Corporate Governance in Europe A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance

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Abstract

European corporate law and corporate governance are moving ahead beyond expectation. Some British voices called this “a renaissance in the past decade”. In December 2012, the European Commission came forward with an Action Plan that combines both corporate law and corporate governance rules and contains sixteen disparate initiatives partly to be implemented through Directives, partly through non-legal measures. Meanwhile a fight on the Draft Shareholder Rights Directive is going on in the European Council and the Parliament, with major compromises pending in 2015. Further corporate law harmonization measures are under way, in particular the proposal of Single-Member Private Limited Companies. The European Court of Justice’s case law has a far-reaching impact on the free movement of corporations in the European Union, but is not able to singlehandedly create European corporate law with decisions based on the freedoms of the Treaty. On this background the article analyzes seven critical areas of European Corporate Law and Governance as of 2015: Empowering shareholders and institutional investors; controlling shareholders, groups of companies and related party transactions; new European corporate forms; corporate and bank governance; free transfer of seat without new incorporation; corporate finance and capital maintenance and European takeover law reform. The article ends with looking into the goals, methods and scope of European corporate law-making. Free mobility and minimum protection have to be balanced. Transparency as a method of regulation strengthens private autonomy and supports market forces. Harmonization must be limited to the core areas of corporate law, and national and European corporate law will need to complement one another. It remains to be seen whether the codification plans of the Commission and the private model law initiatives will produce convincing results. In sum any step to more European law in the before-mentioned core areas should not only be left to the forces or deadlocks of political compromise, but in order to be really useful will need to be addressed in a careful, ongoing, policy-oriented, economic and comparative law discussion.

Keywords: European corporate governance, European corporate law, shareholder rights directive, institutional investors, related party transactions, transfer of seat, corporate finance, takeover law, codification, model law

JEL Classifications: G21, G28, G30, G32, G34, G38, K20, K22

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Outline

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Abstract

European corporate law and corporate governance are moving ahead beyond expectation. Some British voices called this "a renaissance in the past decade". In December 2012, the European Commission came forward with an Action Plan that combines both corporate law and corporate governance rules and contains sixteen disparate initiatives partly to be implemented through Directives, partly through non-legal measures. Meanwhile a fight on the Draft Shareholder Rights Directive is going on in the European Council and the Parliament, with major compromises pending in 2015. Further corporate law harmonization measures are under way, in particular the proposal of Single-Member Private Limited Companies. The European Court of Justice's case law has a far-reaching impact on the free movement of corporations in the European Union, but is not able to singlehandedly create European corporate law with decisions based on the freedoms of the Treaty. On this background the article analyzes seven critical areas of European Corporate Law and Governance as of 2015: Empowering shareholders and institutional investors; controlling shareholders, groups of companies and related party transactions; new European corporate forms; corporate and bank governance; free transfer of seat without new incorporation; corporate finance and capital maintenance and European takeover law reform. The article ends with looking into the goals, methods and scope of European corporate law-making. Free mobility and minimum protection have to be balanced. Transparency as a method of regulation strengthens private autonomy and supports market forces. Harmonization must be limited to the core areas of corporate law, and national and European corporate law will need to complement one another. It remains to be seen whether the codification plans of the Commission and the private model law initiatives will produce convincing results. In sum any step to more European law in the before-mentioned core areas should not only be left to the forces or deadlocks of political compromise, but in order to be really useful will need to be addressed in a careful, ongoing, policy-oriented, economic and comparative law discussion.

Key words

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I. European Corporate Law and Corporate Governance Moving Ahead: The EU Commission's Action Plan of December 2012, The Draft Shareholder Rights Directive as of 2015 and Further Ongoing Harmonization Projects

1. Corporate Governance, the Renaissance of European Corporate Law and the Timing of the New Initiatives of the EU Commission Parallel to the 2015 Vision of a European Capital Market Union

"(N)ext to addressing the financial crisis," corporate governance was "the central leitmotif of the year 2012" in Germany and other European countries.[1] While in the early 1990s, corporate governance was still in its infancy,[2] this subject matter is now an established field in academia, practice, and legislation also in Europe, both at the European Union and the Member States level, one that is not identical to corporate law but is closely linked to it.[3] In 2010/11 the EU Commission jumped on the bandwagon of the international corporate governance movement and highlighted it as urgent in Green Papers on the corporate governance of financial institutions, on audit policy and on corporate governance in general.[4] After the public Consultation on the Future of European Company Law,[5] which garnered numerous responses from nearly all the Member States and some other countries from outside the European Union,[6] on 12 December 2012, the EU Commission presented its (second) Action Plan on European Company Law and Corporate Governance[7] and thereby highlighted the importance it attributes to European corporate law. This importance has been reflected in two statements from England and Germany: "European corporate law has enjoyed a

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[1] The ZGR editors in the preface to the ZGR Symposium 2012 'Corporate Governance in Deutschland und Europa', ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 2012, 157.

[2] B. Cheffins, 'The Rise of Corporate Governance in the U.K.: When and Why', ecgi Law Working Paper No 293/2015, May 2015.

[3] For the USA of late B. Cheffins, 'Delaware and the Transformation of Corporate Governance', University of Cambridge Legal Studies Research Paper No. 64/2014, November 2014. For more on the international status of corporate governance, *see* K.J. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation', AM. J. COMP. L. LIX (2011) 1; P. C. Leyens, 'Corporate Governance in Europe: Foundations, Developments and Perspectives', in RESEARCH HANDBOOK ON THE ECONOMICS OF EUROPEAN UNION LAW (T. Eger/H.-B. Schäfer eds., Elgar 2012), 183.

[4] For more on banks, *see* the European Commission, Green Paper on *Corporate Governance in Financial Institutions and Remuneration Policies*, Brussels, 2 June 2010, COM(2010) 284 and accompanying documents SEC (2010) 669. For more on auditors, *see* European Commission, *Audit Policy: Lessons from the Crisis*, Brussels,13 October 2010, COM(2010) 561 final. For more on the corporate governance of companies in general, *see* European Commission, *The EU Corporate Governance Framework*, Brussels, 5 April 2011, COM(2011) 164/3.

[5] European Commission, *Consultation on the Future of European Company Law*, 20 February 2012.

[6] As to the results of this Consultation see *infra* I 7 c.

[7] European Commission, *Action Plan: European Company Law and Corporate Governance – A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies*, Brussels, 12 December 2012, COM(2012) 740/2. For details see *infra* I 3.

renaissance in the past decade. Fifteen years ago, this would have seemed most implausible."[8] And European corporate law[9] is the "first and most important field of legal harmonization" and "the area of private law … whose Europeanization is developed the furthest."[10] This view is widely shared in Europe, and by the author of this paper, though it is not undisputed.[11] In the meantime the EU Commission (also in its new composition of 2014) has pursued some of its proposals in the Action Plan, in particular by proposing (i) a new Directive reforming the Shareholders Rights Directive of 2007 with far-reaching proposals[12] and (ii) a Directive on single-member private limited liability companies.[13] Both of these are very controversial, have led to considerable changes by the European Council in 2015, and will be analyzed in detail in this article.[14]

The timing of these initiatives was aptly chosen by the EU Commission. Already in 2003, when the first Action Plan on European corporate law was unveiled, the decisive impetus[15] was provided by the Financial Services Action Plan,[16] which was born out of the crisis at the time and pointed toward a European banking and capital markets law. As Dutch Commissioner Bolkestein correctly assessed at the time, success in that field should also be possible in the area of corporate law. While Irish Commissioner McCreevey's tenure was marked by a notable lack of either vision, fortune, or effectiveness, the French Commissioner Barnier has adopted a page from Bolkestein's book: the breathtaking progress in the European architecture – and not only in the financial and capital markets[17] – after the financial crisis is envisaged to spur on European corporate law. Progress in both areas is essential, albeit not

[8] J. Armour/W.-G. Ringe, 'European Company Law 1999-2010: Renaissance and Crisis', COMMON MKT. L. REV. 48 (2011) 125.
[9] The term comes from the field of commercial law, but it functions as an umbrella term. *Cf.* EUROPEAN COMPANY AND FINANCIAL LAW, TEXTS AND LEADING CASES (4th ed., K.J. Hopt/E. Wymeersch, eds., Oxford 2007).
[10] M. Lutter/W. Bayer/J. Schmidt, EUROPÄISCHES UNTERNEHMENS- UND KAPITALMARKTRECHT (5th ed., Berlin, Boston 2012), § 1 ref. no. 2.
[11] See *infra* I 6 a.
[12] 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, COM(2014) 213 final.
[13] European Commission, Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, COM(2014) 212 final.
[14] See *infra* I 4 and 5.
[15] J. Armour/W.-G. Ringe, *supra* note 8, 152 et s.
[16] European Commission, *Financial Services – Implementing the Framework for Financial Markets: Action Plan*, Communication of the Commission from 11 May 1999, COM(1999) 232.
[17] *See* E. Liikanen, *High-Level Expert Group on Reforming the Structure of the EU Banking Sector: Final Report*, Brussels, 2 October 2012; THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS (E. Ferran/N. Moloney/J. G. Hill/J. C. Coffee, eds., Cambridge 2012); FINANCIAL REGULATION AND SUPERVISION, A POST-CRISIS ANALYSIS (G. Ferrarini/K.J. Hopt/E. Wymeersch, eds., Oxford 2012).

without some risk, for as always after stock market and financial crises,[18] there is a very real threat of legislative overreaction cascading over from the governance of banks[19] and a universally perceived tendency toward protectionism,[20] as most recently evidenced by the French Loi Florange of 2015 shielding French corporations from foreign public takeovers.[21]

The initiatives of the EU Commission on corporate law and corporate governance perfectly fit the most recent endeavors of creating a European capital market union. On February 18, 2015 the EU Commission published a Green Paper on "Building a Capital Markets Union"[22] and started a public consultation that ended on 13 May 2015. The British Commissioner Hill intends to lay the fundaments of the capital market union. This "flagship-initiative" has the highest priority and is intended to stimulate employment and growth. There is indeed a considerable gap between the European Union and the USA. The financial markets of the former, while having grown quickly in the last decades (by the end of 2013 around 8.4 trillion Euros with a total value of outstanding debt securities of 22.3 trillion Euros),[23] remain fragmented and lag behind internationally. The capitalization of the stock markets in Europe amounts to 64.5 percent of the GDP, as compared to the USA at 138 percent. The main source of finance is still the banks. They account for around 80 percent of the financial budget of the enterprises, as compared to only 20 percent in the USA. The capital market union is conceived to be the counterpart of the European Banking Union, though the former is to comprise all 28 Member States, while the Banking Union consists only between those Member States that adhere to it, with the exclusion in particular of the United Kingdom. The subject areas and possible measures described by the EU Commission in the Green Paper are varied:[24] among others credit information is to be improved; private placements,

[18] For more on the significance of the stock market and financial crises for corporate governance rules, *see* K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 (16 et s).

[19] K.J. Hopt, 'Corporate Governance of Banks after the Financial Crisis', FINANCIAL REGULATION AND SUPERVISION (G. Ferrarini/K.J. Hopt/E. Wymeersch, eds., Oxford 2012), 337; *id.,* 'Corporate Governance of Banks and Other Financial Institutions After the Financial Crisis', JOURNAL OF CORPORATE LAW STUDIES 2013, 219, also available at < http://ssrn.com/abstract=2334874 >.

[20] K.J. Hopt, 'European Company and Financial Law: Observations on European Politics, Protectionism, and the Financial Crisis', COMPANY LAW AND ECONOMIC PROTECTIONISM (U. Bernitz/W.-G. Ringe, eds., Oxford 2010), 13; I. S. Dine/I. Erel, 'Economic Nationalism in Mergers and Acquisitions', Journal of Finance LXVIII No. 6 (2013) 471.

[21] On the Loi Florange of March 29, 2014 A. Pietrancosta, 'The latest reform of French takeover law: the "Florange act" of March 25, 2014', Revue Trimestrielle de Droit Financier (RTDF) 2014, 42; see also *infra* II 7.

[22] European Commission, Green Paper, Building a Capital Markets Union, 18.2.2015, COM(2015) 63 final. See also the Commission Staff Working Document, Initial reflections on the obstacles to the development of deep and integrated EU capital markets, Accompanying the document Green Paper, Building a Capital Markets Union, SWD(2015) 13.

[23] These and the following figures are according to the Green Paper (*supra* note 22) and the Commission Staff Working Document (supra note 22).

[24] As to the main impediments to capital markets in Europe see Green Paper (*supra* note 22) at p. 14 et s.

securitization, financial collateral and factoring shall be made easier; long-term investment shall be boosted; and a European bond market, in particular the market for enterprise bonds, is to be developed. This is to be accompanied by the creation of a single rulebook and in the end convergence of the highly divergent capital market supervision at the level of the Member States. While the Green Paper contains a basket of rather heterogeneous economic and legal measures, the connection with corporate law and corporate governance is seen in the insufficiently harmonized or inadequate corporate law and corporate governance rules, the non-harmonized conflict-of-law rules in the area of corporate law (including insolvency and tax law) and the differences in regulation and supervisory enforcement.[25]

The first reactions on the Green Paper on the Capital Market Union have been mixed;[26] the detailed results of the public consultation will be made available by the EU Commission probably only in autumn 2015. Most observers agree in principal on the aim of a capital union, for its possible contributions to both more stability and more growth.[27] Yet many observers doubt the comparability with the Banking Union and criticize the heterogeneity of the envisaged matters and areas and the lack of clarity in respect of the panoply of measures mentioned. These measures range from mandatory law and soft law to economic incentives and from mere nudging to financial intervention and all manner of regulation. The path to the European Capital Market Union will certainly be long and strenuous, on this the observers agree,[28] but what is decisive in the present context is the connection with corporate law and corporate governance and the envisaged bandwagon effect of the Capital Market Union on corporate law and corporate governance.

2. Some Remarks as to the Status Quo of European Corporate Law

[25] Green Paper (*supra* note 22) at p. 17 et s., 15 et s.
[26] K. J. Hopt, 'Die Schaffung einer Kapitalmarktunion in Europa – langwierig und schwierig, aber notwendig', EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 2015, 289.
[27] Bank of England, Financial Stability Paper No. 33, February 2015. Cf. also C. Buch, member of the German Federal Bank, 'Mehr Eigenkapital! (more equity capital)', HANDELSBLATT 26.5.2015 No. 98 p. 48; D. Harrison, 'A new European capital market', LAW AND FINANCIAL MARKETS REVIEW 2014, 318; A. Carr, 'A Capital Markets Union for Europe: where do we go from here?' Butterworths J. Int. Banking & Fin. L. 2015, 255. A good economic analysis is given by M. Véron, 'Defining Europe's Capital Markets Union', Bruegel Policy Contribution, Issue 2014/12, November 2014.
[28] Cf. A. Dombret, member of the German Federal Bank, 'What can capital markets deliver?' Speech 18.3.2015 at the ILF Conference in Frankfurt.

The Action Plan of the EU Commission on modernizing corporate law and enhancing corporate governance of 21 May 2003,[29] while harking back in many of its parts to the recommendations of the High Level Group of Company Law Experts,[30] laid out a vision of European corporate law with a plethora of measures in the following core areas:[31] corporate governance, capital maintenance and change of capital, groups of companies and corporate pyramids, restructuring and mobility, as well as European Private Companies (SPEs) and other European corporate law forms. The implementation has since followed in more than half a dozen Directives, including those regarding takeover bids in 2004,[32] mergers in 2005 and 2011,[33] and shareholders' rights in 2007,[34] as well as two influential – though not legally binding – Commission Recommendations. The Recommendation of 14 December 2004[35] dealt with the remuneration of directors of listed companies and was revised by the Recommendation of 30 April 2009.[36] The Recommendation of 15 February 2005[37] related to the role of non-executive or supervisory directors and the committees of the (one-tier) board or the supervisory board. For both Recommendations there is also an Implementation Report.[38]

Since the first Action Plan of 2003, which produced some results but in many cases was not implemented, an enormous amount of progress has taken place in the Member States. Some have passed completely new stock corporation acts, while even more have passed multi-faceted reforms of corporate law. The UK represents the first direction with its wide-ranging, exemplary UK Companies Act 2006, while Germany represents the second with no less than

[29] 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 final.
[30] *High Level Group of Company Law Experts, A Modern Regulatory Framework for Company Law in Europe*, European Commission, Brussels, 4 November 2002, 161 (citing *High Level Group Report II*), also published in REFORMING COMPANY AND TAKEOVER LAW IN EUROPE (G. Ferrarini/K.J. Hopt/J. Winter/E. Wymeersch, eds., Oxford 2004), Annex 3, 925 et s. The first report had a significant influence on the 13th Directive on Takeover Bids: *High Level Group of Company Law Experts, Report on Issues Related to Takeover Bids*, Brussels, January 10, 2002, 96 (citing *High Level Group Report I*), also published in G. Ferrarini et al., *idem*, Annex 2, 825 et s.
[31] *See* THE EUROPEAN COMPANY LAW ACTION PLAN REVISITED, REASSESSMENT OF THE 2003 PRIORITIES OF THE EUROPEAN COMMISSION (K. Geens/K.J. Hopt, eds., Leuven 2010).
[32] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJEU L 142/12, 30 April 2004. See *infra* II 7.
[33] (10th) Directive 2005/26/EC of the European Parliament and of the Council of 26 October 2006 on the merger of corporations from various Member States, OJEU L 310/1, 25 November 2005 with later changes; Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 on the merger of public limited liability companies, OJEU L 110/1, 29 April 2011.
[34] 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, OJEU L 184/17, 14 July 2007.
[35] Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, OJEU L 385/55, 29 December 2004.
[36] Complementing Recommendation 2009/385/EC of the Commission from 30 April 2009, COM(2009) 211 final.
[37] Recommendation 2005/162/EC of the Commission from 15 February 2005, OJEU L 52/51, 25 February 2005.
[38] European Commission, Implementation Report from 2 June 2010, COM(2010) 285 final.

