositions: first, for the foreseeable future at least harmonisation will not lead to complete convergence of national laws, and

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[27] The phrase 'European company law' was first used to distinguish US law from that developed by the European Community, along with that provided for by national laws: see Clive M Schmitthoff (ed.), *The Harmonisation of European Company Law* (London: UK National Committee on Comparative Law, 1973) and Eric Stein, *Harmonization of European Company Laws* (Indianapolis: The Bobbs-Merrill co., 1971). More recently the term came to point to the evolution of national company laws under the influence of European law: see Mads Adenas and Frank Woolridge, *European Comparative Company Law* (Cambridge: Cambridge University Press, 2009) and Grundmann (nt. 1).

[28] Se Title IV TFUE on freedom of establishment (chiefly Arts 49, 50.1, 50.2, lett. *g*), 54.2 TFEU) and title VII on harmonisation of national company law (Article 114, 115, and 352 TFEU).

[29] Article 16 of the Charter of fundamental rights of the European Union, according to which: 'The freedom to conduct a business in accordance with Community law and national laws and practices is recognised'.

[30] The primacy of EU law over national law is outlined in *Costa* v. *Enel*, C-6/64, ECR 585, 1135 ff., available at www.eur-lex.europa.eu.

[31] Through the process of delegation of legislative power set out in Article 1.1. TEU.

[32] In the US literature see Roberta Romano, *The Genius of American Corporate Law* (Washington D.C.: AEI Press, 1993), with reference to takeovers, and Lucian Bebhuck and Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition* 87 Virginia Law Review 111-164 (2001). In a European perspective John Armour, *Who Should Make Corporate Law? EC Legislation versus Regulatory Competition*, ECGI law working paper n. 54/2005, available at www.ecgi.org, supporting competition against harmonisation, and Luca Enriques and Martin Gelter, *Regulatory Competition in European Company Law and Creditor Protection* 7 European Business Organization Law Review 417-453 (2006), focusing on creditor protection. On the consequences of *Centros* on harmonisation and unification see Section 9.

[33] A first trace of this distinction can be found in Johan De Bruicker, *EC Company Law – The European Company v. The European Economic Interest Grouping and the Harmonization of the National Company Laws* 21 Georgia Journal of International and Comparative Law 1991, 192.

[34] For an overview on EU company law directives see Grundmann (nt. 1); for a sceptical take on harmonisation see Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law* 89 Georgetown Law Journal 439-468 (2001); on European company law Enriques (nt. 12).

[35] On the different degrees of harmonisation see nt. 24.

this might not be a 'desirable utopia' anyway.[36] And second, even though some of the efforts have been successful, there are two areas of company law that would appear to be totally impervious to harmonisation:[37] corporate governance[38] and the regulation of corporate groups,[39] and we must keep this in mind.

A second type of EU company law rule is EU regulations to enable the formation of companies that seek to be supranational, independent of national company law. Such norms differ from harmonisation directives in their conception as autonomous and self-sufficient; and they are free from boundaries *ratione materiae* in that at least in principle they aim to regulate all aspects of a company type that can operate by the same rules in all Member States. At least on paper, these entities are a good fit with the idea of legal unification.

Let us now examine ECFs more closely, in the light of the possible legal convergence mechanisms for EU company law.

## 4. European Company Forms Between Freedom of Movement and Minimum Protection

Not all existing, proposed or aborted European legal entity types correspond to companies.[40] Here we consider only those that do, whether they are in being, not yet instituted, or abandoned. Accordingly, both the *Fundatio Europaea*[41] and the Euro-

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[36] Hopt (nt. 14), 22. For an effort to set boundaries to the overarching EU harmonisation programme, see European Company Law Experts, *Response to the European Commission's Consultation on the Future of European Company Law*, May 2012, at 4, available at www.ec.europa.eu.

[37] On how abandoning these projects can be coherent with the principle of subsidiarity in European law, Jaap Winter, *Ius Audacibus. The Future of EU Company Law* in Michel Tison, Hans De Wulf, Christoph Van der Elst and Reinhardt Steennot (eds.), *Perspectives in Company Law and Financial Regulation,* 46 (Cambridge: Cambridge University Press, 2009).

[38] This area was covered by the fifth company law directive proposal: European Comission, *Amended Proposal for a Fifth Directive Founded on Article 54(3)(g) of the E.E.C. Treaty Concerning the Structure of the Public Limited Companies and the Powers and Obligations of Their Organs*, in *O.J.E.C.* of 9 September 1983, n. C 240, 2-38. The proposal was modified a few years later (in *O.J.E.C.* of 11 January 1991, n. C 7, 4-6), raised substantial political difficulties and was never approved. See Daniel T Murphy, *The Amended Proposal for a Fifth Company Law Directive. Nihil Novum* 7 Houston Journal of International Law 215-235 (1985) and Walter Kolvenbach, *EEC Company law Harmonization and Worker Participation* 11 University of Pennsylvania Journal of International Business Law 709-788 (1990). Favouring a coordination of corporate governance codes of EU countries, Weil, Gotshal & Manges, *Comparative Study of Corporate Governance Codes Relevant to the European Union and its Member States*, January 2002, available at www.ec.europa.eu.

[39] A ninth company law Directive on the conduct of groups containing a public limited company as a subsidiary dates back to December 1984, but was never adopted. A new, indirect European innovation in the field of group law can be found in the SUP statute, on which see Pierre Henri Conac, *Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level* 10 European Company and Financial Law Review 194-226 (2013).

[40] According to the meaning outlined by Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Edward Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Oxford: Oxford University Press, 2009).

[41] European Commission, *Proposal for a Council Regulation on the Statute for a European Foun-*

pean Economic Interest Grouping[42] lie outside the perimeter of this study, while the abandoned project for a *Societas Privata Europaea* and the proposed *Societas Unius Personae* are within it.

What is the common ground of such ECFs? They all share a unique trait that sets them apart from national company types, namely the aim of promoting free movement of persons and capital across national borders.[43] This goal can be central to the design of ECF regulations. The ideal of freedom of movement, however, may interfere with the protection of stakeholders, which each European country interprets differently.[44] Shareholder and creditor protections are not equivalent between Member States, either in the strength of protection accorded to the various interest groups or in the legal instruments used.[45] Such differences may greatly complicate the negotiation of a common legal entity type, as Member States may not want to adopt a company form that deviates from national rules but is nevertheless available to domestic entrepreneurs to do business in the country.[46] This difficulty, in any case, is a consequence of greater completeness; hence the political importance of attaining legal unification instead of just harmonisation.

Furthermore, supranational company forms will presumably be instituted by regulation rather than directive and will not govern just one or a few aspects of company

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*dation (FE)*, COM(2012) 35, available at www.ec.europa.eu. On this topic see Stefano Lombardo, *Some Reflections on Freedom of Establishment on Non-Profit Entities in the EU* 14 European Business Organization Law Review 225-263 (2013). The proposal for a *Fundatio Europaea* has been withdrawn: European Commission, *Annex to the Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2015. A New Start*, Strasbourg, 16 December 2014, COM (2014) 910, 12, available at www.ec.europa.eu. The debate on the FE has never been very lively, and the action plan does not even mention it: European Commission, (nt. 8).

[42] See nt. 2. On how the EEIG may have a substantially different shape in each Member State, see Fleischer (nt. 15), 1673. The debate on the European Model Company Act lies outside the scope of this article: on this see Theodor Baums and Paul Krüger Andersen, *The European Model Company Act Project* in Michel Tison, Hans De Wulf, Christoph Van der Elst and Reinhardt Steennot (eds.), *Perspectives in Company Law and Financial Regulation* (Cambridge: Cambridge University Press, 2009) 5-17. See also Marco Ventoruzzo, *The New European Model Company Act*, 14 October 2015, available at www.corpgov.law.harvard.edu.