73 larger and smaller reforms to the Stock Corporation Act of 1965 – an important 74th reform being expected for 2015 – and a large-scale revision of the German Limited Liability Company Act. Almost even more impressive are the changes for listed companies in virtually all of the European Union Member States through the "governmental and non-governmental intervention in the governance of enterprises" in the framework of the corporate governance movement. The entire corporate environment has also changed. Globalization has prevailed, in spite of all the fears and opposition; the capital markets have gained in significance, despite the reversals caused by the financial crisis; and institutional investors have established themselves as important players in Continental Europe as well.[39] Not least among these, the jurisprudence surrounding corporate law has experienced a dramatic continuing development. European corporate law has been well researched in numerous textbooks,[40] essays, and other scholarly work, not to mention the comprehensive literature available on corporate governance.[41] For the analysis here those textbooks and essays that are of most relevance are those whose approach transcends the normative[42] or even purely descriptive and attains a "functional"[43] perspective instead.

In 2010 the EU Commission made a new start with a Reflection Group charged with pondering the future of European corporate law. The group submitted its report on 5 April 2011[44] with chapters covering cross-border mobility (transfer of seat and the revision of the Merger Directive), the role of corporate governance and investors in the long-term direction and viability of companies (including institutional investors), and groups of companies, with

[39] See *infra* II 1.

[40] *E.g.,* G. H. Roth/P. Kindler, THE SPIRIT OF CORPORATE LAW, CORE PRINCIPLES OF CORPORATE LAW IN CONTINENTAL EUROPE (Munich et al. 2013); S. Grundmann, EUROPEAN COMPANY LAW: ORGANIZATION, FINANCE AND CAPITAL MARKETS (Cambridge et al. 2012); M. Lutter/W. Bayer/J. Schmidt, *supra* note 10; M. Habersack/D. A. Verse, EUROPÄISCHES GESELLSCHAFTSRECHT (4th ed., Munich 2011); M. Menjucq, DROIT INTERNATIONAL ET EUROPÉEN DES SOCIÉTÉS (3rd ed., Paris 2011); M. Andenas/F. Wooldridge, EUROPEAN COMPARATIVE COMPANY LAW (Cambridge 2009); A. Dorresteijn/T. Monteiro/C. Teichmann/E. Werlauff, EUROPEAN CORPORATE LAW (2nd ed., Alphen aan den Rijn 2009); J. Dine/M. Koutsias/M. Blecher, COMPANY LAW IN THE NEW EUROPE (Cheltenham 2007); K. van Hulle/H. Gsell, EUROPEAN CORPORATE LAW (Baden-Baden 2006).

[41] Comprehensive references can be found with P. C. Leyens, HANDBUCH CORPORATE GOVERNANCE (2nd ed., P. Hommelhoff/K.J. Hopt/A. v. Werder, eds., Stuttgart, Cologne 2009), Appendix, 931-952; K.J. Hopt, 'Comparative Corporate Governance: the State of the Art and International Regulation', in Comparative Corporate Governance: A Functional and International Analysis (A.M. Fleckner/K.J. Hopt eds., Cambridge 2013), p. 3 at 6.

[42] A. Andenas/F. Wooldridge, *supra* note 40, Foreword, XV: 'limited to the normative system'.

[43] S. Grundmann, *supra* note 40, Foreword and § 1 ref. no. 1; from a legal history perspective, *see* A.M. Fleckner, 'Europäisches Gesellschaftsrecht', FESTSCHRIFT FÜR HOPT (Berlin, New York 2010), vol. 1, 659 (662ff). This functional method is occasionally criticized in the comparative law literature, cf. S. Piek, 'Die Kritik an der funktionalen Rechtsvergleichung', Zeitschrift für Europäisches Privatrecht (ZEuP) 2013, 60, yet it has proven its usefulness in commercial, corporate and capital market law, cf. K. J. Hopt, 'Comparative Company Law', in THE OXFORD HANDBOOK OF COMPARATIVE LAW (M. Reimann/R. Zimmermann, eds., Oxford 2006), p. 1161.

[44] Reflection Group, *Report on the Future of EU Company Law*, European Commission, Brussels, 5 April 2011.

the latter following preparatory work by the Forum Europaeum on Group Law[45] and the High Level Group of Company Law Experts.[46] This report called for corporate law harmonization that would respect the diverging national corporate governance systems and incorporate more flexibility and freedom of choice.

It is beyond the scope of this article to sum up the state ("*acquis communautaire*") of European Company Law in all its detail,[47] especially because this can easily be found elsewhere.[48] The corpus of the legislative instruments of the European Union in corporate law cover 18 Directives (plus the Takeover Directive)[49], two Regulations and several Recommendations. The EU Commission itself concluded during its consultation on the future of European corporate[50] law that the harmonization of European corporate law relates to "the interests of shareholders and others, the constitution and maintenance of public limited-liability companies' capital, takeover bids, branches disclosure, mergers and divisions, minimum rules for single-member private limited-liability companies and shareholders' rights." In addition, there are two genuine European legal forms, namely the European Company/SE and the European Economic Interest Grouping/EEIG, that will be dealt with later on.[51]

3. The Action Plan of 12 December 2012: What is Politically Feasible?

a) Contents

The Action Plan of 12 December 2012[52] begins by addressing the first Action Plan of 21 May 2003 and determines that the majority of initiatives proposed there have already been adopted.

[45] Forum Europaeum Konzernrecht, 'Konzernrecht für Europa', ZGR 1998, 672; also available in English, French Italian, Spanish, and Japanese corporate law journals and in book form: Forum Europaeum Group Law, CORPORATE GOVERNANCE FORUM (Stockholm 2000).
[46] *High Level Group II, supra* note 30, ch. V: Groups and Pyramids, 94 et s.
[47] See *supra* note 32 et s. For more on European corporate law *see* K.J. Hopt, 'Europäisches Gesellschaftsrecht und deutsche Unternehensverfassung', ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2005, 461; *also* in *High Level Group II, supra* note 30; *also* in R. Kraakman et al., THE ANATOMY OF CORPORATE LAW (2nd ed., Oxford 2009).
[48] See on the homepage of the EU Commission:
http://ec.europa.eu/internal_market/company/official/index_en.htm
Documented also in the book cited *supra* note 40.
[49] See *infra* II 7.
[50] *Action Plan, supra* note 7, sec. 1, note 17.
[51] *Infra* II 3.
[52] *Action Plan* of 12 December 2012, *supra* note 7; (former) Reflection Group on the Future of EU Company Law, EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR) 2013, 304.

It defines corporate governance as "the relationships between a corporation's management, its board, its shareholders and its other stakeholders." Good corporate governance is first and foremost the responsibility of the general corporate sector, but the financial crisis revealed considerable deficiencies in financial institutions as well as certain weaknesses among listed companies outside the financial sector. Because European corporate law is a "cornerstone of the internal market," the EU Commission proposes three primary goals: enhanced transparency, inclusion of shareholders, and simplified cross-border transactions for European companies, especially for small and mid-sized companies (SMEs). In addition, it wants to undertake a codification of EU corporate law to create a user-friendlier regulatory framework.

b) The Individual Instruments

In order to enhance transparency, the Commission recommends the following: 1. disclosure of the board diversity policy and of non-financial risk management arrangements; 2. improved transparency of shareholdings in listed companies; 3. improved reporting on corporate governance; and 4. development of transparency rules for institutional investors. To enhance the involvement of shareholders, the Commission suggests the following: 5. better shareholder supervision of remuneration policies; 6. improved shareholder supervision of related-party transactions; 7. regulation of advisors for proxy voting; and 8. clarification of the term "acting in concert" with a view to the cooperation of investors in corporate governance questions. The Commission recommends that the framework for cross-border transactions for European companies should be improved in view of the following: 9. promotion of the SE (European Company, Societas Europaea) and SCE (European Cooperative) as well as 10. promotion of the SPE (European Private Company) and small and medium enterprises (SMEs); 11. identification of obstacles to employee share ownership in Member States, 12. cross-border transfers of seat; 13. cross-border mergers; 14. cross-border divisions; 15. codification of the most important corporate law Directives; and 16. groups of companies, specifically improved information about groups and better recognition of the concept of "group interest." In addition the Commission envisages a proposal to develop a Directive that would codify the most important corporate law Directives.

The instruments that the Commission intends to use are of a very diverse nature, from Directives (specifically: board of directors, transparency of ownership, institutional investors, say on pay, proxy advisors, and related-party transactions; Directives or amendments related to accounting, capital market law, and the Shareholders' Directive) to guidelines of the

ESMA[53] (acting in concert) and non-legislative initiatives (corporate governance reports, comply-or-explain) to simple information campaigns (SE, SCE), analyses (SPE, employee share ownership, transfer of seat), studies (cross-border mergers and divisions), and yet-to-be-determined initiatives (improved information on groups and better recognition of the concept of group interest).

4. The Fight on the Draft Shareholder Rights Directive and Its Status as of mid-2015

a) The EU Commission's Draft Shareholder Rights Directive of 2014

In meantime the EU Commission has come up with a certain number of draft Directives, most prominent among them the Draft Shareholder Rights Directive of 9 April 2014.[54] The main concern of the Commission is how to foster the supply of long-term financing and how to improve and diversify the system of financial intermediation for long-term investment in Europe. The Commission concentrated on five main issues:[55] 1) the insufficient engagement of institutional investors and asset managers, 2) the insufficient link between pay and performance of directors; 3) the lack of shareholder oversight on related party transactions; 4) inadequate transparency of proxy advisers and 5) the difficult and costly exercise of rights flowing from securities for investors.

As to the first problem the Commission wants to increase the transparency of institutional investors and asset managers. Member States shall ensure that institutional investors and asset managers develop a policy on shareholder engagement and disclose it annually on their website on a comply or explain-basis. The policy includes among others the monitoring of investee companies, the exercise of voting rights, the use of services provided by proxy advisers, the cooperation with other shareholders and, in particular, policies to manage actual or potential conflicts of interests.[56] Besides this engagement policy institutional investors are expected to disclose how their equity investment strategy contributes to long-term performance of their assets and what arrangements they have with asset managers. Institutional investors shall also be obliged to disclose if and how they cast their votes in the general meetings of the companies concerned and to give explanations. Further transparency

[53] European Securities and Markets Authority, Paris.
[54] See *supra* note 12.
[55] Draft Directive (*supra* note 12), Explanatory Memorandum, p. 4 et s.
[56] Draft Directive (*supra* note 12), Art 3 f with details on what constitutes such a conflict of interest.

requirements concern the asset managers themselves and, the fourth issue, transparency of proxy advisers. The latter are required to give detailed information on the preparation of their voting recommendation and must disclose to their clients and the company concerned any actual or potential conflict of interest or business relationships.[57]

The third issue, shareholder voting on related party transactions, is particularly touchy. The Commission wants the Member States to ensure that, in case of transactions with related parties that represent more than 1% of their assets, the companies publicly disclose this at the time of the conclusion of the transaction together with a detailed report from an independent third party "assessing whether or not it is on market terms and confirming that the transaction is fair and reasonable from the perspective of the shareholders, including minority shareholders".[58] Exceptions may be granted from the inclusion of a report in cases of clearly defined types of recurrent transactions with an identified related party within 12 months. If the transaction represents more than 5% of the companies' assets or transactions that can have a significant impact on profits or turnover, it must be voted on by the general assembly before the transaction is concluded and without the participation of the related party shareholder in the vote.

The measures proposed as to the second issue include the right of the shareholders to vote on the remuneration policy as regards directors at least every three years. The remuneration policy is required to cover quite a number of relevant points, including the explanation of the ratio between the average remuneration of directors and the average remuneration of full time employees of the company and why this ratio is considered appropriate. After the approval by the shareholders, the policy must be made public. Furthermore the company must draw up a detailed remuneration report as to the preceding financial years and submit it to the general assembly for a vote.[59] As to the fifth issue there are rules on the identification of shareholders, transmission of information, and facilitation of exercise of shareholders rights.[60]

b) The on-going fight over the Draft Shareholder Rights Directive in the European Council and the European Parliament

[57] Draft Directive (*supra* note 12), Art 3 i.
[58] Draft Directive (*supra* note 12), Art 9c.
[59] Draft Directive (*supra* note 12), Art 9a, 9b.
[60] Draft Directive (*supra* note 12), Art 3a-3e.

As expected these far-reaching proposals led to highly controversial discussions not only in the public and in academia,[61] but also in the ongoing political process. As usual the European Council, which is the legislative organ representing the Member States, is not willing to go so far as the Commission proposes, while the European Parliament wants some of the proposals to be even stricter. For the European Council, and therein Germany, the proposed transparency and approval of related party transactions went far too far. German law has its own detailed rules on groups of companies and related party transactions within them (the German *Konzernrecht*), and it entrusts the supervisory board of the corporation to vote on such transactions, not the shareholders as in the UK. The compromise reached already under the first Council Presidency after the beginning of the deliberations, headed by Italy, changed the Commission proposal in two crucial points: First, the report on the related party produced by either an independent third party, the administrative or the supervisory body of the company, the audit committee or any committee the majority of which is constituted by independent directors, provided that the related parties are excluded from the preparation of the report. Second, the Member States shall ensure that material transactions with related parties are 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 of the interests of shareholders who are not a related party, including minority shareholders. Furthermore the Member States may (not must) provide that the shareholders have the right to vote on material transactions approved by the administrative or supervisory body of the company.[62] In the compromise version of 20 March 2015[63] the European Council would also accept the participation of a related party shareholder in the vote provided there are safeguards to protect the interest of shareholders who are not related parties, including minority shareholders. The transaction cannot be approved over the opposition of the majority of the non-related party shareholders or of the majority of independent directors. Exemptions are available for transactions which are entered into in the ordinary course of business and concluded on normal market terms, and there is a whole list of further exemptions, e.g. for transactions with subsidiaries provided that the national law has rules on adequate minority protection.

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[61] Cf. the biannual conference of the ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR); on these topics, see e.g. J. Vetter, 'Regelungsbedarf für Related Party Transactions?', ZHR 179 (2015) 273.
[62] Council of the European Union, 5 December 2014, 15646/14, Art. 9c.
[63] Council of the European Union, 20 March 2015, 7315/15, Art. 9c.

Other changes concerning the EU Commission's draft by the Council concern, for example, the transparency of institutional investors and asset managers and the identification of shareholders. Apart from having been rewritten completely, the transparency rules now contain a provision that the Commission shall, in close cooperation with the ESMA, report publicly on the implementation of the rules, including the appropriateness of their scope and their effectiveness.[64] A first version of the rules on identification of shareholders had provided for mandatory access to information regarding shareholders identity for shareholders' associations whose members represented jointly at least 1% of the share capital and for shareholders that individually or jointly hold at least 3% of the share capital. This would have facilitated the exercise of shareholders rights considerably. But the Council soon shied away from this and left it to the Member States to provide for such access.[65] On the other side, the exercise of shareholders rights is to be improved by requiring the Member States to ensure that the confirmation of votes cast by or on behalf of shareholders is made available to shareholders by the companies on their websites after the general meeting.[66]

On 12 May 2015 the European Parliament`s Committee on Legal Affairs presented a Report by the Italian Socialist Gaetano Cofferati with proposals that are much stricter than the last Council version.[67] There are two general proposals going way beyond the Commission's draft, the first considering the coverage of the Shareholder Rights Directive, the second as to employee participation. According to the Report, the Shareholder Rights Directive should also cover large corporations and large groups even though they are not listed, given that they also do business that has a major impact. Proper involvement of stakeholders, in particular employees, should be considered an element of utmost importance in developing a balanced European framework on corporate governance. As to the Commission proposals and the five before-mentioned issues, there is a tightening-up in many points. The Member States shall put in place a mechanism in order to promote long-term shareholding either by additional voting rights or tax incentives or loyalty dividends or loyalty shares. The transparency of issuers, asset managers and proxy advisers should be enlarged considerably. Shareholders should be identified already at the point when they have more than 0.5% of the shares. The shareholder say on pay should contain a binding vote of the general assembly at least every three years.

[64] Council of the European Union, 5 December 2014 (*supra* note 62) Art. 3i para 4.
[65] Council of the European Union, 5 December 2014 (*supra* note 62) Art. 3a para 4a.
[66] Council of the European Union, 5 December 2014 (*supra* note 62) Art. 3v para 2.
[67] Cofferati Report of the Committee of Legal Affairs, 12 May 2015, accepted by the Legal Affairs Committee on 7 May 2015. The position of the European Council on related party transactions, i.e. an option between shareholder vote and board decision, has been accepted. Cf. the resolution of the European Parliament of 8 July 2015 on the report with further compromises, European Parliament 20214-2019, P8_TA-PROV(2015)0257.

Stakeholders, in particular employees, should be entitled to express a view on the remuneration report before it is submitted to the shareholders. Proxy advisers should adopt a code of conduct and follow it under the comply or explain-rule. Finally, what has particularly stirred up the practicing community is that the Legal Affairs Committee added a completely new requirement as to country-by-country tax reporting for large undertakings and public-interest entities.

It remains to be seen how the fight is proceeding and where it will lead to. The formal trialogue between the EU Commission, the European Council and the European Parliament will probably take place in fall 2015, and many observers expect that it may lead to a compromise after the formal 80-day period, i.e. probably sometime in fall or winter 2015.

c) The status of the Draft Societas Unius Personae Directive as of mid-2015

A number of other harmonization projects as to European corporate governance and corporate law are under way. The most important among them is the Draft Directive on Single-Member Private Limited Liability Companies of 9 April 2014.[68] This new type of European corporate form is also called and usually referred to as Societas Unius Personae (SUP), in accordance with the Latin name and abbreviation for the European Company: Societas Europaea (SE).[69] The SUP is intended to give European small and medium-sized enterprises (SMEs) a simple European form similar to the German Limited Liability Company (GmbH) or vaguely comparable to the LLC found in the USA. Costs should be saved by harmonized conditions, in particular in respect of the registration process. The creation of a SUP would be facilitated by offering uniform templates of association, limiting the creation process with very few formal registration requirements and allowing for the possibility of on-line creation. Since there is only one shareholder, there is no need to protect shareholders, especially minority shareholders. Creditor protection is provided for via the obligation imposed on the SUP directors and in some cases on the SUP single-member to control distributions. The SUP and its articles of association shall be governed by the national law of the Member States where the SUP is registered.

[68] Draft Directive (*supra* note 13). See the critical evaluation by P. Kindler, 'Die Einpersonen-Kapitalgesellschaft als Konzernbaustein – Bemerkungen zum Kompromissvorschlag der italienischen Ratspräsidentschaft für eine Societas Unius Personae (SUP)', Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 179 (2015) 330 and several articles in English on the SUP by P.-H. Conac, J. L. Hansen, V. Knapp, C. Teichmann, S. Harbarth, and C. Malberti in ECFR 2015, issue 2,139-279. Cf. also M. Lutter/J. Koch, eds., Societas Unius Personae (SUP), Berlin 2015.

[69] For details on the SE see *infra* II 3 a.

In general the SUP was received rather favorably in the European Council, though there were quite a number of changes, the latest compromise proposal dating from 5 May 2015.[70] However, there is still a small blocking minority consisting of, among others, Germany, Spain and some smaller countries. One of the reasons for this opposition is labor co-determination, another one is the lobbying of the notaries public who – in countries where the creation of a limited liability corporation must be accompanied by a notary public – fear losing business.[71] The Luxembourg Council Presidency in the fall will certainly try to overcome this opposition through a further compromise proposal. If it is successful, it is expected that the European Parliament will agree. Basically, there are only two main controversies left: one concerns online registration (on which the EU Commission is very keen) and the other concerns the minimum capital for creating a SUP.

d) Other enacted or pending European corporate law measures

Two enacted and two pending European corporate law measures should still be mentioned briefly. The Second Council Directive of 13 December 1976, the so-called Capital Directive, was recast by the Directive of 25 October 2012[72] right before the (second) Action Plan. But the expectations set into this recast instrument were not fulfilled. The EU Commission had shied away from replacing the controversial system of minimum capital and capital maintenance with the more modern US system of liability of directors for unlawfully distributing dividends, a system which by economists and in comparative law is considered to be superior to the old continental European one.[73] Instead the recast Directive, bringing some rather formal adaptations to later rules, basically amounts to nothing more than a re-sequencing of the article with the consequence of confusion for the addressees. The other enacted measure to be mentioned here is the Commission Recommendation of 9 April 2014

[70] Council of the European Union, 5 May 2015, 8320/15; the article of Kindler (*supra* note 68) treats an earlier version.
[71] As to the reasons for the opposition of Germany and others see *infra* II 3.
[72] 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 bv 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, Official Journal of the EU L 315/74, 14.11.2012.
[73] Cf. ANATOMY, *supra* note 47, 5.2.2 with further references. Contra LEGAL CAPITAL IN EUROPE (M. Lutter, ed., Berlin 2006), ECFR Special Vol. 1,

on corporate governance reporting.[74] This Recommendation had been announced in the Action Plan of 2012 and tries to improve the comply or explain-requirement under which corporations shall be induced to follow the corporate governance codes by more than box-ticking or lip-service. Actually, the practical experience is that explanations given by corporations that have not followed a recommendation contained in the corporate governance code which they currently adhere to do have often been found to be rather unsatisfactory. The Recommendation lists more specifically what information the corporations should give in case of a departure from a code and encourages monitoring without further specifications for the Member States.[75]

Two other more relevant measures are highly controversial and still pending: the proposal for a Directive on cross border mergers of companies with share capital (14th Directive), which dates from 2003,[76] and the Proposal for a gender balance Directive.[77] While the former would address a major difficulty for cross-border activities of corporations, it meets with the fundamental opposition of Germany because of its provisions on labor co-determination; the latter is a political and social issue on which the Member States vividly disagree, and some Member States have already enacted their own laws.[78] Additionally, the European Commission lists in its REFIT document, as to company law, a codification initiative intended to codify seven company law Directives into one instrument.[79]

To sum up the political process following the Action Plan of the Commission of December 2012 is moving forward. It seems that the first major breakthrough will be by the enactment of the Shareholder Rights Directive since a compromise has been reached in 2015 in the European Council, though it may always be that there will be last minute changes. This would strengthen the position of the shareholders, reinforce transparency and bring some, but not

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[74] Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ("comply or explain"), OJEU L 109/43, 12.4.2014.
[75] Commission Recommendation (*supra* note 74) Section III and IV.
[76] See *infra* II 6.
[77] Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures of 14 November 2012, COM(2012) 614, adopted by the European Parliament on 20 November 2013 (40 per cent quota until 2020); but the European Council still has to agree. For a recent empirical evaluation, *see* K. R. Ahern/A. K. Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation', QUARTERLY JOURNAL OF ECONOMICS 127/1 (2012), 137, available at < http://ssrn.com/abstract=1364470 >.
[78] For example, Germany by the Law of 24 April 2014, Federal Gazette I 2015, p. 642. In France a 40 per cent quota is mandatory as of 2017 under the Copé-Zimmermann Act of 27 January 2011. For international survey see Deloitte, 'Women in the boardroom, A global perspective', 4th ed., 2015.
[79] Annex to the Communication on 'Regulatory Fitness and Performance (REFIT): Results and Next Steps', COM(2013) 685, 2.10.2013, no. 45. Company law: Codification of 7 Company Law Directives into one instrument to increase transparency and readability.

much progress in the regulation of related party transactions. Other harmonization measures are in the pipeline, but progress is slow. This is a good time to review the critical areas of European corporate law and governance.

5. European Corporate Law and the European Court of Justice's Case Law

a) The Central Role of the European Court of Justice

Among the contributions to European corporate law are some that seem to primarily concern themselves with the European Court of Justice's case law. In fact, this case law is central to companies' Treaty freedoms and their opportunities to operate freely across borders. Company mobility in the European internal market represents the very origin and impetus of European corporate law. However, while the EU Commission began its harmonization process as early as 1968 with its 1st Directive, the Transparency Directive, the European Court of Justice first entered the stage much later. After the *Centros* thunderbolt in 1999,[80] an impressive string of leading cases followed in speedy succession, including *Überseering* in 2002,[81] *Inspire Art* in 2003,[82] *Sevic* in 2006,[83] *Cartesio* in 2009,[84] and most recently *Vale* in 2012,[85] to name only the most important. Another series of decisions related to the golden shares,[86] along with many others that were not directly related to corporate law.[87] Some believe that the result of these judgments has been "the by now nearly fully realized cross-border mobility of corporations."[88] This may be over-exaggerated in view of lingering doubts in the wake of *Vale*, but its tendency is correct. What is certain, however, is that the influx of

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[80] ECJ, 9 March 1999, Case C-212/97 (*Centros*), ECR 1999, I-1459.
[81] ECJ, 5 November 2002, Case C-208/00 (*Überseering*), ECR 2002, I-9919.
[82] ECJ, 30 September 2003, Case C-167/01 (*Inspire Art*), ECR 2003, I-10155.
[83] ECJ, 13 December 2005, Case C-411/03 (*Sevic*), ECR 2005 I-10805.
[84] ECJ, 16 December 2008, Case C-210/06 (*Cartesio*), ECR 2008 I-9641.
[85] ECJ, 12 July 2012, Case C-378/10 (*Vale Epitesi kft*); see O. Mörsdorf, 'The Legal Mobility of Companies within the European Union Through Cross-Border Conversion', COMMON MKT. L. REV. 49 (2012), 629; P. Paschalides, FREEDOM OF ESTABLISHMENT AND PRIVATE INTERNATIONAL LAW FOR CORPORATIONS (Oxford 2012); M. Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law', ECGI Law Working Paper 287/2015; W. Schön, 'Free Movement of Capital and Freedom of Establishment', Max Planck Institute for Tax Law and Public Finance, Working Paper 2015-03, June 2015.
[86] From the wealth of case law come the most recent judgments against Portugal and Italy, such as ECJ, 11 November 2010, Case C-543/08 (*Energias de Portugal*), ECR 2010 I-11241; *also* ECJ, 21 October 2010, Case C-81/09 (*Idryma Typou*), ECR 2010 I-10161; S. Soltysinski, 'Golden Shares: Recent Developments in E.C.J. Jurisprudence and Member States Legislation', FESTSCHRIFT FÜR HOPT (S. Grundmann et al., eds. Berlin 2010) , vol. 2, p. 2571; T. Papadopoulos, 'Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion After Commission v. Greece', ECFR 2015, 1.
[87] For a list, *see* J. Armour/W.-G. Ringe, *supra* note 8, COMMON MKT. L. REV. 48 (2011), 125 at 131 et s.; for an enumeration of relevant case law, *see* S. Grundmann, *supra* note 40, p. 947 et s.
[88] S. Grundmann, *supra* note 40, 2d German edition, Heidelberg 2011, Foreword, p. IX.

Member State companies can no longer be obstructed based on seat theory,[89] and though the restrictive *Daily Mail* doctrine may not have been fully overcome in the aftermath of the recent *Vale* holding, the essential conditions for a free departure have been put in place. Defense instruments outside the purview of corporate law designed to protect the common interests of Member States that traditionally adhere to the seat theory – such as the law of torts or insolvency where the applicable law is determined autonomously from the law applicable to the corporation – still remain in force, though their formal qualification as corporate law or as torts or insolvency law cannot be decisive. The jurisprudence of the Court of Justice has led to considerable regulatory competition by the Member States, though only defensive regulatory competition trying to loosen the burdensome requirements of their corporate law rules that may drive founders to the UK and to other Member States having fewer requirements.[90]

It should be mentioned that voices are occasionally heard hailing or decrying the Court of Justice's case law as being on its way to interfere with general corporate law, and indeed, it has been observed that the Court of Justice might also subject national corporate and takeover law to a proportionality test on the basis of the freedom of establishment.[91] Apart from a few exceptions, the overwhelming opinion does not concur, particularly in Germany where a number of path-dependent corporate law features exist such as corporate group law, labor co-determination and the two-tier board. But most recent estimates of where European Court of Justice case law may go are justifiably more cautious and do not reject this possibility.[92] Foreign opinions range still further, such that the standard English textbook on European law from Wyatt and Dashwood[93] can claim that the actions of private agents under private law under certain conditions are indeed subject to the ban on limitations on fundamental freedoms, as exemplified by the Takeover Directive[94] or minority protection.[95] This fear is

[89] The seat theory maintains that in conflicts of law the relevant law for a corporation is determined by its legal seat, as in Germany, and not by the place of incorporation, as in many other Member States such as the UK.
[90] Cf. M. Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law', ecgi Law Working Paper 287/2015, 16 March 2015.
[91] K.J. Hopt, 'Europäisches und deutsches Übernahmerecht', ZHR 161 (1997), 368 at 414 et s. with further citations.
[92] For further documentation and discussion, *see* M. Lutter/W. Bayer/J. Schmidt, *supra* note 10, § 15 ref. no. 27ff.
[93] *E.g.,* WYATT AND DASHWOOD'S EUROPEAN UNION LAW (6th ed., Oxford 2011), ch. 20 III p. 671 et s.
[94] *Idem*, ch. 21 V C p. 693 et s.
[95] J. Armour/W.-G. Ringe, *supra* note 8, COMMON MKT. L. REV. 48 (2011) 125 at 146ff, 149: "Consequently the protection of free movement of capital by the Court can be understood as an additional restraint on the possibility of a 'race to the bottom' – as regards investor protection – ushered in as a consequence of the freedom of establishment case law."

shared by the European Company Law Experts.[96] Nevertheless, a more general, material control of national corporate law through the European Court of Justice is not in sight, and it would be incompatible with the less than total harmonization of corporate law laid out in the Treaty. This is in line with the recent second *Volkswagenwerk* judgment of the European Court of Justice of 22 October 2013.[97]

b) The Interrelationship between "Negative Integration" and "Positive Integration"

In spite of the corporate law upheaval resulting from the European Court of Justice's case law, we will not further explore these numerous controversial details for two essential reasons – not to mention that our primary topic is the Action Plan and the ensuing harmonization efforts of the EU Commission. First, this case law is chiefly concerned with primary rights and freedoms and not with European corporate law in its strict sense, a distinction which is similar to the distinction in Germany between actual corporate law and the constitutional law that sets those guidelines. Second, it concerns the relationship between the European Court of Justice and the European lawmakers. The former is not solely able to create European corporate law. As became apparent in the Court's *Sevic* decision[98] and the Directive on mergers,[99] "the Court's decisions on freedom of establishment of companies identify the role for Community secondary legislation rather than remove the need for it."[100] Practitioners in the field maintain that only the Directive is able to provide the necessary security to attempt a merger, for though the *Sevic* decision went beyond the Directive, it did not and could not clarify the individual conditions necessary for the transaction. This is why some experts speak of "negative integration" and "positive integration,"[101] which should be thought of not as alternatives but as complementary.[102] In the following discussion, therefore, European corporate law will be viewed through this narrower lens. The European corporate law forms such as the European Company (SE) demonstrate that there is more in play than harmonization, namely a genuine European (secondary) law, i.e. uniform law.[103] For this same reason, we will not concern ourselves further with the fascinating and intricate questions

[96] See *infra* I 6 note 123, para 2 b, p. 4 et s.
[97] ECJ, Judgment C-95/12 of 22 October 2013, European Commission v. Federal Republic of Germany (Volkswagen case).
[98] ECJ, *Sevic, supra* note 83.
[99] Merger Directive, *supra* note 33.
[100] See *infra* I 6 note 123, para 2 b, 4.
[101] As coined by O. Remien in EUROPARECHT (2nd ed., R. Schulze/M. Zuleeg/S. Kadelbach, eds., Baden-Baden 2010), p. 537 at 539 et s.
[102] See *infra* I 6 note 123, para 2 b, 4.
[103] O. Remien in R. Schulze et al., *supra* note 101, p. 537 at 540 et s.

of international corporate law,[104] other than the European Court of Justice's case law. These issues belong less to corporate law and more to the national jurisdictions of international private law viz. conflict of laws.

6. European Corporate Law: Its Opponents and its Supporters

a) European Corporate Law: Its Opponents

European corporate law has strong opponents, among which three very different groups can be identified. The first is composed of many economists and legal experts, who place their trust solely or primarily in the market and in competition. They maintain that lawmakers presume to possess knowledge that they do not and cannot have. Based on this group's priorities, this would mean the following: autonomously established rules instead of law; non-mandatory rules rather than mandatory law in any case; state law above federal law; and, in relation to Europe, Member State law instead of European law. In its purest form this would mean a complete rejection of the federal securities regulation in the United States,[105] and in Europe an absolute abandonment of corporate law to the Member State legislators in the expectation that those legislators will engage in a regulatory competition with one another that will result in market-oriented – read: "better" – laws. This group dismisses the earlier theory of the "race to the bottom" as fundamentally false; instead, its adherents believe that this competition will lead to a "race to the top" and ultimately to a complete convergence of corporate law ("The end of history for corporate law").[106] The accomplishments of corporate law to date are held to be "trivial" – either incidental or completely superfluous – because the market would have produced the same results without the interference of European lawmakers.[107] This is all very interesting theoretically, but as some of its proponents have

[104] *See* VORSCHLÄGE UND BERICHTE ZUR REFORM DES EUROPÄISCHEN UND DEUTSCHEN INTERNATIONALEN GESELLSCHAFTSRECHTS (H. J. Sonnenberger, ed., Tübingen 2007); M. Menjucq, *supra* note 40.