[43] See recital 4 of the SE Regulation, according to which 'the legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in Article 18 of the Treaty are to be achieved'. Creating FSEs thus seems to have the ex post role, updating a legal regime which is lagging behind economic reality. This seems in stark contrast with the SPE Proposal, designed to 'enhance the competitiveness of SMEs by facilitating their establishment and operation in the Single Market', after acknowledging that only a tiny fraction of small enterprises operated cross-border at the time. The unification effort embedded in the SPE proposal thus had a preventive role, and such switch to an ex ante, promotional attitude pairs with the positive action taken to integrate the internal market starting in the eighties: European Commission, *Completing the Internal Market. White paper from the Commission to the European Council*, COM(85) 310 final, Brussels, 14 June 1985, available at www.ec.europa.eu.

[44] On the the need to strengthen shareholder activism and stimulate enterprise extension on a European scale see European Commission, (nt. 9), 3 and Hopt, *A Critical Review* (nt. 14) (in the abstract).

[45] On the limits of the harmonisation process see Section 3.

[46] See Section 9.1.

law but will consist in comprehensive, self-standing regulation of the matters relating to the life of a company, inevitably compressing Member State legal self-determination. In other words, without a strong, choral political commitment no ECF proper would be created, just as under such circumstances no meaningful cooperative unification is conceivable.

This theoretical framework will help us in analysing each ECF.

## 5. ECF Statutes: Attempting Legal Unification

Now let us consider the rules laid down in ECF statutes, examining their structure and content in the light of their aims.[47] After an account of the salient traits, we focus on the main issues they raise, to determine whether true unification has occurred and whether these company forms can truly be considered 'European'. The conclusions will help to determine whether the sum of the ECFs can construct a consistent regulatory system.

### *5.1. The European Company*

The discussion on the statute for a European company (*Societas Privata Europaea*, or SE) lasted for decades.[48] It should have become the 'flagship'[49] of European company law;[50] but after a long legislative 'skimming' exercise[51] the structure of the SE emerged significantly 'trimmed down'.[52]

The SE Regulation[53] gives the reader a rather fragmented picture: it states that the aim of the SE is to 'carry out the reorganisation of [businesses] on a Community scale',[54] making cross-border mergers easier[55] and solving 'legal and psychological difficulties'[56] ousting 'cooperation operations involving companies form different Member States'.[57] Hence, the differences in applicable law seem to be the main reason

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[47] Roberto Weigmann, *L'interpretazione del diritto societario armonizzato nell'Unione Europea* 1 Contratto e Impresa Europa 487-501 (1996).

[48] For an account on the debate on the 1970 project see Kolvenbach (nt. 38).

[49] Klaus Hopt, *Europäisches Gesellschaftsrecht – Krise und neue Anläufe* in *Zeitschrift für Wirtschaftsrecht*, 99 (1998) (from the original German "flaggschiff").

[50] For an original view on the power of uniformity in company law, see Pieter Sanders, *Vers une Société Anonyme Européenne?* 4 Rivista delle Società 1163-1176 (1959).

[51] Luca Enriques, *Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage* 4 Journal of Corporate Law Studies 77-95 (2004).

[52] Fleischer (nt. 15), 1675-1677; see also Terence L Blackburn, *The Societas Europaea: The Evolving European Corporation Statute* 61 Fordham Law Review 695-772 (1993).

[53] Full references at nt. 3.

[54] Recital n. 1 of the SE Regulation.

[55] Recital n. 2 of the SE Regulation.

[56] Recital n. 3 of the SE Regulation.

[57] Recital n. 4 of the SE Regulation.

behind the design of 'companies formed and carrying on business under the law created by a European Regulation directly applicable in all Member States'[58] allowing European entrepreneurs to manage transnational undertaking 'free from the obstacles arising from the disparity and the limited territorial application of national company law'.[59] These passages clearly show the substantial effort that has been made for unification.[60]

Reading on, however, these first explanatory statements would appear to be heading for retraction. Since the 1970 proposal 'work on the approximation of national company law has made substantial progress' and 'on those points where the functioning of an SE does not need uniform Community rules reference may be made to the law governing public limited-liability companies in the Member State where it has its registered office'.[61] A European company would not 'need' European rules to work properly, as it could just as well use national rules. This is true from the purely practical standpoint, as EU provisions may state the applicability of national law; the problem with this approach is that it undermines the very idea of legal unification. It would be coherent with that idea only if national legal provisions were also unified. But this is not the case; instead, national company law has simply been harmonised, and not even completely. The contradiction here is significant.

Unfortunately, the legal rules on the SE are even more fragmented than the recitals presage; the complex structure of the SE regulation embraces many different kinds of provisions. First are the common rules, which have been unified and apply to all SEs regardless of the Member State in which they are incorporated: e.g. the rules on company name, share capital, legal personality and currency,[62] the formation of the company[63] and fundamental governance arrangements, in which Member States can choose between a one-tier and a two-tier board structure.[64]

The SE Regulation, however, does not provide all the essential rules of governance; some are laid down in a separate directive on employee involvement[65] and are therefore only harmonised rather than unified. The Regulation also calls for the application of important national provisions that were previously harmonised by directives,[66] such

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[58] Recital n. 6 of the SE Regulation.

[59] Recital n. 7 of the SE Regulation.

[60] See Section 3.

[61] Recital n. 9 of the SE Regulation. Emphasis added.

[62] Art. 1.1, 1.3 and 4.1 of the SE Regulation.

[63] From art. 17 of the SE Regulation.

[64] Title III of the SE Regulation. Such rules helped to spread the use of the two-tier board structure in national company forms: Giuseppe B Portale, *Il modello dualistico di amministrazione e controllo. Profili storico-comparatistici* 112 Rivista del diritto commerciale 56 (2015).

[65] See nt. 3 for references.

[66] This is consistent with recital n. 9 mentioned above.

as rules on capital formation,[67] mergers,[68] and annual accounts.[69] Unfortunately, there is also extensive reference to national rules that did not undergo any harmonisation, such as directors' liability,[70] the possibility for a company or for another legal entity to be a member of one of the corporate bodies,[71] the matters for which the general meeting is competent,[72] and the procedure for amending the by-laws.[73] These issues, like the rules on liquidation and insolvency proceedings,[74] are subject to significantly different provisions in different Member States. Under the SE Regulation, countries also retain significant scope for adapting some other rules, such as identifying the categories of transactions that require authorisation by the strategic oversight body in the two-tier system or an express decision by the board of directors in the one-tier system, while shareholders enjoy significant freedom to design the articles of association.[75]

This picture clashes with the original idea of a common set of rules for a single company form: SEs incorporated in different Member States may retain substantial structural differences. These deviations from the original unification project produce a multi-layered set of prescriptions that is not only at odds with the very idea of unification but fails to advance in any way even the idea of simple harmonisation of basic corporate governance provisions.

We must add to this patchy landscape a number of practical issues upon which scholars have already dwelt: the procedural obligations for setting up an SE are

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[67] Art. 5 makes applicable to the SE the national law of the member State where it is incorporated in the field of 'the capital of an SE, its maintenance and changes thereto, together with its shares, bonds and other similar securities' which were harmonised (but not unified) by Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards, in *O.J.E.U.* n. L 315 of 14 November 2012, 74-97.

[68] On which see Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011, concerning mergers of public limited liability companies, in *U.J.E.U.* n. L 110 of 29 April 2011, 1-11.

[69] Title IV of the SE Regulation.

[70] Art. 39 and 43 of the SE Regulation, whereby managing directors 'shall be responsible for day-to-day management under the same conditions as for public limited-liability companies that have registered offices within that member State's territory'.

[71] Art. 47.1 of the SE Regulation.

[72] Art. 52.2 of the SE Regulation, providing that national law is applicable on 'matters for which responsibility is given to the general meeting of a public limited-liability company governed by the law of the Member State in which the SE's registered office is situated'.

[73] This is not a case of direct cross-referencing to national law, but rather a sort of equality clause. According to Article 59 of the SE Regulation the required majority must not be less then two thirds of the votes cast 'unless the law applicable to public limited-liability companies in the Member State in which an SE's registered office is situated requires or permits a larger majority'. This is another example of how the unificatory purpose of the Regulation was dampened. Adapting supranational legislation to the stricter regulation of some member States led to a de facto differentiation of the rules applicable to the SE depending on its State of incorporation.

[74] Title V of the SE Regulation.

[75] Most of all the choice between one-tier and two-tier system, according to Article 38.1.b of the SE Regulation.

burdensome,[76] founding members need to belong to different Member States,[77] the minimum legal capital is far too high,[78] and the substantial setup costs that result, de facto,[79] discourage small and medium-sized businesses.[80] Also, the ban on having the registered office in a different state from the head office[81] did the SE no good.[82] It is certainly a pity that the opportunity for revising this provision under Article 69.1 of the SE Regulation was not taken.[83] This rule also conflicts starkly with the *Centros* jurisprudence: regulatory arbitrage has become a reality in European company law, and even if an SE can transfer its offices freely among member States, it is still less versatile than any national company, which is free to relocate its head office and not its registered office, or vice versa.

As far as worker participation is concerned, it is clear that abandoning unification helped to speed up the negotiations, but at a price: it not only compromises the theoretical framework of unification but also (and more practically) undermines the appeal of the SE by increasing setup costs and discouraging entrepreneurs in countries with no provision for worker participation from adopting the SE model.[84] On the other hand, the ability to transfer the registered office of a company without reincorporation is a useful feature indeed,[85] but while it paved the way for the discussion of a directive on cross-border mergers, after the adoption of the latter the chance of effectively using the SE to relocate and exercise legislative arbitrage[86] was reduced.

Another potential advantage is commercial rather than legal. The European image of the SE could help enterprises from east or south European countries shed national identities that the wider European market is unfamiliar with, possibly avoiding the 'newcomer' stigma.[87] The effectiveness of this feature, however, is hard to gauge, and it is certainly not likely to be such as to justify the whole SE project on its own.

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[76] On which Title II of the SE Regulation.

[77] Art. 2 of the SE.

[78] Art. 4.2 of the SE Regulation, requiring a minimum legal capital of 120,000 euro; this is a particularly heavy requirement, particularly when compared to Art. 6.1 of Directive 2012/30/EU (nt. 77) requiring only a minimum capital of 25,000 euros for national public limited liability companies.

[79] Regulatory intricacies contribute to raising setup costs as firms will need expert legal advice to setup an SE.

[80] This is the technical opinion gathered by European institutions: Ernst & Young, *Study on the Operation and the Impacts of the Statute for a European Company*, 9 December 2009, at 12, available at www.ec.europa.eu, and the SPE Proposal, (nt. 5); *contra* Fleischer (nt. 15), 1676. From this opinion the idea of the SPE Proposal was born (see Section 5.3).

[81] Art. 7 of the SE Regulation.

[82] This situation puts the SE at a substantial competitive disadvantage vis-à-vis national company forms, especially after the *Centros* ECJ jurisprudence, on which Section 9.

[83] The SE Regulation will not be amended in the near future: European Commission (nt. 8), 15.

[84] Reflection Group, (nt. 18), at 30.

[85] Art. 8 of the SE Regulation, even if through a burdensome procedure and without uniform protection of rightholders (art. 8.7).

[86] Enriques (nt. 51), at 77-79.

[87] European Commission, *Studio di fattibilità per uno statuto europeo della PMI*, July 2005, available at www.ec.europa.eu.

As a whole, the SE fails to deliver on its promises, and is still too bound to national law to get to legal unification: it therefore cannot be called a genuinely European company.

### *5.2. The European Cooperative Company*

The statute of the European Cooperative Company (*Societas Cooperativa Europaea*, or SCE) was a 'socio-political tag-along' to the SE;[88] maybe this is why it did not engender much debate. In any event, the consequence is that many of the problems pointed up in our analysis of the SE are present in the SCE, which also has the dual Regulation-Directive structure and whose articles are patterned closely on those of the SE statute. The main differences are designed to serve the peculiar needs of the cooperative company.[89]

Article 8 of the SCE Regulation[90] seeks to bridge the significant differences in cooperative company regulation across Member States[91] through a multi-layered approach combining unification, harmonisation and cross-referencing to national law[92] that resembles closely that of the SE.[93] This near-identity makes further analysis superfluous.

### *5.3. The European Private Company*

The proposal for a European Private Company (*Societas Privata Europaea*, or SPE) was seen as offering an opportunity to facilitate the growth of small and medium-sized enterprises,[94] and it was studied in depth.[95] Certainly there were a series of efforts to make this company type viable, with a preliminary consultation,[96] a feasibility study,[97]

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[88] Fleischer (nt. 15). The impression is reinforced reading the recitals, very similar to those of the SE Regulation.

[89] Danilo Galletti, *La tutela delle minoranze nella SCE* in Antonio Fici and Danilo Galletti (eds.), *La società cooperativa europea: quali prospettive per la cooperazione italiana?*, 49.

[90] For an Italian perspective see Gaetano Presti, *Le fonti della disciplina e dell'organizzazione interna della società cooperativa europea* in Antonio Fici and Danilo Galletti, (nt. 582), 67-68.

[91] Galletti (nt. 89), at 49-50.

[92] See Art. 8.1.c.ii of the SCE Regulation, referring to the laws of Member States which would apply to a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office.

[93] See also J Schmidt, *SE and SCE: Two New European Company Forms – And More to Come!* 27 Company Lawyer 106 (2006).

[94] European Commission, (nt. 9), 23-24, building on High Level Group of Company Law Experts, (nt. 19), 113 (underscoring the academic origins of the SPE project); see also www.europeanprivate-company.eu.

[95] Heribert Hirte and Christoph Teichmann (eds.), *The European Private Company – Societas Privata Europaea (SPE)* 3 *European Company and Financial Law Review* (2013); Paul Davies, *The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws*, ECGI Working Paper n. 154/2010, May 2010, available at www.ssrn.com; Robert R Drury, *The European Private Company* 9 European Business Organization Law Review 125-136 (2008).

[96] See European Business Test Panel, *Response statistics for European Private Company*, www.ec.europa.eu.

[97] European Commission (nt. 87).

and an impact assessment.[98] These efforts were aimed at filling what was perceived as a void in the system of European company types, as the SE was unsuitable for small businesses.[99] The SPE proposal has now been withdrawn,[100] but it is still worth analysing because it provides instructive insights into the new single member company project[101] discussed in the next section.

The first SPE Proposal[102] aspired to independence from national company law: its statute was supposed to be 'uniform and definitive' and to 'dispense with references to national law'.[103] This idea is in accord with the concept of legal unification and appears clearly in the Commission's language, with the reference to uniformity, legal certainty and flexibility.[104] But the proposal was heavily amended, the last compromise version being released in May 2011 (the SPE Compromise).[105]

While the original Proposal allowed the SPE to have its registered and head offices in different Member States,[106] as amended it made national law applicable, so as to 'ensure that SPEs are not used for the purpose of evading the SPEs' obligations in the territory of the Member State where they are established'.[107]

A second important point is the minimum legal capital requirement. The first draft put it at one euro and prohibited Member States from instituting any higher threshold.[108] The final compromise version allowed countries to raise the legal minimumto 8,000 euros[109] but required the Commission to revise this provision within two years from the adoption of the Regulation.[110]

The third controversial element of the draft SPE Regulation was worker participation. The original version simply referred to the law of the State of incorporation,[111]

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[98] European Commission, *Summary of the impact assessment accompanying the proposal for a Council Regulation on a statute for a European Private Company (SPE)*, COM (2008), 396, available at www.ec.europa.eu. The Commission considers here three options to enhance the growth of small and medium-sized enterprises: (*i*) no legislative intervention, trusting ECJ jurisprudence; (*ii*) harmonisation of national laws, which is not considered politically viable at the moment; (*iii*) adaptation of the SE Regulation to SMEs, but this option would have the downside of making the Regulation too complex; on this see the opinion of Pierre Henri Conac, *The Societas Unius Personae (SUP): A 'Passport' for Job Creation and Growth* 12 European Company and Financial Law Review 175 (2015).