[105] This is actually promoted by R. Romano, 'Empowering Investors: A Market Approach to Securities Regulation' in COMPARATIVE CORPORATE GOVERNANCE (K.J. Hopt/H. Kanda/M. Roe/E. Wymeersch/S. Prigge, eds., Oxford 1998), 143; *also* in 107 YALE L. J. 2359 (1998).

[106] H. Hansmann/R. Kraakman, 'The End of History for Corporate Law', 89 GEO. L. J. 439 (2001); *idem*, 'Reflections on the End of History for Corporate Law', August 2011, available at < http:/ssrn.com/abstract=2095419 >; on the question of harmonization vs. convergence, *see* A. M. Fleckner, FESTSCHRIFT FÜR HOPT, *supra* note 86, p. 659 at 672 et s, 681 et s.

[107] L. Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?', U. PA. J. INT. ECON. L. 27 (2006), 1; *also* L. Enriques/M. Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union', U. PA. J. INT. ECON. L. 27 (2006), 939. For a more balanced treatment, *see* L. Enriques/T. Tröger, 'Issuer Choice in Europe', CAMBRIDGE L. J. 67 (2008), 521 on regulatory competition and free transfer of seat in the EU. The proposition that European corporate law is trivial is far from reality. Beyond corporate

freely admitted, still far from reality and actual practice, in Europe at any rate. Path-dependence and the influence of special interests are ignored in this theory,[108] and the complete convergence of corporate laws, whether legal, economic, or cultural, is neither in sight nor even a desirable utopia.

The second group is comprised of special interest groups and Member States. Their primary motivation is maintaining the status quo, whether because of the conviction that this is better (often without fully knowing or understanding the alternative) or because of a desire to protect vested interests or votes. Examples include German labor co-determination, ongoing protectionism[109] in takeover law, and the golden shares of Member States that continue to come to the European Court of Justice in ever new manifestations.[110]

Finally, there are general regressive tendencies of a political and economic nature that call for the dismantling – or at least a halt of any further development – of the influence of Brussels and Strasbourg and of European corporate law as well.

b) European Corporate Law: Its Supporters

There are three groups among the supporters of corporate law as well. Many treat European corporate law simply as an existing resource that must be improved and further developed without any additional examination. A typical example is the European Parliament Resolution of 14 June 2012,[111] in which the Commission is called upon to resume work on the 5th and 9th Directives (on the internal structure of the corporation and on groups of companies) without any further justification or analysis of their significance for European corporate law as a whole. Most European corporate law textbooks also give short shrift to these basic

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law, S. Hölscheidt/T. Hoppe, 'Der Mythos vom „europäischen Impuls" in der deutschen Gesetzgebungsstatistik', ZEITSCHRIFT FÜR PARLAMENTSRECHT (ZPARL) 41 (2010), 543 at 546 estimate on the basis of numerical data that "all in all, 80% of European law may actually correspond to the norms currently in operation in Germany."

[108] For a comprehensive discussion of these positions based on the example of European corporate law, *see* K.J. Hopt, EUROPÄISCHES ÜBERNAHMERECHT (Tübingen 2013), p. 26 et s. For an analysis of Romano as the opinion leader, *see* J.C. Coffee, 'The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated' in THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS, *supra* note 17, p. 301. *See also* H. Eidenmüller, 'Europäisches und deutsches Gesellschaftsrecht im europäischen Wettbewerb der Gesellschaftsrechte' in FESTSCHRIFT FÜR HELDRICH (Munich 2005), 581; M. Gelter, 'The Structure of Regulatory Competition in European Corporate Law', JOURNAL OF CORPORATE LAW STUDIES (JCLS) 5 (2005) 247.

[109] *Supra* note 20 and *infra* II 7.

[110] *Supra* note 86.

[111] European Parliament, Resolution 14 June 2012, on the future of European corporate law (2012/2669(RSP)).

principles before launching into their agenda of presenting the corporate law that has already been harmonized and that which still needs to be harmonized.[112]

Where this is viewed as a problem, as is sometimes the case among this position's representatives in academia, it usually occurs on the basis of the conventional theory of the "race to the bottom." Differences in regulations are then frequently and rashly regarded as market access barriers that are related to fundamental freedoms. But this is exactly what the European Court of Justice has consistently labeled as insufficient in its case law.[113]

A third position is technocratic and works in phases, such as when full harmonization[114] should replace minimum harmonization in individual areas, as is presently the tendency in capital market law, or when Regulations are slated to replace Directives in order to cut back diversity in the member state law and options are opened up only under political pressure. The European Parliament's contemplated step-by-step consolidation of European corporate law in multiple chapters[115] is moving in the direction of a European Rule Book on Company Law, a Europe-wide Stock Corporation Act.[116] The role model is the nearly completed consolidation in the area of banking supervision law.[117]

c) The EU Commission's Consultation of 20 February 2012, the Resolution of the European Parliament of 14 June 2012, and the Statement of European Company Law Experts in May 2012 as to More or Less European Corporate Law

In view of the developments described above, the EU Commission issued a public consultation on 20 February 2012 regarding the future of European corporate law; it received 496 responses from 26 Member States and several countries outside the EU.[118] Taking into account certain distortions arising from the origin and geographic distribution,[119] particularly

[112] *E.g.,* M. Lutter/W. Bayer/J. Schmidt, *supra* note 10, § 2; in contrast, *see* S. Grundmann, *supra* note 40, p. 43 et s.: economic theory.
[113] *E.g.,* ECJ, 8 June 2010, Case C-58/08 (*Vodafone*), ECR 2010 I-04999, no. 32.
[114] For more on full harmonization, see O. Remien, *supra* note 101, p. 559 et s.; "stand still," M. Lutter/W. Bayer/J. Schmidt, *supra* note 10, § 3, ref. no. 46.
[115] A summary by category: formation and operation (1st and 2nd Directives and Auditor Directive), mobility (3rd, 6th, 10th, 11th, 13th, and future 14th Directives), and EU legal forms (e.g., SE, SCE, EEIG).
[116] European Parliament, Resolution 14 June 2012, *supra* note 111, para 10.
[117] O. Remien, *supra* note 101, p. 565.
[118] European Commission, *Feedback Statement, Summary of Responses to the Public Consultation on The Future of European Company Law*, Brussels, July 2012 (hereinafter: *Feedback Statement*).
[119] This is partly due to origin: 24% of the responses came from stakeholders registered in Brussels, 30% from attorneys and notaries, and 11% each from industrial associations and academia. There was only minimal response from labor unions with 2%, institutional investors with 0.4%, and 0.2% from other shareholders (retail

insofar as percentages were tabulated based on the individual questions, the consensus was that corporate environment and mobility and the protection of creditors and shareholders should be the goals of European corporate law.[120] Forty percent supported both an enhancement of the current harmonization and an examination of whether new fields should also be harmonized. Only 13% took a stand against further harmonization, preferring to leave it either to the stock markets or self-regulation. These opinions on harmonization primarily concerned the 1st, 10th, and 11th Directives – transparency, cross-border merger, and branches – and were least interested in the Shareholders' Directive and the 12th Directive on single-member companies. One important topic that emerged was the transfer of seat in general. A strong majority spoke out for a comprehensive codification, maintaining that the European corporate law forms should be overhauled and giving overwhelming support to the SPE. More than two-thirds of the responses called on the Commission to finally tackle the problem of European law of groups of companies. Two-thirds of the relevant responses positioned themselves against a revision of the 2nd Directive, and only 30% of the responses found the Model Law approach helpful.

Only two of these many stimulating responses will be addressed here, one political and one academic. In its Resolution of 14 June 2012,[121] the European Parliament highlighted the European corporate law forms as especially important, stood by the Capital Directive (though emphasizing that it was in need of simplification), and charged the Commission to once more tackle the 5th, 9th, and 14th Directives, namely, structure, groups of companies, and transfer of seat. The Resolution went on to call codification a sensible step, one that should not immediately be carried out wholesale but in smaller steps, such as creation and operation (1st and 2nd Directives and Directives concerning accounting and statutory audits), mobility (3rd, 6th, 10th, 11th, 13th, and the future 14th Directives), and EU legal forms (for example, the SE, SPE, and EEIG). It also stressed the importance of enforcement. In an earlier Resolution

investors). It is also due to geographic distribution: the most responses came from Spain (115), followed by Germany (86), Austria (54), France (41), Belgium (31), and the United Kingdom (30). Between 10 and 20 responses came from Italy, Finland, the Netherlands, and Europe-wide organizations. The remaining 69 responses, sometimes only one or two, came from the other Member States, with eight coming from third countries.

[120] *Feedback Statement, supra* note 118, p. 4, question 5: an overwhelming consensus supports the protection of shareholders and creditors (including employees), and at the same time protection of the capital market and economy. But what does this mean for the necessary protection of shareholders when only 0.2% of the responses came from typical shareholders, for regional balance when one-fourth of the responses came from Spain, and for the needs of middle and eastern European countries, when only 38 responses came from there?

[121] European Parliament, Resolution of 14 June 2012, *supra* note 111.

in 2011 based on its Green Paper on corporate governance,[122] the European Parliament expressed regret that important corporate governance questions such as board of directors in the one-tier system and the management board and the supervisory board in the two-tier system, board member independence and conflict of interest, and inclusion of shareholders had not or not adequately been addressed in the Green Paper. In addition, it emphasized that the Commission needed to address the issues of gender balance, remuneration, and institutional investors.

The European Company Law Experts (ECLE),[123] of which this author is a member, agreed in May 2012 that unlike for capital market law only a harmonization of core areas, both mandatory[124] and fall-back rules, was necessary for corporate law. Two significant reasons for this are the companies' and their shareholders' freedom of choice, which would still need to be secured across Europe, and the substantial differences from one country to another in shareholding structure and in the way employee interests are protected. This corresponds to a hierarchy of "candidates" for harmonization: In high priority are the 14th Directive on transfer of seat, cross-border merger and similar structural measures, and cross-border voting, and the 11th Directive on branches. In medium priority are groups of companies, the reform of the (2nd) Directive on capital maintenance, and the simplification of the requirements in the various Directives for small and mid-sized companies. In contrast to the European Parliament, the Experts Group gave European corporate law forms the lowest priority.

II. Critical Areas of European Corporate Law and Governance as of 2015

1. Empowering Shareholders and the Case of the Institutional Investors

One of the primary objectives of the EU Commission's Action Plan and the Draft Shareholder Rights Directive is the "engagement" – or better, the "activation" – of shareholders in the corporate governance of their corporate. The Commission thereby joins a strong political

[122] European Parliament, Resolution of 29 March 2012 on a corporate governance framework for European companies (2011/2181(INI)).
[123] European Company Law Experts (ECLE), 'Response to the European Commission's Consultation on the Future of European Company Law', May 2012 (this ECLE paper will be cited in the following), available at < www.ecle.eu > and at < http://ssrn.com/abstract=1912548 >; also ECLE, 'Response to the European Commission's Green Paper "The EU Corporate Governance Framework', 22 July 2011. Other position papers are available on the ECLE's website at < http://europeancompanylawexperts.wordpress.com/ >.
[124] Cf. J. Dammann, 'The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law', HASTINGS L. J. 65/2 (2014) 441.

movement in corporate law and corporate law reform in the Member States that for various reasons, including protectionist ones, maintains that one of the main weaknesses of the modern corporation lies in short-termism. Indeed it is true that short-termism is a more and more common practice for corporations, management and shareholders. Under the pressure of short interval disclosure, such as of quarterly earnings, market expectancies, international competition and short-term compensation packages, management and boards can be tempted to shy away from more risky long-term decisions. Even for institutional investors many of whom traditionally hold a longer-term investment perspective, the time horizon has shortened. This goes so far that the traditional distinction between hedge funds, which typically invest in corporations with the short-term aim of making profit and then exit, and institutional investors seems to get blurred. Member States feel threatened by this development and react with various measures such as rules and codes of conduct for institutional investors like the UK Stewardship Code,[125] double votes for shareholders who hold their shares for a certain period of time as in France,[126] more generally multiple votes (as in Italy),[127] bonuses for attending the general assembly (as in Spain), more rights for the shareholders like say on pay (as in the Sweden, the UK, Germany and other countries)[128] and rules improving minority protection. [129] A frequently used measure of choice is also strengthening the rights of the board, allegedly in order to enable it to fight off hostile takeovers in the interest of the shareholders, thus as in France as recently as 2015 – in a turn-volte as to the former French antifrustration rule – as well as in other countries.[130] Both the motives of the legislatures and the measures chosen by them are of course mixed and contain a good portion of protectionism.

Yet it is by no means established that a short time view is necessarily bad for the corporation. There is a whole strand of literature that denies that short-termism is really a problem. The major arguments against undue concern on short-termism contend that the assertion rests on an inaccurate factual basis, i.e. that the stock market is, net, short-termist; critics contend instead that stock market sectors often seem to overvalue the long-term and that many of the major shareholders (at least in the USA, e.g. mutual funds run by Fidelity and Vanguard) and major pension funds have not shortened their holding periods. Furthermore, one must

[125] Financial Reporting Council, *The UK Stewardship Code,* London, September 2012. See also *infra* note 143.
[126] The double voting right for loyal shareholders is traditional in France.
[127] M. Ventoruzzo, 'The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat', ecgi Law Working Paper No 288/2015, March 2015.
[128] The European Commission and the Draft Shareholder Rights Directive propose to deal with this problem by a consultative say on pay and transparency, see *infra* II 4.
[129] As to the Draft Shareholder Rights Directive see *supra* I 4.
[130] Loi Florange, *supra* note 21.

consider not only the financial markets, but also the venture capital markets and private equity markets where the long-term perspective is more common; even in the financial markets, the quickly growing practice of high-velocity trading has shortened the average holding periods but not the holding periods of major stockholding institutions.[131] Further factual arguments have been brought forward concerning specifically the USA, such as that, on average, U.S. firms trade 30% of their own share over a five-year period and that managers seeking to increase long-term shareholder values may destroy more value than short-termism. [132]

Despite these fundamental economic objections the EU Commission shares the concerns that exist in the Member States and is looking for remedies. For the purpose of furthering long-term views and engagement in the corporation, the EU Commission is of the opinion that transparency needs to be improved in the management board (as to compensation and by corporate governance reports) and among institutional investors. Above all, institutional investors are to be incentivized to engage in the company's corporate governance by stewardship codes in line with the UK example and by more transparency as to their voting. Yet one must also see that too much transparency can be counterproductive. This pertains less to the Commission's intention to achieve transparency through the voting strategies and policies of institutional investors as has been recommended already by the High Level Group of Company Law Experts, and more to the controversial plan to require also disclosure of the specific votes in the general assemblies, even if possibly only on request and only bundled and later. This can lead to a generally weakening of engagement – at least in certain cases, such as in state-controlled enterprises – and a tendency to vote with the mainstream. On the other hand, since institutional investors frequently fall back on the services of proxy advisers, more transparency and a regulation of conflict of interest is in order for them.[133]

In its Action Plan the EU Commission has also announced measures in relation to acting in concert. [134] The Commission hopes that moderating and clearing up the acting-in-concert

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[131] These are some of the theses brought forward by M. J. Roe, 'Corporate Short-Termism – In the Boardroom and in the Courtroom', BUS. LAW. 68 (2013) 977. Roe's further arguments are geared against the argument drawn by many from short-termism, namely that managers and boards should be shielded from shareholder influence; L. A. Bebchuk/A. Brav/W. Jiang, 'The Long Term Effects of Shareholder Activism', Colum L. Rev., forthcoming, available at "http://ssrn.com/abstract=2291577 >. As to this issue see also L. A. Bebchuk, 'The Myth that Insulating Boards Serves Long-Term Value', 113 Colum. L. Rev. 1637; *infra* II 7.

[132] For example J. M. Fried, 'The Uneasy Case of Favoring Long-Term Shareholders', YALE L. J. 124 (2015) 1554.

[133] Action Plan*, supra* note 7, sec. 3.3, p. 10 et s.

[134] *Action Plan, supra* note 7, sec. 3.4, p. 11. For more on the acting-in-concert reform in takeover law from a comparative law perspective, *see* K.J. Hopt, EUROPÄISCHES ÜBERNAHMERECHT, *supra* note 108, p. 60 et s. See also *infra* II 7.

threat for institutional investors, namely eventually having to make a mandatory bid under takeover law, will ensure more long-term shareholder engagement and provide a framework that will truly allow shareholders to hold management accountable for its actions.[135] Yet on the basis of the actual and political difficulties, the Commission shied away from tackling the issue legislatively; instead, it has tried to resolve the question in cooperation with ESMA, whose authority over takeover issues is debatable, and the national regulatory authorities.[136] The real goal is to prompt institutional investors to engage in more company-internal cooperation in corporate governance issues.

The Commission also wants to strengthen shareholder rights, in particular protection of minority shareholders, and indeed this may be a more promising alley for moving forward. The regulation of the position of shareholders as the residual claimants or ultimate risk-bearers [137] has always been a central area of national corporate laws. The European Shareholders' Rights Directive of 2007[138] that had tried to improve shareholder rights and protection has hardly had any effect in Germany, given Germany's already comparatively high level of shareholder protection. In some other Member States, however, this may have been different. Yet in the context of shareholder rights reform it must be taken into consideration that in the meantime, the shareholder base in European countries has changed considerably. Foreign investors are playing a significantly larger than role than before.[139] Institutional investors and hedge funds in particular have increased their presence, even though some spectacular individual instances of interference have served to unnaturally magnify their significance, as illustrated by the "swarms of locusts" comparison (*Heuschreckenmetapher*) in connection with changes as regards policy and board composition forced upon the Deutsche Börse by British hedge funds in 2005. As important and right as it may be to engage institutional investors in corporate governance and set incentives,[140] many

[135] *Action Plan, supra* note 7, sec. 3.4, p. 11.
[136] See *infra* II 7.
[137] ANATOMY, *supra* note 47, 1.5 n. 80; K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 at 28 et s.; L. Klöhn, 'Supranationale Rechtsformen und vertikaler Wettbewerb der Gesetzgeber im europäischen Gesellschaftsrecht', RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT (RABELSZ) 76 (2012), 276 at 312ff.
[138] *Supra* note 34.
[139] Ernst & Young, Analysis of the Shareholder Structure of DAX Companies as of 26 April 2012, p. 5: 54% of shares were held by foreign investors (based on 24 companies); p. 8: 62% were held by institutional investors (based on 28 companies).
[140] See most recently the comprehensive study by M. Bassler, DIE BEDEUTUNG VON INSTITUIONELLEN ANLEGERN FÜR DIE INTERNE CORPORATE GOVERNANCE IHRER BETEILIGUNGSUNTERNEHMEN, Baden-Baden 2015. As to the heated discussion on hedge funds cf. most recently L. A. Bebchuk/A. Brav/W. Jiang, 'The Long-Term Effects of Hedge Fund Activism', COLUM L. REV. 115 (2015) 1085; M. Getmansky/P. A. Lee/A. W. Lo, Hedge Funds: A Dynamic Industry in Transition', available at < http://ssrn.com/abstract=2637007 >.

of these investors simply have another business model,[141] and we should not hope for too much from these Commission measures. In spite of increased transparency and shareholders' rights, public shareholders have little incentive to become involved,[142] especially if they are diversified, and it remains to be seen whether institutional investors can be won over to lasting engagement in internal corporate governance with measures such as the British Stewardship Code,[143] the Dutch Pendant Eumedion,[144] a French-style double or loyalty voting right, or an attendance premium as has been reported from Spain.[145] This provides all the more reason to have given more attention to the corporate control aspect and to corporate governance.[146] Furthermore the exercise of voting rights, especially cross-border rights, is a problem. Foreign shareholders rarely make use of their voting rights, partly because of the long intermediation line between them and the ultimate investee. Intervention proposals have been made,[147] but the Commission has not yet really tackled the problem of cross-border voting apart from a timid measure proposed in the Draft Shareholder Rights Directive[148] concerning the visibility of shareholdings in listed companies[149] and a better stream of information between corporate and shareholders, one that would especially include foreign shareholders and run both ways to accommodate the corporation's interest to know its shareholders as well.[150]

2. Controlling Shareholders and Groups of Companies: Overcoming the Diversities in the Member States by Rules on Related Party Transactions?

[141] R. J. Gilson/J. N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights', 113 COLUM. L. REV. 863 (2013).
[142] In the responses to the Commission's consultation, the need to improve the Shareholders' Directive was the least articulated, *Feedback Statement, supra* note 118, p. 5, question 6.
[143] Financial Reporting Council, *The UK Stewardship Code,* see *supra* note 125. For more details, *see* D. Arsalidou, 'Shareholders and Corporate Scrutiny: The Role of the UK Stewardship Code', ECFR 2012, 342; B. Cheffins, 'The Stewardship Code's Achilles' Heel', MOD. L. REV. 73 (2010), 1004.
[144] *Action Plan, supra* note 7, sec. 2.4, p. 8, note 32 with further examples.
[145] C. Van der Elst/E. P. M. Vermeulen, 'Europe's Corporate Governance Green Paper: Do Institutional Investors Matter?', 8 June 2011, available at < http://ssrn.com/abstract=1860144 >; E. Micheler, 'Facilitating Investor Engagement and Stewardship', EBOR 14 (2013), 29.
[146] *Infra* II 4.
[147] ECLE 2012, *supra* note 123, para 3c, 9 et s.; C. Strenger/D.A. Zetzsche, 'Corporate Governance, Cross-border Voting and the (draft) Principles of the European Securities Law Legislation – Enhancing Investor Engagement Through Standardisation', JOURNAL OF CORPORATE LAW STUDIES 13 (2013), 503.
[148] See *supra* I 4 a at the end.
[149] *Action Plan, supra* note 7, sec. 2.3, p. 7. In contrast, *cf.* for the United States L. Bebchuk/R. J. Jackson, 'The Law and Economics of Blockholder Disclosure', HARV. BUS. L. R. 2 (2012) 40, *available at* < http://ssrn.com/abstract=1884226 >.
[150] *Feedback Statement, supra* note 118, p. 5.

With the exception of specialized areas such as accounting, banking, insurance, and auditing, the EU Commission traditionally has not chosen not to deal with groups of companies by corporate law measures, apart from blockholder disclosure.[151] This is not a reflection of economic reality. Academics have long called for basic regulation to cover such a European corporate group law. Advance work has already been prepared by the Forum Europaeum on Group Law,[152] the High Level Group of Company Law Experts,[153] the Reflection Group,[154] and others.[155] The answers to the consultation of the EU Commission confirmed this demand, though here there was justifiable consensus among these responses that there could not be a comprehensive European law of corporate groups patterned on the German corporate law of groups.[156] Indeed, for the internal market the implications of regulating these issues are obvious, certainly insofar as the controlling shareholders and groups of companies, in the absence of sufficient controls and in view of their vulnerability to takeovers, can seal off their own governance and business ventures against foreign bidders.[157]

The following areas could qualify as candidates for such a basic regulation: better information about the group structure beyond International Accounting Standard 24, a balancing of group interests against single company (subsidiary) interests modeled on the French Rozenblum legislation,[158] a corporate-wide special investigation[159] regulations on the structure of the corporate group, a prohibition against listing for corporate pyramids that are being misused, rules on the entry into and exit from corporate groups, directors' duties during a crisis, and possibly also (with great caution) one-share/one-vote.[160] The consultation responses also contained a call for a revision of the Directive on single-member private limited liability companies that would especially facilitate the organization of groups.[161] The prerequisites for controlling shareholder liability or liability of the parent corporate should also be discussed,

[151] *See* K.J. Hopt, 'Konzernrecht: Die europäische Perspektive', ZHR 171 (2007) 199.
[152] Forum Europaeum Konzernrecht, *supra* note 45, ZGR 1998, 672.
[153] *High Level Group II, supra* note 30, ch. 5: Groups of companies and pyramids.
[154] Reflection Group, *supra* note 44, ch. 4, and again (former) Reflection Group (*supra* note 52), ECFR 2013, 305 (325 f). See also A. Dorresteijn et al., *supra* note 40, p. 290 et s.
[155] F. Chiappetta/U. Tombari, 'Group Corporate Governance', ECFR 2012, 261 with experiences from the Pirelli Group; Forum Europaeum on Company Groups, 'Proposal to Facilitate the Management of Cross-Border Company Groups in Europe', ECFR 2015, 299.
[156] *Feedback Statement, supra* note 118, p. 12, question 19.
[157] K.J. Hopt, EUROPÄISCHES ÜBERNAHMERECHT, *supra* note 108, p. 69 et s. *id.*, supra note 20, p. 13.
[158] *See* already Forum Europaeum Konzernrecht, *supra* note 45, ZGR 1998, 672 (705ff); Reflection Group, *supra* note 44, 62 et s.; Forum Europaeum on Company Groups, *supra* note 155.
[159] For comparative law evidence, *see* K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 (57 f); evaluation from the Netherlands: "most effective mechanism."
[160] For details, *see* K.J. Hopt, *supra* note 151, ZHR 171 (2007), 199 at 213 et s..
[161] *Feedback Statement, supra* note 118, p. 9, question 13.

though a general crackdown[162] should be avoided by all means. The restructuring of groups and group insolvency should be included in these considerations too.

The Action Plan has already taken up some of these requests, such as more transparency not only for the parents but for the subsidiaries in the group and the recognition of the concept of group interest.[163] Also, related party transactions are mentioned there.[164] The Draft Shareholder Rights Directive also contains, more specifically, two measures relevant in particular for corporate groups, i.e. the transparency of related party transactions that represent more than 1% of the corporate assets and shareholder consent to such transactions if they amount to more than 5%.[165] Both proposals have led to an outcry in some Member States, particularly in Germany where there is already a subtle but very different law on corporate groups that relies on duties and liabilities of the corporations of the group and their boards, but not on shareholders. German observers, while agreeing that related party transactions need regulation (in particular transparency, voting by an independent body and a check by the auditors or the requirement of an independent fairness opinion), point out that (i) the shareholders, at least the minority shareholders, are less apt to decide on such transactions as the (supervisory) board and independent directors and (ii) inquiring with the general assembly before the transactions is totally impractical because such decisions may have to be taken quickly when the opportunity arises.[166] Furthermore, they suggest that related party transactions pose different regulatory problems concerning directors and controlling shareholders. Observers from Italy and the UK, while confirming the need for rules on related party transactions, hold the Commission's proposal as inconclusive in the absence of making sure that there is enforcement.[167] The European Council under the Italian Council Presidency

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[162] ECJ, 21 October 2010, Case C-81/09 (*Idryma Typou*), ECR 2010 I-10161; *but cf.* A. Dorresteijn et al., *supra* note 40, 300 et s.
[163] *Action Plan, supra* note 7, sec. 4.6, p. 14ff.
[164] *Action Plan, supra* note 7, sec. 2.1, 2.2., 2.4, 3.1, p. 6ff and in particular sec. 3.2, p. 9ff. *See* OECD, RELATED PARTY TRANSACTIONS AND MINORITY SHAREHOLDER RIGHTS (Paris 2012); J. H. Farrar/S. Watson, 'Self-Dealing, Fair Dealing and Related Party Transactions: History, Policy and Reform', JOURNAL OF CORPORATE LAW STUDIES 11 (2011), 495. Also K.J. Hopt, 'Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis', EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR) 2013, 167, available at < http://ssrn.com/abstract=2178152 >.
[165] See *supra* I 3 a.
[166] Cf. e.g. J. Vetter, 'Regelungsbedarf für Related Party Transactions?' ZHR 179 (2015) 27; H. Fleischer, 'Related Party Transactions bei börsennotierten Gesellschaften: Deutsches Aktien(konzern)recht und Europäische Reformvorschläge', Betriebs-Berater (BB) 2014, 2691. See also T. H. Tröger, 'Corporate Groups, A German's European Perspective', House of Finance/SAFE Francfort Working Paper, September 22, 2014.
[167] L. Enriques, 'Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)', EBOR 16 (2015) 1. See also M. Bianchi/A. Ciavarelli/L. Enriques/V. Novembre/R. Signoretti, 'Regulation and self-regulation of related party transactions in Italy, An empirical analysis', ecgi Finance Working Paper no. 415/2014, March 2014 and K. J. Hopt, 'Groups of Companies, A Comparative Study on the Economics, Law and Regulation of Corporate Groups', ecgi Law Working Paper No 286/204, February 2014, p. 14 et s.

and the later Latvian Council Presidency has reacted to these problems and, instead of mandating shareholder consent, proposed an option which would allow Member States like Germany to keep their group law with board consent.[168] This implies that, for the moment, the current Member States provisions as to group law will stay as they stand. Open for future research is the question whether those Member States that deal with related party transactions and group law by imposing duties on the boards and directors of the parents and the subsidiaries (e.g. the UK and others[169]) achieve equivalent results as those that tackle the same problem with a more specific group law; similarly open is the question which one is solving the problem better. At a recent conference[170] it has been suggested that the German rules deal with the problem in a more group-specific way instead of through a one size fits-all regulation, namely having the same rules for the independent corporation and group situations. This leads to academia and practitioners dedicating more attention to the problem (as is actually the case in Germany) and allows for a more tailor-made, in a way micro-surgery regulation.

3. More European Corporate Forms Beyond the Societas Europaea?

a) The SE

European corporate law forms are attracting a great deal of attention today from the public and from academia in Germany and in several other Member States. They are sometimes called the 29th model[171] because they exist as European legal options side by side with unrestricted national corporate law forms, thus simultaneously competing with those national options. Many found it disappointing, therefore, that the EU Commission's Action Plan called for no short-term revision of the SE Statute and certainly not of the Co-determination Directive, though there are currently more than 2,000 registered SEs.[172] The Commission wants to avoid "the potential challenges involved in reopening the discussions."[173] This may

[168] See *supra* I 4 a.
[169] Cf., e.g., P. L. Davies/S. Worthington in Gower & Davies, PRINCIPLES OF MODERN COMPANY LAW, 9th ed., London 2012, part 4, 687 et s., 719 et s. for the UK law; K. J. Hopt, *supra* note 167, p. 8 et s. for the different regulatory models for groups of companies.
[170] K. J. Hopt at the Conference at the Hamburg Max Planck Institute for Comparative and International Private Law on 28-29 May 2015.
[171] Reflection Group, *supra* note 44, ch. 2.7 (at that time still the 28th model).
[172] Cf. http://de.worker-participation.eu/Europa-AG-SE/Facts-Figures.
[173] *Action Plan*, *supra* note 7, sec. 4.5, p. 14.

be politically understandable because the SE is the "flagship of European corporate law,"[174] to quote a specially coined and much-quoted phrase, and as an English essay recently remarked, the SE "marked a watershed for the further development of European corporate law."[175]

The advantages and disadvantages of the SE based on the current statute and the Co-determination Directive were investigated by Ernest & Young in 2010 for the EU Commission in the form of an extensive opinion poll.[176] On 17 November 2010, the Commission released a report on its application in the Member States,[177] along with the Feedback Statement mentioned above that contained answers to issues related to the SE.[178] The most important advantage was originally the mobility of the SE, which was the only corporation that could easily transfer its seat to another Member State. However, since the Mergers Directive simplified transnational mergers and especially offered a more flexible solution for co-determination, this has become less important. Today the European image of the SE is preeminent, along with its supranational character that apparently makes cross-border structural changes – especially fusions – more easily acceptable for all those involved. Other advantages include a simplification of the group structure, including supervision by supervisory authorities only; financing benefits; and to a certain extent that varies by Member State, the possibility to avoid rigid and non-market-related regulations of national corporate laws.[179] This final point applies especially to managerial co-determination and is closely related to the size – a size that is no longer appropriate for optimal effectiveness – of supervisory boards in the two-tier system, specifically in Germany. The alleged location advantages of German co-determination propounded by interested parties is still a fairy tale, even after the financial crisis.[180] Though it is by far not as pronounced in Europe as it

[174] For more on supranational corporate forms in the EU, *see* H. Fleischer, 'Supranational corporate forms in the European Union: Prolegomena to a theory on supranational forms of association', COMMON MKT. L. REV. 47 (2010) 1671.
[175] J. Armour/W.-G. Ringe, *supra* note 8, COMMON MKT. L. REV. 48 (2011) 125 at 158.
[176] Ernst & Young, Study on the operation and the impacts of the Statute for a European Company (SE), Final Report (to the European Commission), 29.10.2009 (K.J. Hopt, Menjucq, and Rickford participated as advisors), available at
< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0676:FIN:DE:PDF >.
For real field experience (with Allianz), *see* P. Hemeling, 'Praktische Erfahrungen mit der Societas Europaea' in SUPRANATIONALE GESELLSCHAFTSFORMEN IM TYPENWETTBEWERB (P. Jung, ed., Tübingen 2011), 41.
[177] European Commission, *Report on the Application of Council Regulation* (EC) No. 2157/2001 of 8 October 2001 of the Statute for a European Company (SE), Brussels, 17 November 2010, COM(2010) 676 final (hereinafter: *SE Report*). Recently for Germany comes the announcement that Axel Springer AG is changing into an SE, FRANKFURTER ALLGEMEINE ZEITUNG 9 January 2013 No. 7, 15; SE-RECHT MIT GRENZÜBERSCHREITENDER VERSCHMELZUNG (M. Habersack/F. Drinhausen, ed., Munich 2013).
[178] *Feedback Statement, supra* note 118, p. 6, questions 9-11 (generally on the European corporate law forms).
[179] *Feedback Statement, supra* note 118, p. 6, question 9.
[180] This is no plea against co-determination. There have been some very good experiences with a (non-quasi-parity) co-determination, especially in difficult situations that could only have been successful through cooperation between capital and labor. There were examples of this during the reconstruction in eastern

(originally) was in the United States,[181] the possibility of the choice of the European company form tends to lead to an economically sensible competition among national lawmakers, and to a certain extent even to vertical competition.[182] There are also disadvantages of the SE, such as formation expenses,[183] a lack of knowledge and familiarity with the new legal form, an overly extensive relegation to national corporate law, and a co-determination solution that is still too complex. Though these disadvantages are detrimental, they are comparatively less weighty.