[99] Economic and Social Committee, *Opinion of the Economic and Social Committee on 'A European Company Statute for SMEs'*, in *O.J.E.C.* n. C 125 of 27 May 2002, 100.

[100] See nt. 6.

[101] Both measures are addressed at small and medium enterprises.

[102] See nt. 5.

[103] European Parliament, *Report with recommendations to the Commission on the European private company statute*, document n. A6-0434/2006 (2006) at 5, available at www.europarl.europa.eu.

[104] European Commission, (nt. 5), at 3.

[105] European Council, *Proposal for a Council Regulation on a European Private Company – Political Agreement*, internal paper from the Secretary General to the Council, 23 May 2011, available at www.europa.eu.

[106] Art. 7.1, subpara. 2 of the SPE Proposal.

[107] Art. 7.1 of the SPE Compromise.

[108] Art. 19.4 of the SPE Proposal.

[109] Art. 19.3, subpara. 2 of the SPE Compromise.

[110] This was one way, albeit a questionable one, of overcoming the political deadlock: Art. 19.3.a of the SPE Compromise.

[111] Ch. VI of the SPE Proposal, consisting only of Article 34.

thus dropping the prospect of pure unification. This solution did not prove to be viable, and although a complex new draft was proposed, the matter was too controversial for agreement.[112]

Arguably it was these three elements that led to the project's demise, but it must be admitted that in its first draft the SPE Regulation came closer than other EU company types to legal unification[113] and could have been a viable instrument for small and medium-sized enterprises.[114]

The debate on the SPE shows just how hard it can be to reach a political compromise on such diverse and delicate topics, particularly when a substantially unified company model is put forward. In their desire to preserve the characteristics and popularity of national company forms, the Member States moulded a common company model that even while allowing free movement of offices throughout Europe would not be too attractive and so unable to compete with the national forms.

This company form confirms how hard it is to reconcile stakeholder protection with freedom of movement, which is a severe impediment indeed to unification.

### *5.4. The Single Member Company*

The Commission saw that the failure of the SPE project was not due to lack of demand for a unified legal form for small companies[115] and so put forward a new proposal for a *Societas Unius Personae*.[116] Two public consultations[117] and an impact assessment[118]

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[112] Art. 35 ff. of the SPE Compromise.

[113] Even if national law was still recalled quite a few times: see in general Art. 4.1, but also the specific exclusion of directors' duties and liabilities (Art. 31.5) and the shareholders' right to challenge the resolutions of the general meeting (Art. 27.4, subpara. 2 of the SPE Proposal).

[114] No crossborder element was required to set up a SPE, and the registered office could be transferred across member States without reincorporation (Art. 35.1 of the SPE Proposal); the SPE could also be set up from scratch (Art. 5.1.*a*) and considerable freedom was left to shareholders as to the internal design of the company (Art. 26.2 of the SPE Proposal).

[115] These were the basis on which the SUP Proposal was issued. It was part of a broader initiative to foster the growth of small and medium-sized enterprises: European Commission, *Think Small First. A Small Business Act for Europe*, Brussels, 30 September 2008, COM (2008) 394. See also European Commission, *Review of the 'Small Business Act' for Europe*, Brussels, 23 February 2011, COM(2011) 78, available at www.eur-lex.europa.eu.

[116] See *European Company and Financial Law Review* no. 2/2015, with a detailed comment of the SUP Proposal.

[117] The results of the 2012 consultation are summarised by European Commission, *Feedback Statement. Summary of Responses to the Public Consultation on the Future of European Company Law*, July 2012, available at www.ec.europa.eu: 'some voices argued for the revision of the 12th Company Law Directive in order to introduce a simplified company charter to facilitate the organisation of groups (i.e. single member private limited-liability companies would be exempted from certain harmonised rules, not indispensable for a single member company' (p. 9), hence the idea of a SUP. The Commission ran a further *Consultation on Single-member Limited Liability Companies*, and its results are available at www.ec.europa.eu.

[118] European Commission, *Impact Assessment Accompanying the Document: Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies*, Brussels, 9 April 2014, available at www.eur-lex.europa.eu.

have been carried out, so we cannot argue that the difficulties facing unification stem from lack of commitment or resources.

On first glance, the Commission's approach to the SUP Proposal is peculiar: notwithstanding its Latin name, there is no open statement of "Europeanness" in it – it lost its 'E' – and the rules are established by a Directive, not a Regulation. This suggests that the new proposal is geared more to harmonisation than unification. But the Commission is also asking 'Member States to provide in their legal systems for a national company law that would follow the same rules in all Member States and would have an EU-wide abbreviation'.[119] And if this is not a European company form, it is a national form with identical rules in all Member States: what is the difference? Thus although the proposal does not appear to entail legal unification in form, it may do so in substance.[120] Let us now look at some of the SUP rules to see whether this is the case.

The SUP directive[121] requires a minimum legal capital of one euro, exactly as in the first SPE draft,[122] but also requires Member States to allow online company formation[123] and the free separation of registered and head offices,[124] while protecting creditors through a balance-sheet test and a solvency statement.[125] The articles of association are standardised[126] and governance is simplified, with a prohibition on forming a company with more than one member.[127]

In short, the first SUP Proposal is clearly designed to solve many of the problems with the previous proposals. The structural differences with respect to its predecessors may prompt doubt over the very idea of classifying the SUP as a 'company' in the strict sense. The question is: can a legal entity be called a 'company' even if it can have only a single member? If having more than one member automatically transformed it into another type of entity, this model would be analogous to an individual enterprise with limited liability.

This peculiar feature is important not only because it sets the SUP apart from other ECFs, but also because it affects the structure of the regulation dramatically. It implies

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[119] European Commission, *Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies*, Brussels, 9 April 2014, COM(2014) 212 final, 2, available at www.europarl.europa.eu.

[120] The Economic and Social Committee points in the same direction: 'the Commission's aim, with the new proposal for a directive on single-member private limited liability companies, is effectively to introduce the European private company by a different route': Economic and Social Committee, *Opinion on the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies*, COM(2014) 212 final, 2014/0120 (COD), Brussels, 10 September 2014, 6, available at www.consilium.europa.eu and known as 'Röpke report'.

[121] At least the part of the directive regulating the SUP: the first part of the SUP directive applies to all Member State private limited liability companies: see Arts 1 to 5.

[122] Art. 6.1 of the SUP Proposal.

[123] Art. 14.3 of the SUP Proposal.

[124] Art. 10 of the SUP Proposal, which was later amended (cfr. nt. 158).

[125] Art. 18.2 e 18.3 of the SUP Proposal.

[126] Art. 11.1of the SUP Proposal.

[127] Par 7 of the SUP Proposal.

that the single share of a SUP cannot be split,[128] even if this clashes head-on with the concept of 'participation'.[129]

Another important rule is the one requiring transformation of the SUP into a different national company form if the member wishes to issue additional shares.[130] This sharply restricts the potential for growth, making the SUP form less flexible and adaptable.

The one-member rule is softened by allowing the single share to be held in common by more than one person, if this is possible under national law,[131] but this clearly opens up a whole series of complex issues on the rights and duties of the holders of parts of the share.[132]

A more general but still relevant issue is the relationship between the single member and the management body. Article 23 of the SUP Proposal allows the single member to give binding instructions to the management body[133] but is unfortunately silent about the member's liability for such instructions, making his position unclear.

Common, mandatory rules on the SUP thus prove to be unconvincing, opening up complicated theoretical questions and casting doubt on practical application. Compromise on the quality and clarity of legal norms is an extremely high price to pay for political agreement.

The proposed directive also leaves scope for national law, in keeping with its nature as a harmonising instrument while at the same time betraying the clearly stated aim of unification. The SUP and its articles of association, in fact, are made subject to 'the national law of the Member State where the SUP is registered,'[134] even though such references are less frequent than in the other ECF proposals.[135] In addition to the rules (which must comply with national law both for transformation into SUP[136] and for amendment)[137], it is national law that determines whether or not a legal person can be a director[138] and sets the rules that apply to former directors.[139]

The SPE Proposal is in the form of a Directive, but its aim is to produce the effects of unification of the SPE project. Its hybrid nature appears to be geared to the existing internationalised ventures and unsuitable to expanding businesses, given the rigid one-member requirement; unfortunately the low quality of the rules governing the

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[128] See Art. 15.1 of the SUP Proposal.

[129] Its Latin root assumes both the separation of a part from a whole (*pars*) and some form of appropriation of such part (*càpere*) by a subject percieved as distinct from another: if such otherness ceases, so does the need to specify that different parts have a different destination.

[130] Art. 25.2 of the SUP Proposal.

[131] Art. 15.1 and 15.3 of the SUP Proposal.

[132] Such issues may have significantly different solutions according to the applicable national law.

[133] See Art. 23.2.

[134] Art. 7.4 of the SUP Proposal.

[135] The SUP Proposal features only six express references to national law.

[136] Art. 10.3.b of the SUP Proposal.

[137] Art. 12.1 of the SUP Proposal.

[138] Art. 22.4 of the SUP Proposal.

[139] Art. 22.5 of the SUP Proposal.

SUP could make its practical application even more difficult and uncertain than other ECFs.

The SUP-type hybrid harmonisation strategy raises substantial problems[140] and could be resisted both by Member States that fear its exploitation to circumvent codetermination (particularly if the SUP is allowed to locate registered and head offices in different countries)[141] and by interest groups that fear losing business.

As a consequence of these pressures, Article 10 of the SUP Proposal, which only required that the SUP maintain registered office and central administration 'in the Union' (that is, in different member States if so desired) was dropped from the most recent version.[142]

Even though we do not know if the SUP Directive is ever going to be approved, it is clear that the Commission retained its idea of creating a '29th' company law regime, but it is changing its approach. In the process, however, it risks enacting rules that are poor in quality as well as incapable of attaining effective unification.

## 6. Company Forms in Search of an Identity

The regulation of ECFs shows that company forms are not independent of national law. The legal unification of company forms would require common rules in lieu of national ones and the complete regulation of all aspects of company life. This is obviously more difficult than mere harmonisation. None of the ECFs, in being or only proposed, meet these conditions, and none, accordingly, can be considered 'genuinely' European.[143]

The ECFs already enacted are suitable only for large businesses. Their source of law is threefold: unified legal provisions, harmonised rules, and rules drawn from member State regulation. This creates a complex regulatory pattern whereby the same ECF actually embraces significantly different companies, depending on the State of incorporation. And such critical matters as corporate governance and groups are still regulated by national law.[144] The Commission evidently recognised the problem, at least in part, while structuring the SUP proposal as a directive. But this new course

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[140] See K Hopt, (nt. 14), at 15 f.

[141] See, before the last amendment, Conac (nt. 98), at 171-173 (considering the downside of the distinction between the main office and the registered office, in particularly for those Member States adopting the real seat theory). On the problems related to the seat of the company in countries involving codecision, see Stephan Harbarth, *From SPE to SMC – The German Political Debate on the Reform of the 'Small Company'* 12 European Company and Financial Law Review 235-236 (2015). On the role of member State interests in shaping FSEs, see Section 9.

[142] European Council, *Outcome of Proceedings: Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies – General approach*, Brussels, 29 May 2015, available at www.data.consilium.europa.eu, where Art. 10 has been repealed. On whether this rule is compatible with the *Centros* jurisprudence see Section 9.2.

[143] High Level Group of Company Law Experts, (nt. 19) at 117.

[144] These arguments support the view of the chances of harmonisation of European company law as intrinsically limited: Hopt (nt. 14), at 22 and text corrisponding to nt. 43.

is unlikely to succeed in overcoming such deeply rooted resistance to unification, leaving fundamental differences in national law untouched.

If we were to consider ECFs as a genus, moreover, the only homogeneous character we would find is the transactional element, i.e. the involvement of more than one Member State, while they differ markedly in both ambitions and results.

To try to determine whether it was worth the cost and effort to build the ECFs already in place, we now turn to the practical results of their implementation.

## 7. Who Uses ECFs?

'A simple, maybe obvious but still very helpful proof of the usefulness of a law in the business word lies in the success of its application'.[145] We now turn to the details of the diffusion of ECFs to see how market players have responded.

The application of the ECF statutes was closely monitored by the Commission with a 2009 study by Ernst and Young[146] on 369 SEs,[147] many of which were only shell companies.[148] The SEs were mostly registered in countries already familiar with worker participation mechanisms, such as Germany and the Czech Republic.[149] The Commission issued a report[150] indicating that the number of SEs had risen to 595 by June 2010, distributed as in the previous report.[151] The report also found extraordinarily high setup costs (an average of €784,000), cumbersome procedures, legal uncertainties and widespread lack of confidence in this company form.[152] The document argued that these problems were a probable cause of the relative lack of diffusion of SEs. Although this report did not judge the results of the SE project particularly harshly, a report by the Reflection Group on the Future of European Company Law offered a much more severe critique, saying flatly that 'it has not been a success'[153] and that – to use the lexicon adopted here – it should be geared to the greatest possible unification.[154]

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[145] Francesco Vella, *Le reti per crescere e la quadratura del cerchio* in Fabrizio Cafaggi, Paola Iamiceli and Gian Domenico Mosco (eds.), *Il contratto di rete per la crescita delle imprese,* 473 (Milan: Giuffè, 2012).

[146] Ernst & Young (nt. 80).

[147] *Ibid*, at 11.

[148] Regardless of the prohibition imposed by Art. 12.2 of the SE Regulation, forbidding the incorporation of an SE without the pre-requisite worker involvement procedure is carried out.

[149] Ernst & Young, (nt. 80), at 12.

[150] European Commission, *The Application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)*, Brussels, 17 November 2010, COM(2010) 676, available at www.ec.europa.eu.

[151] *Ibid.*, at 3.

[152] *Ibid.*, at 4.

[153] Reflection Group (nt. 18), at 29.

[154] *Ibid.*, at 30.

Following a 2010 study that found there were just 17 SCEs in all of Europe, the 2012 Action Plan counted 1426 SEs, maintaining feebly that 'interest in this legal form continues to grow'[155] but also recognising the far from brilliant results to that point and acknowledging that registering an SE does not mean it is actually engaged in business.[156] Unfortunately, however, rather than tracing this relative failure to structural problems, the European institutions tend to see more effective advertisement of the virtues of this company type as the best way to make progress. But our analysis shows that an advertising campaign is very unlikely to be decisive in overcoming problems that are rooted in dysfunctional legal unification.[157] It is certainly unfortunate that the Commission closed the door to any improvement of the SE Regulation owing to the 'difficulties of reopening the discussion'.[158] On the other hand, the results for the SCE look even poorer, with a mere 25 SCEs in 2012[159] and 27 in 2014.[160]

At the time of writing, there are 2481 SEs in Europe, mostly registered in the Czech Republic;[161] Italy, strikingly, counts only two.[162]

The data confirm that today's ECFs lack popularity among European entrepreneurs: more than ten years after their introduction, their presence is scanty and unevenly distributed, and many are shell companies. National company forms still dominate the European incorporation market.

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[155] Cooperatives Europe-Euricse-Ekai Center, *Study on the implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society (SCE)*, 5 October 2010, 28 and 136, available at ww.euricse.eu.

[156] Similarly Michael Stollt and Melinda Kelemen, *A Big Hit or a Big Flop? A Decade of Facts and Figures on the European Company (SE)* in Jan Cremers, Michael Stollt and Sigurt Vitols (eds.), *A Decade of Experience with the European Company*, 25-48 (Brussels: Etui, 2013).

[157] See nt. 8.

[158] *Ibid.*

[159] *Ibid.*

[160] The figure was retrieved in 11 December 2014 at www.libertasinstitut.com.