Still, improvements are justifiably needed and broadly expected since the results of the SE investigation and the Commission's SE report, including the direct approval of the formation of an SE without requiring two nationalities, the possibility to have both the business office and the registered office in the same Member State, increased simplification and fewer references to national corporate law,[184] and as always progress in the harmonization of tax law. In many Member States with a one-tier model and no co-determination, this may cause an increase or even a beginning of the foundation of European companies. The Commission's self-imposed limitation to promoting, increasing awareness, and engaging in an "information campaign" is clearly too little; when viewed in the context of European corporate law and more generally of Europe as a whole, it is regrettable.

b) Further Legal Forms: the EEIG, the SPE, the SUP and the European Foundation

The Action Plan is also reticent on further European legal forms, and sometimes it is completely silent. This is understandable for the Statute for a European Cooperative Society (SCE), because this legal form has not met with a favorable reception. The Commission mentions only 25 established SCEs (as of July 2012).[185] This may be because there is no need

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Germany after reunification, an era similar to the origins of German managerial co-determination during the crisis after World Wars I and II. Interesting facts can be found in H. Eidenmüller/L. Hornuf/M. Reps, 'Contracting Employee Involvement: An Analysis of Bargaining Over Employee Involvement Rules for a Societas Europaea', JOURNAL OF CORPORATE LAW STUDIES 12 (2012), 201.

[181] Many believe that this competition has already been decided in favor of Delaware, but after the most recent investigation Delaware has needed to assert itself. Cf., e.g., M.D. Cain/S.M. Davidoff, 'Delaware's Competitive Reach', JOURNAL OF EMPIRICAL LEGAL STUDIES 9, Issue 1 (2012), 92; J. Armour/B. Black/B. Cheffins, 'Is Delaware Losing its Cases?' JOURNAL OF EMPIRICAL LEGAL STUDIES 9 (2012), 605; in connection with takeover bids, *see* K.J. Hopt, EUROPÄISCHES ÜBERNAHMERECHT, *supra* note 108, p. 21 et s., 70 et s..

[182] For more detail on this, *see* L. Klöhn, *supra* note 137 at 276.

[183] For numbers, *see* Ernst & Young Study, *supra* note 176, p. 5.

[184] *Feedback Statement*, *supra* note 118, p. 7 specifically questions 9, 10, and 11.

[185] *Action Plan, supra* note 7, sec. 4.5, p. 14.

for this particular legal form, but the investigation commissioned by the EU Commission also revealed that the regulation is too complex.[186]

The Action Plan mentions the European Economic Interest Grouping (EEIG) only in passing in regard to the transfer of seat; the Commission's plans do not attach any significance to it on its own merits. In fact, this legal form, established in 1985 as the first of the European legal forms, has gained little traction outside of individual branches, even though nearly 2,100 such EEIGs have been established since 1989.[187] In Germany it is used primarily for the cross-border cooperation of law firms and other independent professions. This lack of success was consciously accepted by the Member States, which may have been even more concerned with protecting their own national legal forms at that time than they are now. The purposeful restriction against pursuing a profit for oneself and numerous individual limitations make the EEIG unattractive. A reform of the EEIG with the goal of creating a cooperative legal form without artificial barriers could be beneficial, but it is not yet on the agenda.

With regard to the European Private Company (SPE), the Action Plan reveals the EU Commission's weariness.[188] This legal form that is related to the German GmbH has been comprehensively debated in recent years,[189] but it has been abandoned by the European Commission as part of the REFIT exercise,[190] mainly because of German co-determination. This is even more disappointing because it was Germany and France and members of their academic communities and industry who had originally launched and strongly advocated the idea of the SPE.[191] Though the European Parliament went to bat once again for the SPE in its resolution of 14 June 2012,[192] there are voices in academia that ascribe much less relevance to the SPE than to the SE.[193]

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[186] For an exhaustive treatment of the SCE, *see* M. Lutter/W. Bayer/J. Schmidt, *supra* note 10, § 42, and most recently and comprehensively I. Barsan, doctoral thesis in Paris, 2014 (forthcoming).
[187] M. Lutter/W. Bayer/J. Schmidt, *supra* note 10, § 40, ref. no. 3. Cf. most recently M. K. Meiselles, 'The European Economic Interest Grouping – A Chance for Multinational Rules?' EUROPEAN BUSINESS LAW REVIEW (EBLR) 26 (2015) 391.
[188] *Action Plan, supra* note 7, sec. 4.4, p. 13.
[189] Most recently R. Krause, 'Co-determination by Workers under the Proposed European Private Company (SPE)', in THE EUROPEAN PRIVATE COMPANY – SOCIETAS PRIVATE EUROPAEA (SPE) (H. Hirte/C. Teichmann, eds., ECFR special vol. 3, 2013), 375. For an exploration of other reasons, especially the fear among Member States of the competitive disadvantages of their national corporate forms or of too much mandatory SE law, *see* P. Davies, 'The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws', available at < http://ssrn.com/abstract= 1622293 >.
[190] *Supra* note 79.
[191] For a comprehensive recent report, *see* P. Hommelhoff/C. Teichmann, 'Societas Privata Europae (SPE) – General Report' in H. Hirte/C. Teichmann, *supra* note 204; M. Lutter/W. Bayer/J. Schmidt, *supra* note 10, § 43.
[192] European Parliament, Resolution 14 June 2012, *supra* note 111
[193] ECLE 2012, *supra* note 123, para 5b, p. 20

Yet while the SPE seems to be dead, the idea to have a simple European legal form beyond the SE has not been abandoned by the EU Commission, instead appearing again in the SUP,[194] which the EU Commission is now pushing hard. The SUP is supposed to serve the same purpose as the SPE, i.e. offering SMEs a simple, flexible and uniform European form in order to reduce the costs and obstacles to be faced when creating a subsidiary abroad in another Member State. The possible reach of such a new form is far wider than that of the SE, which is geared only to stock corporations. According to the Commission there are around 21 million SMEs in the EU, out of which there are 12 million limited liability companies and 5.2 million single-member private limited liability companies.[195]

This proposal creates a number of problems which endanger its adoption by the European Council. First and foremost, some Member States fear that this European form will bring unwelcome competition to their national limited liability companies. This cannot be ruled out since the draft provides for an easy conversion of the national limited liability companies to an SUP.[196] As for the SPE, the German trade unions in particular have feared fear labor co-determination including their own seats in German corporate boards, although the usual SUP would fall well below the requirements for quasi-parity labor co-determination under German corporate law.[197] On the other side, many in academia do not see a real need for this new European corporate form since the limited liability laws of the Member States already allow for very flexible forms that could be easily adapted to the national corporate laws in cross-border cases. This is particularly true as regards the corporate groups to whom the SUP would be available.[198] The parents of these groups are accustomed to cross-border trade since virtually none of these groups are doing business in only in their home country and most already have subsidiaries abroad and know how to form new ones. By contrast, for founders who are not part of a group, the SUP may be a real trap, in particular if they are small start-up enterprises, since after a while they may need new capital from other shareholders and they then must transform the SUP into another corporate form. This transformation process is full of pitfalls and is much more complicated than the initial creation of the single-member

[194] *Supra* I 4 c.
[195] Draft Directive (*supra* note 13), explanatory memorandum, p. 5.
[196] Draft Directive (*supra* note 13), Art. 9. Cf. OECD, New Approaches to SME and Entrepreneurship Financing: Broadening the Range of Instruments, Paris 2015.
[197] Cf. the Opinion of the European Economic and Social Committee, Röpke Report, 10.9.2014, INT/744, 4.4. See also *infra* II 6. See also the position of the German Federal Government on the proposal of the European Commission for a Directive on single-member private limited liabiltiy companies, Annex to the Meeting Document of 3 November 2014 for the preparation of the Working Party on 21 November 2014.
[198] The Röpke Report (*supra* note 197), 1.8, is strongly against this and would limit the form to small-sized companies.

company. The draft seems to try to cope with this problem by allowing that a single share of a SUP may be owned by more than one person, those persons then being regarded as one member in relation to the SUP and being represented by a common representative.[199] But it is well known, e.g. in the German law of commercial partnerships, that the position of such indirect shareholders creates huge problems as to their rights, duties and protection.[200] It is needless to add that the requirement of a share capital of at least 1 Euro is hardly convincing, quite apart from the general objection as to the creditor protection achieved by minimum capital and capital maintenance requirements.[201] But as mentioned above, despite all these objections the chances that the proposal will go through are not bad.

The European Foundation (FE) had not been particularly mentioned in the Action Plan or in the main initiatives listed in the annex. This was understandable because a proposed Regulation for a European Foundation statute had been submitted on 8 February 2012 and was debated in the European Parliament.[202] In the meantime, however, the new EU Commission has met a climate that is generally hostile to new EU initiatives, and it is instead looking for redistributing areas dealt with by the EU back to the Member States as it has become a prime issue under the threat of the UK leaving the European Union ("*Brexit*"). As a result the Commission formally gave up not only the SPE but also the plan of creating a European Foundation statute. As the Commission said, it did not see – at least for the foreseeable future – how to obtain the consent of the Member States.[203] Because of the important economic and social impact a European Foundation would have and since at a later stage the idea might well be picked up again in a more favorable political climate, some comments on it shall be made in the following paragraph despite its withdrawal.

[199] Draft Directive (*supra* note 13), Art. 15 para 3.
[200] M. Roth in HANDELSGESETZBUCH (A. Baumbach/K.J. Hopt, eds., Munich, 36th 3d. 2014), Annex to § 177a HGB comments 77 et s.
[201] See Anatomy, *supra* note 47.
[202] European Commission, Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final, available at < http://ec.europa.eu/internal_market/company/docs/eufoundation/proposal_de.pdf > and European Parliament, (supporting) Resolution of 2 July 2013. For more information, *see* European Foundation Centre (EFC), Revised legal analysis of the European Commission proposal for a Council Regulation on the Statute for a European Foundation (FE), 23 November 2012; S. Lombardo, 'Some Reflections on Freedom of Establishment of Non-profit Entities in the EU', LAW WORKING PAPER NO. 192/2012, available at < http://ssrn.com/abstract=2115107 >; A. Richter/A. K. Gollan, 'Fundatio Europaea – Der Kommissionsvorschlag für eine Europäische Stiftung (FE)', ZGR 2013, 551; with further citations, K.J. Hopt/T. von Hippel, 'Die Europäische Stiftung', ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEUP) 2013, 235.
[203] This conclusion was reached as a part of the REFIT exercise too, see *supra* note 79. See also Commission Work Programme 2015, A New Start, Annex to the Communication of the Commission, 16.12.2014, COM(2014) 910 final, Annex 2.

The recommendation was based on many years of academic preparation,[204] it was already incorporated into the 2003 Action Plan after support from the High Level Group of Company Law Experts, and it was positively evaluated by the feasibility study conducted by the University of Heidelberg and the Hamburger Max Planck Institute in 2008.[205] According to the evaluation of the feasibility study, the European Foundation would significantly ease the cross-border activities of foundations. Determining and adhering to the various legal and administrative requirements in the individual Member States and the insecurity of attaining nonprofit recognition have posed significant obstacles in the past, not to mention tax law barriers. In the interests of trustworthiness, the EU Commission had recommended that the European Foundation should have a minimum capital of 25,000 euro, an exhaustive list of charitable purposes accepted in most Member States, as well as transparency and accountability. Oversight would stay with the national regulatory authorities. The suggestion to grant the European Foundation the same tax incentives it would receive according to domestic tax law was certainly too ambitious, unless it was just a savvy tactic of the Commission to demand too much at first – much like the reform of European auditor law – so that it could then make concessions in the spirit of political compromise. Problems also arise with the issue of whether, under which conditions, and to what extent foundations should be allowed to engage in economic activity. This is why it is not surprising that reactions in the Member States were cautious. But as it becomes clear that the modern social and welfare state will not be able to perpetually finance the common good in a way the European people have a right to expect, private for-profit companies that can operate more effectively than the public sector must take on this responsibility insofar as the management can do this profitably; when this becomes impossible – as may predominantly be the case – nonprofit organizations and foundations must fill the gap. If a European Foundation can support this in even a small way, then there this idea should be supported, as the ECLE has done.[206] The case law of the European Court of Justice, which also references the freedom of establishment for

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[204] THE EUROPEAN FOUNDATION : A NEW LEGAL APPROACH (K. J. Hopt/W. R. Walz/T. von Hippel/V. Then, eds., Cambridge 2006). Cf. also COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS (K. J. Hopt/T. von Hippel, eds., Cambridge 2010) and most recently S. Thomsen, 'Comparative Corporate Governance of Non-Profit Organizations', forthcoming in ECFR 2014.

[205] K.J. Hopt/T. von Hippel/H. Anheier/V. Then/W. Ebke/E. Reimer/T. Vahlpahl, *Feasibility Study on a European Foundation Statute, Final Report* (Brussels 2009), available at < http://ec.europa.eu/internal_market/corporate/docs/eufoundation/feasibilitystudy_en.pdf >.

[206] ECLE 2012, *supra* note 123, para 5c, p. 20 et s. Cf. K.J. Hopt/T. von Hippel, *supra* note 202, ZEuP 2013, 235.

foundations,[207] cannot achieve this by itself, as was already illustrated in conjunction with international mergers.[208]

4. Corporate Governance and Boards: Bank Governance versus Corporate Governance

As to corporate governance and corporate boards the EU Commission has come up with a number of rather diverse reform proposals. In the Action Plan, the EU Commission cites the "disclosure of board diversity policy and management of non-financial risks" as the most important issue and potential measure related to corporate governance. It is apparent even from the outside that this bundles together two very different problems in relation to their content and significance: first, the composition of the management board; and second and far more important, the structure and organization of risk management. The Commission notes the necessity of diversity in the board and mentions the danger of "group think."[209] In relation to how non-financial risks are handled, the Commission is apparently thinking of Article 46, para 2, lit. f of the 4th Directive on Annual Accounts, which specifies that, under certain conditions, the annual report is also to cover the corporation's risk management goals and methods and the risks associated with changing prices, credit, liquidity, and cash flow. Unfortunately the Commission has not specified which risks it is considering. It is trying to provide an incentive for companies to develop lasting and long-term strategies for their business operations. This initiative as an addendum to the planned initiatives is too broad in scope (though unintentionally so) when the text speaks so generally about risk management arrangements without limiting these to non-financial risks.

As to board reform one must most of all keep in mind that there is a fundamental difference between corporate governance and bank governance as discussed in economic and comparative legal literature.[210] The recent reforms after the financial crisis have spelt out in much detail the rights, duties, liabilities and supervision of the boards and directors of banks

[207] For more on the ECJ decisions in the Stauffer and Persche cases of 14 September 2006, Case C-386/04, and 27 January 2009, Case C-318/07, *see* K.J. Hopt/T. von Hippel, *supra* note 202, ZEuP 2013, 235 (243).
[208] *Infra* II 5.
[209] With further citations, *see* K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 (23ff).
[210] See in detail K. J. Hopt (supra note 19); L. Enriques/D. Zetzsche, 'Quack Corporate Governance, Round III? Bank Board Regulation Under the New European Capital Requirement Directive', ecgi Law Working Paper No. 249/2014, March 2014. Cf. more generally on boards CORPORATE BOARDS IN LAW AND PRACTICE, A COMPARATIVE ANALYSIS IN EUROPE (P. Davies/K. J. Hopt/R. Nowak/G. van Solinge, eds., Oxford 2013). Firm value increase after board reform in many countries is found by L. Fauver/M. Hung/X. Li/A. Taboada, 'Board Reforms and Firm Value: Worldwide Evidence', available at < http://ssrn.com/abstract=2607785 >.

and other financial institutions. In principle this is adequate for financial institutions in view of the particular systemic risk faced in these sectors, though clear signs of overregulation and excessive trust in the capabilities of supervisory agencies can be observed. Yet one must be careful not to transpose these rules to the non-financial sector where such systemic risks do not exist or only in a very different and less relevant form. Corporate boards must not be deterred from taking risks as long as they follow the business judgment rule.