[161] Even if there are indeed large and important transnational businesses which decided to incorporate as SsE, such as Allianz SE, the important aspect here is that of the recurrence of this choice, which is low and indicates the poor success of its rules. For an account of how complex setting up an SE can be, see Hermann Biehler and Elke Hahn, *The Process of Creation of Allianz SE from the Point of View of the Employees. Distance Survey*, Munich, May 2007, available at www.ine.otoe.gr.

[162] The first Italian SE is the Brenne Basistunnel BBT SE, aimed at building the tunnel that will link Innsbruck with the Italian city of Fortezza. The other Italian registered SE is Trevi Holding SE, the holding company of Trevi Finanziaria Industriale s.p.a., listed on the Italian stock exchange and head of the multinational Trevi group. Both companies thus have a strong industrial background, and can afford the high setup costs of an SE.

## 8. Accounting for the Scanty Diffusion of ECFs

It is time to seek an explanation for the failure of the ECFs. We adopt a classical method for assessing problems in the production and implementation of legal rules[163] drawing heavily on the theory of public choice.[164]

First we must consider the role of interest groups. Since Member States fear that the introduction of new ECFs will undercut national law, they will tend either to endorse only those European rules that mimic national law or to oppose supranational rules altogether.[165] This could give rise to competitive conduct, analysed below.[166]

We must not forget the role of the 'bureaucrats [who], being concerned primarily with enhancing their power and prestige, will tend to engage in "empire building," thus causing regulatory regimes to expand beyond their optimal size and operate in a dysfunctional manner'.[167]

For the SE and the SCE, time constraint problems can be ruled out. The European institutions had ample leisure to discuss the proposals, which took years and years to be adopted. The SPE and SUP projects may have been more hurried and less thoroughly thought through, insofar as they were discussed or even first proposed during the last financial crisis as part of a package of measures for growth.

We must also consider the possibility of inappropriate incentives. 'Ideally, policymakers who have responsibility for company matters will have some form of coherent long-term vision concerning the interrelationship between the law and corporate activity. This is because if those in charge have a good grasp of what they are trying to achieve, they should be better positioned to develop a rule system which is internally consistent, easy for all concerned to understand and well-suited for achieving relevant policy objectives".[168]

In fact, the Commission carried out a whole series of preparatory studies to determine the feasibility and assess the likely impact of these projects.[169] Nevertheless, the ECF system is internally inconsistent and extremely complex (hence not readily comprehensible), and it failed to achieve its goal of legal unification. This is bad news, of course, but it also represents the rebuttal of one possible criticism directed at European institutions: namely, insufficient attention to the requests of market participants. Indeed, the Commission may have gone too far in the other direction: at least as

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[163] Brian Cheffins, *Company Law. Theory, Structure and Operation,* 178-213 (Oxford: Clarendon, 1997).

[164] See in general Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon, 1994); Daniel A Farber and Philip P Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991) and Jonathan Macey, *Public Choice: The Theory of the Firm and The Theory of the Market Exchange* 74 Cornell Law Review 43 (1989).

[165] It is no accident that the SE two-tier system resembles the German, and the SPE resembled a GmbH.

[166] Section 9.1.

[167] Cheffins, (nt. 163), at 21-22 quoting William A Niskanen, *Bureaucracy: Servant or Master? Lessons from America* (London: Institute of Economic Affairs, 1973).

[168] Cheffins, (nt. 163), at 187 s.

[169] See the documents referred to in Section 7.

regards the SPE and the SUP projects, it may have given too much weight to businessmen's demands and become overambitious. Undoubtedly entrepreneurs would be happy to have a company form that can be established at no cost and with no bureaucratic obligations, that can circulate freely throughout Europe, and that is not subject to creditor protection measures. In other words,[170] for market players the ideal company form stresses free movement over stakeholder protection, necessarily compromising the delicate equilibrium between these two sets of regulatory objectives. Less concern for the opinions of businessmen would improve the quality of ECF proposals.

Let us now turn to enforcement, perhaps the greatest weakness of today's ECFs. Even assuming that uniform, systematically consistent, European-wide rules were enacted, ECFs would still be isolated in the broader set of rules that govern companies' day-to-day activity. There is no such thing as a '29th' legal system, and trying to construct one via company law alone would not level the playing field, because it would not touch tax law, labour law, administrative law, or bankruptcy law. In a word, it may be difficult for these company forms to find the righ legal habitat to thrive.[171]

We must also discuss the cost impact of regulation,[172] and in particular the drafting, discussion, amendment and implementation of the ECF statutes. These costs may not be quantifiable in detail, but they would appear to be substantial. In our discussion so far, we have stressed the considerable time and effort put into them, and it seems, at least in retrospect, that the European legislature seriously underestimated these costs. This opinion is buttressed by a view of the SUP project as an effort to make some use of the substantial body of work done for the SPE.

To get a rough idea of the costs sustained for the drafting and approval of ECF statutes, first there are sunk costs, which by definition cannot be recovered, apart from the opportunity cost of devoting time to discussing the ECFs in lieu of other, possible more fruitful activities. We must add the costs sustained by the businesses that adopted existing ECFs, essentially in connection with the change of company form[173] and a complex and sometimes unclear regulatory regime that heightens setup and general legal costs. The lack of an established reputation of European-brand companies could also increase costs, as business relationships may well suffer from the legal uncertainties affecting these company types. An enterprise adopting an ECF would almost certainly suffer the adverse financial effect of counterparty scepticism over new forms that are not clearly regulated.[174] In the light of these costs, the few advantages pale in importance.

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[170] Following the framework detailed in para. 4.

[171] This perspective is endorsed also by Reflection Group, (nt. 18), 29, as some of its components believe that company law 'can only function properly as part of a national jurisdiction that it supplements'.

[172] See Cheffins, (nt. 163), at 203.

[173] The so-called *switching costs*, which are linked to legal unification: Carbonara and Parisi, (nt. 25), at 372.

[174] Diffidence for a model not commonly found in international commercial practice could nullify the presumed benefits of a company denomination that is netural with respect to country, which has

Another problem, not considered in the traditional taxonomy adopted here, is the poor quality of the rules, which again engenders costs. If ECFs have more patchy or plainly worse rules than their national counterparts, they will be more costly and correspondingly less popular.

## 9. Regulatory Competition and Regulator's Choice

By examining the dichotomy between harmonisation and unification, we were able to evaluate the function and structure of ECFs and analyse the way in which cooperative convergence may occur. We should now look more closely at how the choices of the national legislatures may influence this landscape.

Each Member State has three different options. First, it may seek further convergence of company law regimes. The cooperative version of this approach was discussed above; spontaneous adaptation will be examined in Section 9.2. Second, a State may also want to accentuate the differences between its own company law and those of other countries by adopting innovative rules that are unique to it. This concerns national law only and is accordingly irrelevant to the present analysis.[175] Third, a Member State may have an interest in keeping its company law exactly as it is, preventing exogenous (i.e. European) innovations and preserving the status quo. This option is of vital importance to understand the issues affecting ECFs.

Two more elements are worth recalling. First, the power of the individual Member State to adopt and enforce company law is in principle unfettered, unless it freely decides to transfer part of its sovereignty to a supranational authority.[176] On the supranational level, however, we have seen that normative power is in the hands of the European institutions, which are readily influenced by single Member States and transnational interest groups. Second, at least in principle entrepreneurs in every nation can choose freely between national and foreign company forms,[177] which

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nevertheless been repeatedly pointed to as one of the main advantages of some types of ECF: European Commission, *The Application of Council Regulation 2157/2001*, (nt. 150), at 3.

[175] It could happen that a company law provision which is innovative in nature is introduced by one Member State and induces emulation by others. In this case such successive spontaneous modifications could be classified as examples of spontaneous convergence through unilateral amendment: see Section 9.2.

[176] See further nt. 192.

[177] In this field Member States may engage in two different types of regulatory competition: they can compete either to build 'friendly' ECFs, displaying quasi-national features, or to design more attractive national forms. Competition for ECFs is indirect and can be spotted only looking at the political debate surrounding the proposals (see Section 9.1); the influence that a single State can exert over the shape of an ECF is naturally attenuated through the negotiations with other member States. Regulatory competition concerning national company forms is different: it is direct, as it is the result of the direct exercise on national sovreignty *natura diretta* and emerges directly from the law applicable to the domestic company form and is accordingly more easily recognised. Because of this structure it will be easier to track down and study the second kind of regulatory competition than the first, but this does not make it less important. As a matter of fact, such indirect regulatory competition is necessary to undestand ECFs.

means that regulatory competition[178] may well affect the design of ECFs. We shall now see whether this type of influence can be significant (Section 9.1) and whether unilateral amendment of company law by Member States, which is non-cooperative in nature, can be an alternative to supranational unification as a route to regulatory convergence (Section 9.2).

### *9.1. 'Regulatory Protectionism' in Company Law, Driving Out Cooperative Convergence*

Regulatory competition shapes the ECF negotiations. If a Member State is not interested in changing the number or characteristics of its own company forms, it will maintain the status quo. If European institutions exert pressure for new company forms, the latter may not be aligned with existing national forms and would therefore alter the status quo. In particular, as each ECF must balance free movement against stakeholder protection,[179] it could well violate provisions of national law, enabling domestic entrepreneurs, de facto, to opt out of their home company law, choosing instead a more attractive supranational form to sidestep burdensome national requirements. This would make the new ECF into a potential danger, from the national standpoint.

The natural reaction of such a Member State would be to lobby for the inclusion in the ECF statute of the same legal guarantees provided for in national company forms,[180] or alternatively to force the introduction of burdensome requirements that mimic national company law, making the ECF less attractive in spite of other potentially popular measures, or else opposing the proposal outright.

The power that the Member States have in this respect stems from Article 352 TFEU, which requires Council unanimity. Every country, that is, has de facto veto power over a Regulation introducing an ECF. The use of this power to protect the national status quo in the field of company forms could be termed 'regulatory protectionism'.[181] Its aim is to protect and favour the application of national company

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[178] On regulatory competition see Fleischer (nt. 15), 1700-1703; in the US see Mark J Roe, *Delaware's Politics* 118 Harvard Law Review 2491-2453 (2005) and literature in nt. 37 and 38. With reference to the European Delaware discussion, Martin Gelter, *The Structure of Regulatory Competition in European Corporate Law* 5 Journal of Corporate Law Studies 247-284 (2005). For a skeptical view on so-called 'defensive' regulatory competition, at least for small companies wishing to operate in Germany, see Wolf Georg Ringe, *Corporate Mobility in the European Union – A Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition* 10 European Company Law Review 230-267 (2013); a more positive opinion is expressed by Ulrich Noack and Michael Beurskens, *Of Tradition and Change – The Modernization of the German GmbH in the Face of European Competition* in Joseph A McCahery, Levinus Timmerman and Erik PM Vermeulen (eds.), *Private Company Law Reform. International and European Perspectives,* 157-180 (The Hague: Asser Press, 2010).

[179] Section 4.

[180] See for example the German codetermination procedure: nt. 141.

[181] Economic protectionism includes only public intevention aimed at favouring local versus foreign enterprises (see Gianni Parmithiotti, *Is Project 1992 the First Step Towards European Protectionism?* in Sandro Sideri & Jayshree Sengupta (eds.), *The 1992 European Single Market and the Third World,* 74,

forms,[182] making clear how company law 'can be exploited for political objectives'.[183] Such objectives reflect the complex and diverse historical and sociological origins of European entrepreneurship.

The role played by 'implicit' regulatory competition in the failure of ECF projects is clear. The only way to overcome this difficulty would be to alter national culture and interests in a way that could be either impossible or undesirable, at least at this stage. More feasible could be changing the powers of EU institutions and the procedures for unified rules in such a way as to diminish the influence of national interests on supranational legislation. A simpler option still might be to wait for the European Union to mature into a more politically integrated system in which its legislative power is more readily brought to bear.[184]

In fact, given regulatory protectionism, differences in national company law – especially as regards governance and corporate groups – may have caused not only

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nt. 2 (London: Frank Cass, 1992), but things change when we look at the market for rules applicable to companies. On the role of economic protectionism in company law see Ulf Bernitz, Wolf Georg Ringe (eds.), *Company Law and Economic Protectionism. New Challenges to European Integration* (Oxford University Press, 2010); unfortunately the work does not consider ECFs. See in particular Crispin Waymouth, *Is "Protectionism" a Useful Concept for Company Law and Foreign Investment Policy?*, *ibid.*, at 32-53 (proposing to substitute other terms for the notion of protectionism).

[182] Traces of regulatory protectionism can be found both in the influence exerted by Member States in the formation of ECFs and in the competition between national company forms (on the two forms of competition see nt. 178). Member States suffering such competition see it as an attempt to sidestep the applicable national law and try to stop it broadening the reach of national rules. This mechanism can be clearly seen in a recent decision: ECJ, 10 December 2015, *Simona Kornhaas v. Thomas Dithmar, acting as liquidator of the assets of Kornhaas Montage und Dienstleistung Ltd*, C-594/14 (Sentenza *Kornhaas*), still unpublished but available at www.curia.europa.eu. The case concerned German rules on the reimbursement of payments made by company directors after insolvency but before the opening of the proceeding provided for by §64 GmbHG for GmbH to UK companies operating exclusively in Germany. The ECJ qualified those rules as insolvency law, rather than company law, justifiying the application of the law of the COMI according to the Regulation on insolvency proceedings applicable at the time (Council Regulation EC n. 1346/2000 of 29 May 2000 on insolvency proceedings, in *O.J.E.C.* n. L. 160 of 30 June 2000, 1-18, now recast as Regulation EU 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in *O.J.E.U.* n. L 141 of 5 June 2015, 19-72). The decision was received suspiciously; see G Ringe, 'Kornhaas and the Limits of Corporate Establishment', *Oxford Business Law Blog* (25 March 2016), at www.law.ox.uk/buiness-law-blog (*disponibile all'indirizzo*, judging that the ECJ must have been 'in a state of mental blackout'). This could be an excessive reaction, but the absence of clear boundaries between company and insolvency law is indeed worrying. This brings to mind the longstanding issue in US law on the separation between corporate law and securities law: see recently James J Park, *Reassessing the Distinction Between Corporate and Securities Law*, UCLA Law & Economics Research Paper no. 16-09, available at www.ssrn.com). Which claims are brought under corporate law and which under securities law? Such uncertainty is a tool in the hands of national courts to (*i*) expand the application of national company law in spite of the principle of incorporation in case of insovency, (*ii*) *de facto* limit the applicability of the law of other member States and (*iii*) use this technique to attenuate regulatory competition. This ECJ decision seems to uphold such practices, in contrast with the principles of the *Centros* jurisprudence.

[183] Wolf Georg Ringe and Ulf Bernitz, *Company Law and Economic Protectionism – An Introduction* in *Id*., *Company Law and Economic Protectionism*, (nt. 181), at 9.

[184] See Section 9.2, especially nt. 192.

the failure of legal unification but also the resistance to harmonisation.[185] The present study is thus relevant to interpreting and advancing that discussion.

### *9.2. Competition among National Company Forms: Fostering Spontaneous Convergence*

The relationship and potential interaction between national legislatures in shaping national company forms is also worth some discussion. Regulatory convergence among member States can be obtained by unilateral amendment, giving rise to regulatory competition. But if the choice between incorporating under a national or a European form is unfettered,[186] in order to incorporate under the law of a different Member State regulatory arbitrage must be legal. Back in 1999 the Centros jurisprudence allowed letterbox companies to be set up and to operate throughout Europe,[187] thus making regulatory competition at least theoretically practicable.