The Commission wants also to tackle remuneration policies and the individual remuneration of directors, and it has done so in the Draft Shareholders' Directive[211] by proposing a remuneration report and – more far-reaching – shareholder say on pay[212] than in the UK, Germany and other Member States. With this move the Commission is jumping on the international convoy that is not only justifiably attempting to set remuneration guidelines for the financial sector but is also moving in the populist direction of exerting remuneration control outside the financial sector.[213]

The discussion of better corporate governance also encompasses improvement in the quality of corporate governance reporting and the comply-or-explain mechanism, as detailed in the above-mentioned Commission Recommendation of 9 April 2014,[214] and also the issue of acting in concert that in the meantime has been dealt with by detailed recommendations of the ESMA.[215]

Each of these planned measures is open to debate: some are more economically reasonable, such as increasing risk transparency and strengthening the comply-or-explain mechanism; others owe more to socio-political considerations such as the gender proposal. There is little consistency apparent in determining which rules can improve corporate governance, and if so, how these can be implemented on the European level in particular. But the consultation answers and the European Parliament[216] have made it plain that there is a demand for further

[211] *Action Plan*, *supra* note 7, sec. 3.1, p. 9.
[212] *Action Plan, supra* note 7, sec. 2.2, p. 6-7; sec. 3.1, p. 8; and sec. 3.4, p. 11. With "say on pay," the focus and scope of co-determination makes a decisive difference, specifically whether it is merely advisory or, as the Swiss *Abzockerinitiative* requires, mandatory (a referendum took place on 3 March 2013), and whether it deals with only general remuneration policy or with more concrete, numerical compensation guidelines and even intervention in the contract itself.
[213] As to the experience made in the USA see K. R. Brunarski/T. C. Campbell/Y. S. Harman, 'Evidence on the outcome of Say-On-Pay votes: How managers, directors, and shareholders respond', J. Corp. Fin. 30 (2015) 132.
[214] See *supra* I 4.
[215] See *infra* II 7 note 245.
[216] European Parliament, Resolution of 29 March 2012 on corporate governance, *supra* note 122, with 15 individual measures related to the management board.

harmonization of companies' internal governance structure.[217] In fact, there are a plethora of measures from the areas of business administration and monitoring,[218] information and organization[219] – areas central to corporate governance – that are as relevant or even more relevant than those that are planned. Chief among these are the comparative-law-supported Forum Europaeum recommendations on the (simple and corporate-wide) special audit and on directors' duties in a crisis.[220] Many other national and European reform issues[221] were debated during the run-up to the Action Plan, including the following: free choice between the one- and two-tier systems, supported most recently in Germany by the Association of German Jurists in 2012;[222] independent and better qualified directors; conflict of interest in the management and supervisory boards or in the board; minority representatives; division of CEO and chairman; mandate ceilings; the evaluation of the supervisory board (including periodic observation by outside experts); and last but not least the responsibility and liability of directors.[223] This final issue must be considered in conjunction with procedural questions of enforcement through investors and possibly a cross-border register for directors who have been subject to a professional ban in another Member State.[224] This should by no means be understood as a call to regulate all of this as a part of European corporate law. But surely one could have expected from the Action Plan a coherent and consistent approach to which of these measures are most important and most promising; the relevant information had already been assembled.

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[217] *Feedback Statement, supra* note 118, p. 5, question 6.

[218] K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 (30ff); M. Roth, 'Information und Organisation des Aufsichtsrats', ZGR 2012, 343. It is very informative in this context to observe the main principles in The UK Corporate Governance Code, September 2012: leadership, effectiveness, accountability, remuneration, and relations with shareholders.

[219] M. Roth, *supra* note 218, ZGR 2012, 343; P. C. Leyens, INFORMATION DES AUFSICHTSRATS (Tübingen 2006).

[220] Forum Europaeum Konzernrecht, *supra* note 45, ZGR 1998, 672 at 715 et s., 752 et s.; from a comparative law perspective (UK, BRD), see F. Steffek, GLÄUBIGERSCHUTZ IN DER KAPITALGESELLSCHAFT (Tübingen 2011), ch. 4, 259 et s., 342 et s., 555 et s.

[221] For the whole range in an international comparison, *see* K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1.

[222] 69th Association of German Jurists (Deutscher Juristentag), Munich 2012, Resolutions of the Commercial Law Division, Resolution No. 19. Also *Feedback Statement*, *supra* note 118, p. 5; with further citations, *see* K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 (20ff). *See also* K.J. Hopt/P. C. Leyens, 'Board Models in Europe', ECFR 2004, 135 (163 et s.).

[223] European Parliament of 14 June 2012, *supra* note 111, sec. 14: Enforcement; *Feedback Statement, supra* note 118, p. 5, question 6; K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 at 37 et s., 42 et s.. After the financial crisis, directors' liability has become a burning problem, K. J. Hopt, 'Responsibility of Banks and Their Directors, Including Liability and Enforcement', in FUNCTIONAL OR DYSFUNCTIONAL – THE LAW AS A CURE? (L. Gorton/J. Kleineman/H. Wibom, eds., Stockholm 2014), p. 159; idem, 'Die Verantwortlichkeit von Vorstand und Aufsichtsrat', ZIP 2013, 1793; G. Spindler, 'Organhaftung in der AG – Reformbedarf aus wissenschaftlicher Perspektive', AG 2013, 889. UNCITRAL is discussing liability of directors before insolvency, cf. UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency, New York 2012, p. 55 et s.

[224] *Feedback Statement, supra* note 118, p. 5, question 6.

In the end, neither economic considerations nor aspects of subsidiarity point against focusing on European rules as the indispensable prerequisites for the effective management and control of joint stock companies (according to the previously mentioned definition of corporate governance). This prevents an exclusive emphasis on the support and further promotion of the internal market through harmonized corporate law, which certainly is not sufficient; instead, the focus is on the necessary minimum rules for the functioning of the core areas of management and supervision that will cause the least interruption and distortion to the economy, investors, employees, and creditors in the internal market.[225]

5. Merger, Transfer of Seat, Division of Companies: The Stumble Stone of German Labor Codetermination

Cross-border mobility is of key relevance for enterprises. The European Union is expected to dismantle as far as possible the existing barriers to formation, merger, transfer of seat, division, and others. This reflects the general consensus as expressed in the Commission's consultation questions and their answers, the European Parliament's statement of 14 June 2012, and even before from the Reflection Group and academia. The ECLE also sees this as a top priority and has issued individual recommendations on cross-border transfer of seat, merger, voting, and branch office regulation.[226] The regulatory jurisdiction (Kompetenz) of the European Union is just as apparent here as is the economic reasonableness of such a harmonization for the internal market. The European Court of Justice has already torn down the essential barriers to formation; now the European lawmakers must create or improve the necessary regulatory framework. This is why it had been anticipated that the EU Commission would commit itself to comprehensively and passionately tackling this desideratum above all others. In the Action Plan, however, the outlook is far more hesitant. Concerning the cross-border transfer of a registered office, there is to be further analysis and possible initiatives; regarding the overhaul of rules on cross-border mergers and new regulations on cross-border divisions, merely a study and possibly an amendment have been announced.[227] In 2014 the

[225] These minimum rules contain differentiations of nature and degree that are comparable to the various strategies of regulation, such as governance strategies and affiliation strategies (entering and exiting public markets), ANATOMY, *supra* note 47, 2.2.
[226] European Parliament, Resolution of 2 February 2012 (on the Regner Report, *infra* note 230) and Resolution 14 June 2012, *supra* note 111; Reflection Group, *supra* note 44, ch. 2; ECLE 2012, *supra* note 123, para 3 et s., p. 6 et s.
[227] *Action Plan, supra* note 7, sec. 4.1, 4.2, and 4.3, p. 12-13.

EU Commission conducted an online consultation on cross-border mergers and divisions[228] and is deliberating on a new directive.

The general consensus is indeed that a resumption of work on the 14th Directive on transfer of seat is of the utmost urgency.[229] The European Parliament even requested this of the Commission in March of 2009 by way of a legislative initiative report based on Article 192, para 2 of the EC Treaty, and in January 2012 the Regner Report provided concrete suggestions.[230] A transfer of seat should not result in the dissolution of the corporation in its own Member State, nor should it result in tax-related profits. Shareholders, employees, and creditors must all remain protected. Whether this should go as far as imposing an obligation for acceptance on Member States is debatable;[231] this would depend on the conditions of such an obligation. Without question, German co-determination is a stumbling block. But perhaps the understanding will eventually permeate the German consciousness that a flexible co-determination system – like the one that is in place for mergers, or if need be even narrower like that of the SE – makes sense and may even be advantageous for Germany, as long as the guarantee of a backdoor contingency plan is retained to maintain the status quo.[232] If this is rejected yet again, it might be worth considering whether the blockade could be dispelled through a solution limited to the remaining Member States.[233] The economic price of the political intransigence and special interests at the expense of the German economy would then become visible and perhaps also ultimately politically effective.

A further improvement of the Cross-Border Merger Directive has also been generally called for and the European Commission has published a Study by Bech-Bruun/Lexidale in September 2013.[234] Based on practical experience, the primary problems here are the valuation of assets (including the selection and appointment of auditors in such cases),

[228] The consultation was open until 1.12.2014. The 151 contributions received can be viewed at < https://ec.europa.eu/eusurvey/publication/cross-border-mergers-divisions >. The summary results of the consultation are to be awaited.
[229] ECLE 2012, *supra* note 123, para 3a, p. 7ff. As a result, the European Commission tackled this first after the Action Plan and opened a new consultation on the cross-border transfer of seat (until April 2013) and has published a Feedback Statement, September 2013.
[230] European Parliament, Report with recommendations to the Commission on a 14th Company Law Directive on the cross-border transfer of corporate seats (Regner Report), Committee on Legal Affairs, 9 January 2012.
[231] *Feedback Statement, supra* note 118, p. 9, question 15. *Cf. also* F.M. Mucciarelli, 'The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU', TUL. J. OF INT'L & COMP. L. 20 (2012), 421.
[232] Working Group on European Enterprise Law (Arbeitskreis Europäisches Unternehmensrecht), 'Thesen zum Erlass einer europäischen Sitzverlegungsrichtlinie', NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 2011, 98, thesis 12: the "before and after" principle.
[233] Reflection Group, *supra* note 44, ch. 3.2 p. 53.
[234] ECLE 2012, *supra* note 123, p. 8ff; *Feedback Statement, supra* note 118, p. 10 question 17. European Commission, Study on the Application of the Cross-Border Mergers Directive by Bech-Bruun and Lexidale, September 2013. On cross-border merger, *see* most recently M. Habersack/F. Drinhausen, *supra* note 177.

creditors' rights and the duration of their protection period, and the length of the national authorities' administrative period for processing the merger. In addition, the requirement that the registered office and the administrative office be in different countries must be abolished.[235]

Further comparable requests deal with cross-border divisions, which could be based on the model of the Merger Directive;[236] improvements to the regime of branches of companies;[237] and finally facilitating the mobility of partnerships.[238] The necessary interaction between the European Court of Justice and European lawmakers has already been explained above in the merger example, and it can be confirmed in the example of the "golden shares."[239]

It is not possible to go into detail here on the stormy debate and evolution of events surrounding the rescue, rehabilitation, and winding up of financial institutions, though they do functionally belong to European corporate law ("from the cradle to the grave"), and the spillover effects of this regulation on general corporate law are significant and dangerous.

6. Corporate Finance and Capital Maintenance: A Deadlock

The EU Commission did not specifically address corporate finance in the Action Plan because the 2nd Directive was newly drafted in October 2012.[240] There is not much to say about this as, other than a necessary jurisdiction-related change in Article 6, the revisions are purely technical (with significant re-numbering) and have no effect on the material contents. Based on one's perspective on the economic sense of the Directive on capital maintenance, this will either be embraced (as in Germany) or panned (as it was more generally outside of Germany. The economic and legal arguments for this have been brought forward.[241]

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[235] *Feedback Statement, supra* note 118, p. 8 question 11 and p. 9 et s. questions 14, 15, 16.
[236] *Feedback Statement, supra* note 118, p. 1 question 18; more generally on the fundamental changes, ANATOMY, *supra* note 47, ch. 7.
[237] ECLE 2012, *supra* note 123, para 3d, p. 11 et s.
[238] K.-H. Lehne, Chair of the Committee on Legal Affairs of the European Parliament in KSzW 01.2010 I 3 (I 4).
[239] *Supra* I 5 a.
[240] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012, OJEU L 315/74, 14 November 2012. The designation as the second Directive has been dropped.
[241] See recently L. Handschin, 'Risk-Based Equity Requirements: How Equity Rules for the Financial Sector Can Be Applied to the Real Economy', JOURNAL OF CORPORATE LAW STUDIES 12 (2012) 255; ANATOMY, supra note 47, 5.2.2; L. Enriques/J. R. Macey, Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules, Cornell L. Rev. 86 (2001) 1165.

7. European Takeover Law: The Case for Reform of the 13th Company Law Directive

Takeover law has been harmonized to a certain degree by the so-called 13th Company Law Directive, the Takeover Directive of 21 April 2004.[242] According to a sunset clause, this Directive had to be revised on the basis of experience gained in the five years of application subsequent to its adoption on 20 May 2006. On the basis of an examination carried out by Marccus Partners and the Centre for European Policy Studies, the Commission published an Application Report on 26 June 2012. The success or failure of the implementation of the Thirteenth Directive is assessed very differently. According to its Staff Working Document of 21 February 2007, the Commission is disappointed. The compromises in the Directive as regards options and reciprocity rules have tended to result in a move away from bidder-friendly rules. Yet the mandatory bid (Article 5) has mainly been a success, as have the other rules regarding general principles for supervision, disclosure and transparency, procedures, squeeze-out and sell-out. However, it cannot be ignored that the danger of protectionism has increased considerably. The legal policy debate focuses on the extent to which takeover law should be regulated at European level, in particular as far as the mandatory bid[243] and the antifrustration rules[244] are concerned. Whilst some object to further Europeanization or even demand re-nationalization, others argue for greater harmonization. There is a whole catalogue of regulatory demands from academia and practice. Yet, apart from the acting in concert issue on which the ESMA has given guidelines,[245] the Commission has for political reasons shied away from taking up the problem of takeover law reform, even though the mandatory bid is functionally equivalent to an early protection against the formation and alteration of corporate groups (early exit), the antifrustration rule is "a cheap and effective method of keeping management on their toes",[246] and the takeover market has been described as "the most effective corporate governance mechanism."[247]

[242] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJEC 2004 L 142/12 of 30 April 2004.

[243] For more detail, see K. J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', EBOR 15 (2014) 145.

[244] For more details, see K. J. Hopt, 'Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis', Colum. J. of European Law 20.2 (2014) 249.

[245] Cf. European Securities and Markets Authority (ESMA), Public Statement, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, ESMA/2013/1642, 12 November 2013. Cf. R. Ghetti, 'Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights', ECFR 11 (2014) 595.

[246] P. Davies & S. Worthington, *supra* note 169, at § 28–76 (on page 1102).

[247] J. Macey, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 10, 118 et s. (2008). *See also id.* at 50 (table 3.1 on effective/ineffective regulatory mechanisms).

III. European Corporate Law: Goals, Methods and Scope

1. Free Mobility and Minimum Protection

The fundamental disagreement between the opponents and the partisans of European corporate law and governance and their reasons has been described above.[248] After having analyzed seven critical areas of European corporate law and governance as of 2015, it is now time to resume with the presentation of the European Commission's and the author's own position. The Action Plan itself speaks to these fundamental questions and to the central debate only indirectly, namely by explaining the plans for corporate law initiatives: the goal is to strengthen shareholders for the purpose of improved corporate governance through transparency and self-protection and to promote the growth of European companies and their competitiveness by simplifying their cross-border transactions.[249] Some may regret this or even criticize it, but it is clearly a politically understandable and pragmatic decision.

The standpoint represented here occupies a middle position between the two opposite camps described in II 3, and therefore accounts for especially important factors in the development of corporate law.[250] In its origin and essential arguments it is consistent with the position of the European Company Law Experts (ECLE), but it places a higher value on European corporate law in various individual areas, specifically in light of answers to the consultation[251] and the Action Plan 2012. Driven by a definite objective,[252] the ECLE deems European corporate law to be significantly less important than European finance and capital market law for three reasons.[253] First, its members are convinced that spontaneous, interest-driven convergence fundamentally produces better results, in corporate law as well as elsewhere,[254]

[248] *Supra* I 6.
[249] *Action Plan*, *supra* note 7, sec. 1, p. 3.
[250] ANATOMY, *supra* note 47, 1.6.1: pattern of corporate ownership, international competition, cross-jurisdictional coordination.
[251] Only 13% of those who answered were against further harmonization and only supportive of subsidiarity and competition of lawmakers, *Feedback Statement*, *supra* note 118, p. 4, question 6, and *supra* I 2 b. Also *idem*, p. 4, question 5 on the goals of European corporate law: mobility and minimum protection.
[252] For more on the debate surrounding the goals of corporate law, *see* ECLE 2012, *supra* note 123, para 2, 1 et s.; for an economic perspective, *see, e.g.*, ANATOMY, *supra* note 47, 1.5: pursuit of overall social efficiency, to the benefit of the shareholders as residual claimants; J. Armour/W.-G. Ringe, *supra* note 8, COMMON MKT. L. REV. 48 (2011), 125 at 127: minimize costs of business enterprise activity while restricting externalization.
[253] For the following, *see* ECLE 2012, *supra* note 123, para 2a, 2 et s.
[254] For more on the theory, *see* J. Armour, 'Who Should Make Corporate Law? EC Legislation versus Regulatory Competition', CURRENT LEGAL PROBLEMS 58 (2005), 369; T. Tröger, 'Choice of Jurisdictions in European Corporate Law: Perspectives of European Corporate Governance', EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 6 (2005), 3.

but that there are also basic national path-dependent institutions that remain resistant to convergence, such as the shareholding structure or co-determination.[255] Second, they rely on the subsidiarity principle of the Treaty.[256] Finally, they believe that the European legislative process is deficient. This in no way represents a general rejection by the ECLE of corporate law harmonization; instead, its members believe that there are areas where European harmonization is essential. This is demonstrated in the comprehensive priority list for European corporate law measures that they developed: four areas of highest priority (the 14th Directive, cross-border mergers, cross-border exercise of voting rights, and the 11th Directive), three areas of middle priority (groups of companies, fundamental reform of the Capital Directive, and a simplification of national rights for small and mid-sized companies), and three areas of lower priority (European legal forms of companies, the SPE, and the European Foundation).