As far as public companies are concerned, there is not much room for regulatory arbitrage. National regimes show a significant degree of overlap, thanks mainly to EU harmonisation over past decades.[188] Although important areas of company law are still not covered, they are unlikely to justify mass migrations.[189]

The case of limited companies, those that might be interested in expanding abroad using a SUP, is rather different.[190] If what they are interested in is reduced setup costs through a low minimum capital requirement plus a single, flexible legal structure, the fact is that many Member States already offer it. Such simplified company forms have been instituted in a good many countries for some time now, and although they are not perfectly identical they all serve substantially the same purpose.[191] So there does appear to be an *inter pares* competition to establish popular company forms, but the cause was clearly not the emergence of aggressive and competitive European company forms, but rather a string of decisions by the European Court of Justice in favour of freedom of establishment. In other words, vertical competition was superseded by horizontal competition.

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[185] See nt. 38, nt. 39 and accompanying text.

[186] Specific limitations pertaining the type of ECF aside: recall the restrictions imposed on the setup of a SE (Section 5.1).

[187] See nt. 11, and Federico Maria Mucciarelli, *Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi* (Milan: Giuffrè, 2010).

[188] On company law harmonisation see Section 2.

[189] In particular on the Fiat-Chrysler case see Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat*, ECGI Law Working Paper no. 288/2015, available at www.ssrn.com.

[190] See Marco Ventoruzzo, *"Cost-based" and "Rules-based" Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U.* 3 NYU Journal of Law and Business 91-153 (2006). At 102 the author highlights how regulatory competition is particularly strong in Europe for small and start-up companies wishing to decrease legal and administrative costs. This phenomenon is termed 'cost based competition', and differs from that – known in the US – involving more mature companies migrating to look for more suitable corporate governance rules.

[191] See e.g. Ringe, (nt. 178), at 230.

Member States protect the domestic status quo both by influencing supranational measures and by shaping the national company forms they control to make them more competitive. This unilateral amendment process may give birth to national models that resemble one another more and more closely.

In this scenario it is hard to argue for the existence of a '29th' legal system, which would necessarily be lacking many of the fundamental elements of a legal system, such as genuinely European legal persons and an independent (or at least highly consistent) enforcement mechanism. This is tantamount to the assertion that, in a context of cooperative convergence, vertical competition does not appear to be working.

The root of the problem with ECFs, then, can be traced to the workings of a sort of dual regulatory competition: one implicit and negative, in the form of Member State rejection of potentially popular company forms at European level, and another explicit and positive, in the form of spontaneous cross-country emulation, at least as far as small companies are concerned. The two types of competition have substantially different effects: one prevents legal unification, the second is likely to bring national laws towards convergence.

It is hard to say whether unification in the field of company forms is ever going to be complete and successful. This would require political agreement[192] which is strictly bound up with questions of sovereignty.[193] Failing complete sovereignty, in fact, it is hard to build a consistent legal system. It is also clear that Member States are capable of autonomously constructing increasingly similar legal forms, enabling spontaneous convergence to prevail over formal cooperative design of ECFs. Such cooperative design, in fact, looks more and more like a useless duplication. This is confirmed by

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[192] Section 9.1. See Mark Roe, *Political Determinants of Corporate Governance. Political Context, Corporate Impact* (Oxford: Oxford University Press, 2003), framing legal rules in the context of political preferences. It is interesting to look at what political sociology has to say on the link between society and sovereignty in contemporary Europe. As the classical notion of society tends to coincide with State, we could imagine that creating a genuinely European society would require a powerful European central government which, at least to a certain extent, imposes its authority over member States (Claus Offe, *Esiste una società europea?* in Elena Paciotti (ed.) *Sfera pubblica e costituzione europea,* 117 (Rome: Carocci 2002). Strong, centralized political action would be necessary now that we are withnessing the detachment of democratic legitimation – which is still strongly at national level – from political power – largely transferred to European institutions – with a view to strong common policies. See Andrea Santini, *L'assetto istituzionale dell'Unione Europea: verso una maggiore efficienza e legittimità democratica?* in Ugo Draetta and Andrea Santini (eds.) *L'Unione Europea in cerca di identità: problemi e prospettive dopo il fallimento della 'Costituzione',* 57-100 (Milan: Giuffrè, 2008) (calling for a federal Europe) and Alessandro Cavalli and Alberto Martinelli, *La società europea,* 315 (Bologna: Il Mulino, 2015), inviting to seize the opportunity that the political crisis is offering and hoping for a stronger political integration in Europe. The failure of the project for a European Constitution is another expression of the fundamental national differences giving rise to these political problems: Francesco Sucameli, *L'Europa e il dilemma della costituzione. Norme, strategie e crisi del processo di integrazione,* 232-235 (Milan: Giuffrè, 2007). From a company law pespective, then, the impossibilty of unification and the consequent failure of ECFs, as well as the failure of harmonisation in certain areas (such as corporate governance) is just a reflection of the lack of real political governance. It can be foreseen that as long as this difference between political power and democratic legitimation persists, EU company law makers should refrain from going down the road of cooperative adaptation.

[193] Nt. 22 and Section 9.1.

an examination of the ECFs' provisions for freedom of movement, which despite their obvious potential advantage[194] are not significantly better.

Non-cooperative convergence can be an effective alternative to cooperative unification, at least for now, bringing comparable advantages while circumventing supranational political roadblocks.

## 10. The Future of ECFs

Although European company forms are a part of European company law, they are not instances of legal unification, nor do they successfully combine freedom of movement with stakeholder protection. As a consequence, they are not sufficiently attractive to be chosen by a significant number of businesses. The unavoidable conclusion is that the resources allocated to developing and discussing them could have been employed more fruitfully in other projects.

The causes for this failure include political pressure from Member States, the counteraction of other interest groups, and over-attentiveness of the European legislature to market players' desires, to the detriment of the legal structure and content of the European company forms. The quality of the rules is not often very high, which also does not facilitate entrepreneurs.

Differences in business culture produce differing regulatory responses at national level, hence regulatory competition. This turns out to be an obstacle to good ECFs. The costs of making and using them are far too high, both for the institutions that designed them and for the businesses that could use them. In the end, one can say that no law would be better than bad law and 'an excess of ambition in integration […] may lead to disintegration'.[195]

As far as the European models of types of public company are concerned, both unification and harmonisation via directives face insuperable obstacles to levelling the playing field on key matters still ruled by national law, such as corporate governance and groups. The poor results of ECFs to date certainly suggest it is opportune to postpone efforts at harmonisation.

As far as ECFs for small and medium-sized enterprises are concerned, the SPE and SUP experiences should bring more attention to competition among Member States, which already appears to be producing more successful company forms in spontaneous fashion. This goes for small limited companies for which the minimum capital requirements are low. Member States may sidestep supranational political deadlock and cross-vetoes by unilateral amendments that may well bring legal convergence. Such national efforts usually presuppose the same sort of thorough comparative enquiry into company law that is the necessary premise to an ECF proposal.

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[194] See Section 5.1 ff.

[195] These are the words of Niall Ferguson in an interview in *Corriere della Sera*, 17 November 2015, available at www.corriere.it referring to the migrant crisis; this is another piece of evidence of the close link between political governance and corporate governance.

What should be done with the ECFs that have already been devised? Perhaps the most appropriate response to our findings would be for the EU to simply refrain from legislative activity in this field for a while, downgrading the high priority that these projects have enjoyed to date and focusing instead on the consistency of the mechanisms for the foundation of European law. The success of corporate governance unification or harmonisation in Europe would appear to depend heavily on the unification of political governance, but today, especially after Brexit, the road to Political Union is longer and steeper than ever.

The Commission should promote further interdisciplinary comparative studies of company law, as it did in the past,[196] and put this question at the centre of the regulatory debate.

While it would be impractical to repeal the ECF rules now in force, there is unquestionably a good deal of room for their improvement, to alleviate the adverse consequences of the failure of a dream that 'collapse[d] under the weight of its irreconcilable demands'.[197]

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[196] See Carsten Gerner-Beuerle, Philipp Paech and Edmund P Schuster, *Study on Directors' Duties and Liabilities Prepared for the European Commission DG Market* (London, April 2013), available at www.ec.europa.eu.

[197] Davies (nt. 95), at 31, but back then it was mere speculation.