In the legal policy debate, even those who fundamentally agree on their objectives have significant differences in their evaluation of the best candidates for harmonization, and this can be attributed to the following reasons. The European corporate law arena requires much more intensive legal and economic justification than, for example, capital market law or financial law, especially since the financial crisis; therefore, this justification cannot be achieved for the entire area but only for specific areas of harmonization measures. In this way, the position on European corporate law represented here is fundamentally different from that of the two adversaries described above, opponents as well as supporters.[257] The substantive discussion and the need to justify shift the emphasis away from general theoretical, benefit-driven, or ideological positions and arguments toward concrete issues. The roller coaster history of European corporate law,[258] the contrast between bottom-up and top-down, and the positioning of the race to the bottom or the race to the top provide only partial answers in any case. It all depends on the significance that the individual corporate law areas and the measures to be considered here have for the European internal market. This means, however, that it would not make sense to restrict corporate law harmonization strictly to

[255] *Cf.* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATION OF COMPARATIVE ADVANTAGE (P. Hall/D. Soskice, eds., Oxford, New York 2001); CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (J. Gordon/M. Roe, eds., Oxford 2004); D. Cabrelli/M. Siems, 'Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis', Am. J. Comp. L. LXIII (2015) 109.
[256] Most recently, *see* H. Fleischer, 'Corporate Governance in Europa als Mehrebenensystem', ZGR 2012, 160 (168ff); see also the discussion report, ZGR 2012, 197f: subsidiarity controls are actionable (Art. 8 EUSubsidProt), but it is a 'gray zone'.
[257] *Supra* I 6 a, b.
[258] For a historical overview of corporate law, *see* A.M. Fleckner, FESTSCHRIFT FÜR HOPT, *supra* note 86, 665 et s.

cross-border problems, a position that the EU Commission once raised for debate but then did not pursue in the face of the hostile response, primarily from management circles. This would lead to an unsustainable two-tier regime for domestic and cross-border situations and could simultaneously result in significant competition distortions in both directions depending on the regulation's effect on an internationally active corporation.

The conclusion for our central discussion is that there should be no genuine European Stock Corporation Act like in the United Kingdom or in Germany and no general European Corporate Governance Code nor a comprehensive harmonization of the corporate law of the Member States, either now or in the mid-term future. European corporate law must limit itself to the core areas essential for European integration.[259] It must primarily focus on cross-border mobility and secure the closely related protection of shareholders and creditors.[260] In the process, European corporate law assumes the responsibility of giving concrete form to the European Court of Justice's case law related to the Treaty freedoms and making this predictable and manageable for companies. If there is any doubt, the shareholders and companies should be given expanded freedom and opportunity for more party choice.[261] Furthermore, during the regulatory debate, it is essential to remember that path dependent legal structures represent a part of culture and therefore have value in themselves. This was already formulated 20 years ago: " 'Unity and diversity in European corporate law' is the perspective, not *ius commune societatum Europae*."[262]

2. Transparency as the Primary Method of Regulation

The EU Commission's Action Plan places primary emphasis on transparency. Seven of the 16 planned measures deal with transparency:[263] the disclosure of diversity and risk management agreements of the board; an improved transparency of shareholdings; qualitative improvement of corporate governance reporting, including the comply-or-explain mechanism; disclosure of voting strategies and policies of institutional investors; more transparent remuneration of

[259] S. Grundmann, *supra* note 40, p. 20 et s.
[260] ECLE 2012, *supra* note 123, para 2b, 5.
[261] Also J. Armour/W.-G. Ringe, *supra* note 8, COMMON MKT. L. REV. 48 (2011), 125 at 130. For the basics, see N. Moloney, HOW TO PROTECT INVESTORS, LESSONS FROM THE EC AND THE UK, Cambridge 2010; INVESTOR PROTECTION IN EUROPE (G. Ferrarini/E. Wymeersch, eds., Oxford 2006).
[262] K.J. Hopt, 'Harmonisierung im europäischen Gesellschaftsrecht', ZGR 1992, 265 (293). For more detail, *see* C. Teichmann, BINNENMARKTKONFORMES GESELLSCHAFTSRECHT (Berlin 2006).
[263] Of the 16 initiatives described in the Annex to the Action Plan, this refers to numbers 1, 2, 3, 4, 5, 7, and 16.

directors; improved transparency of consultants on share voting rights; and enhanced information about groups of companies.

Through this the Commission gives the impression that it regards transparency as an essential component of substantive reform measures, as the steps that have been announced certainly will be when they are formulated into rules. But transparency is also – and perhaps should be primarily understood as – a regulatory approach.[264] Transparency rules allows lawmakers or regulators to abstain from defining the content of a regulation by a specific norm, leaving this to be determined instead by the market participants. Transparency rules can therefore be particularly expedient in cases where there is insecurity about the appropriate content, or where lawmakers' or regulators' ideas are threatened by resistance that they are either unwilling or unable to break, such as with the Action Plan on the grounds of subsidiarity, among others.[265] Transparency as a regulatory approach has three essential advantages: First, it strengthens the autonomy of the individual, supports the market mechanism with better data, and in the process makes the markets more attractive for professionals and private operators. Second, it represents a less restrictive, market-related means of regulation. And finally, it facilitates enforcement through public entities and private – here shareholders, particularly institutional investors. Transparency can also have negative effects, however, such as when essential information is hidden in a glut of other information (information overload), when transparency facilitates the defense against takeover bids and defensive mechanisms (management entrenchment), or when it is misused as advertising like the earlier German practice of ad-hoc disclosure.

The Commission apparently envisions mandatory regulations for most of the transparency measures listed in the Action Plan. This seems to take account of the recognition from the British and international Corporate Governance Code debate that transparency rules must generally be prescribed if they were not chosen by the participants themselves, as is the case with the comply-or-disclose/comply-or-explain mechanism of § 161 of the German Stock Corporation Act and others. Whether mandatory law or fall-back rules should be chosen for the harmonization of corporate law cannot be generalized. Economic impulses will be of

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[264] Regarding the following, *see* K.J. Hopt, 'Company Law Modernization: Transatlantic Perspectives', in RIVISTA DELLE SOCIETÀ 51 (2006) 906 (911ff). For the basics, *see* PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET (S. Grundmann/W. Kerber/S. Weatherill, eds., Berlin et al. 2001); on the boundaries of information-based shareholder protection, *see* B. E. Hermalin/M. S. Weisbach, 'Information Disclosure and Corporate Governance', JOURNAL OF FINANCE LXVII (2012), 195.

[265] For more on this, *see* K.J. Hopt, 'Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen' in FESTSCHRIFT FÜR HOFFMANN-BECKING (Munich 2013), p. 563 at 565 et s.

particular relevance, specifically information asymmetries, externalities, and collective action problems,[266] and legal protection issues will also play a decisive role. When the protection of shareholders and other stakeholders cannot be adequately balanced through the market and European lawmakers have to step in, it usually does not make sense to combine the mandatory protection with fall-back rules. Yet in some instances this can be effective if an entire group – shareholders, employees, and creditors – can negotiate protection in a legally binding procedure such as co-determination in the SE or in cross-border mergers.

Even when the transparency regulation is mandatory, this does not insure its adherence. The EU Commission's experience showed that there is a large range of quality in the justifications of the declarations of non-compliance from the companies in the various Member States. Sometimes there was no explanatory statement at all, while others contained inadequate or boiler plate language. This provided the impetus for the Commission to make the necessary corrections. The possibilities and problems related to the implementation of transparency rules can be itemized briefly using the Corporate Governance Code's comply-or-explain mechanism as an example. When market forces alone are not adequate and the goal is to proceed against actual infringements, the following enforcement mechanisms may be considered[267]: verification mechanisms within the corporation itself, such as a shareholders' committee (a problem in controlled companies); liability for a false statement or non-statement (problems with the causality, damage, and the right to sue, also the negative incentive among directors to reduce the liability risk through comparatively fewer and overly general explanations); voidability of discharge decisions, possibility also of resolutions of the general meeting or even the board of directors or supervisory board (with the danger of paralysis); inclusion of the Code rule(s) in the stock exchange admission requirements (then stock market and stock-market-law-related penalties, but only when the corporation is listed); verification procedures organized through private law (an example from accounting law would be §§ 342b ff HGB, German Financial Reporting Enforcement Panel/FREP); formal and/or substantive verification through an independent auditor (in Germany, compare the IDW Auditing Standard PS 345: Effects of the DCGK on the Statutory Audit); and, as in a number of southern Member States such as Spain and Portugal, intervention by the capital

[266] For particulars on European corporate law, *see* S. Grundmann, *supra* note 40, p. 50 et s. For a comprehensive discussion of dispositive law, *see* F. Möslein, DISPOSITIVES RECHT: ZWECKE, STRUKTUREN UND METHODEN (Tübingen 2011).

[267] See also ECLE, 'Making Corporate Governance Codes More Effective, A Response to the European Commission's Action Plan of December 2012', December 2013, see website *supra* note 123. As to recent reforms of corporate codes in Member States *see* for example for the UK Grant Thornton, Corporate Governance Review 2013, Governance steps up a gear, London 2013; for France afep/MEDEF, Corporate governance code of listed corporations, Amended in June 2013, Paris 2013.

markets authorities (problem: agency capacity, a weakening of self-governance, and possibly even agency interference in the requirements of the Code itself).

Regarding the selection of appropriate instruments for the harmonization of corporate law, an entire arsenal of types of measures comes into consideration, primarily Regulations and Directives. Both have well-known advantages and disadvantages. As demonstrated by the corporate law Directives and draft Directives,[268] Directives used to be preferred because of the latitude they allowed in their system-compatible implementation in the Member States. Since the financial crisis, however, there has been a stronger tendency in capital market law to embrace Regulations that are immediately valid without an implementation process. In opening up a new field of harmonization, or when areas are affected that are regulated in a very nationally path-dependent manner, the Commission has rightly chosen Recommendations with the intention of transitioning into Directives or even Regulations after a probationary period. Examples include the Commission Recommendations on the management and supervisory boards that have been mentioned several times above.[269] These methods as well as the continuation of the so-called Open Method of Coordination (OMC) deserve support. They allow "policy learning."[270]

3. Scope, Stock Exchange Law, Small and Medium-Sized Enterprises

The Action Plan makes only brief mention of the scope of its various planned measures,[271] but apparently they are not all to have the same scope of application. European corporate governance rules – those dealing with the qualitative improvement of corporate governance reporting and more meaningful corporate governance statements in the realm of comply or explain – are to be valid only for listed companies.[272] In contrast, European corporate law applies "in principle to all EU public limited liability companies." At the same time, the Commission guarantees that companies should carry no "unnecessary burden" and that it intends to make allowances for the special situation of SMEs.[273]

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[268] .See *supra* I 2 at the end.
[269] See *supra* I 2 notes 35 et s.
[270] H. Fleischer, *supra* note 256, ZGR 2012, 160 (176ff): 'open methods of coordination."
[271] *Action Plan, supra* note 7, sec. 1, p. 4 f.
[272] But see most recently the Cofferati Report, *supra* note 67.
[273] *See also Action Plan, supra* note 7, sec. 4.4, p. 13f on flexible legal forms for European SMEs.

These very general statements from the Commission address the problem that there are vastly diverse positions on the scope of application for corporate governance rules and European corporate law, a divergence that is not least related to their goals and methods. This ranges from a strict limitation to listed companies (in part even to the prime segment), to the distinction between public and private companies (in which the former include unlisted joint stock companies, while the latter also include closed joint stock companies in addition to all other companies), on through to the inclusion of the GmbH and family and business partnerships. Some suggest that there should be a distinction on the basis of size,[274] though to this point there has already been an effort in accounting law to avoid overburdening medium-sized and smaller companies (SMEs) and most recently even micro-entities (Micro Directive of 2012).[275] The answers to the Commission's consultation resulted in support for the distinction between listed/unlisted rather than public/private.[276] To that effect, there was broad consensus on implementing lower requirements and exemptions for small and mid-size enterprises.[277] According to the majority opinion of the Association of German Jurists,[278] the target group should be listed companies and – with regard to protection – also those companies that choose to be involved in a multilateral trading system, especially the open market, but not family companies and other private enterprises.[279] This opinion was directed at corporate governance rules, but it is relevant for European as well as national regulation. The fact that specific regulations may be advisable for listed companies demonstrates the new, internationally detectable development toward a special field of law relating to listed companies.[280] Internal market-induced, corporate law-related regulation requirements could also arise for other public enterprises, including those outside the joint stock company category. This cannot be established schematically by listing, type of law, size, and shareholding structure; instead it will depend on the individual protection requirements of the internal market.

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[274] *Feedback Statement, supra* note 118, p. 8, question 7.
[275] Directive 2012/6/EU of the European Parliament and of the Council from 14 March 2012 amending Council Directive 78/660/EEC on the annual accounts of certain types of companies as regards micro-entities, OJEU L 81/3, 21 March 2012.
[276] *Feedback Statement*, *supra* note 118, p. 8, question 7 with conclusions.
[277] *Feedback Statement, supra* note 118, p. 8 et s., question 13; ECLE 2012, *supra* note 123, para 4c, p. 16 et s.
[278] Association of German Jurists (Deutscher Juristentag), *supra* note 222, Resolution 2, in connection with the expert opinion of M. Habersack.
[279] *Cf. also* ECLE 2012, *supra* note 123, para 2c, p. 6: in particular listed companies; ECLE 2011, *supra* note 123, p. 5 et seq.: to be confined to publicly traded companies but not limited to regulated markets.
[280] For more on this discussion, *see* Association of German Jurists, *supra* note 222, *Resolutions of the Commercial Law Division,* with an expert opinion from W. Bayer.

We will have to wait to see how far the EU Commission will push its ambit with each of the measures it tackles. This will partially be determined by the prospective instrument, such as those measures that will be fulfilled in the form of Directives.[281] For example, the accounting regulations fundamentally encompass all joint stock companies including the German GmbH & Co (a commercial partnership with a limited liability company as general partner) albeit with incremental requirements that vary according to small, mid-size, and large companies, with the exception, on the other hand, of those with capital market connections. The transparency of ownership was directed only at listed companies from the start. The (draft) Shareholders' Directive is focused on all publicly listed companies whose shares are registered in a regulated market in a Member State. The future Transfer of Seat Directive is likely to encompass the same territory as the Mergers Directive – which suffered from the same core problem of co-determination – so it will apply to all corporations, not only to publicly listed companies. The same goes for regulations governing cross-border divisions. Any codified Company Law Directive would have to take all these particularities of scope into consideration, for it would be impossible to imagine debating each of these individual compromises once again during the already difficult codification process.

4. Codification and the Pros and Cons of a Model Law

The EU Commission's Action Plan announced that the Commission will prepare a European corporate law codification.[282] The plan is to include, among others, half a dozen Company Law Directives or their amended versions.[283] From a technical and legislative standpoint, a complete codification of corporate law in the sense of a European Stock Corporation Act[284] is impossible because anything more than a regulation of core areas is neither realistic nor desirable. Codifying the current, partial regulation of core areas into a Directive – as has already been carried out in banking law[285] and has been suggested by the European Parliament for European corporate law[286] – makes complete sense from the perspective of the

[281] Like all of the transparency measures (*supra* II 4 b, other than those relating to comply or explain), as well as possibly the last measure relating to group information and group interests.
[282] *Action Plan, supra* note 7, sec. 5, p. 15.
[283] The 1st, 2nd, 3rd, 6th, 11th and 12th Directives concerning transparency, formation and capital, mergers, divisions, foreign branches, and single-member private limited companies.
[284] *Supra* I 6 c at the end regarding the limitation to regulating core areas; *also Feedback Statement, supra* note 118, p. 8, question 8.
[285] Directive 2006/48/EC of the European Parliament and of the Council from 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJEU L 177/1, 30 June 2006.
[286] European Parliament, Resolution of 14 June 2012. *supra* note 111.

target group and users, and though it is complicated on purely technical grounds, it is doable. The devil is in the details, though, and here there is a particular danger that the compromises currently captured in written form will have to be revisited and dissected. More than a purely formal integration of the existing content cannot be expected, as desirable as it would be to use this opportunity to do away with conflicts and disagreements, to consider new developments and insights, and in the process to fully consider the changing economic and social environment.[287]

As is politically advisable, the Action Plan is affected by the fact that the EU Commission, in contrast to some of the suggested reforms and even the perspective instruments for their implementation, has followed a very "soft"[288] course of action. Oddly enough, the possibility of options – whether for Member States or for companies and their shareholders – has not been more closely examined, although these options will virtually shape the Takeover Directive, for example, and above all else play a very significant role in the academic reform debate that is reaching even beyond European corporate law.[289] Perhaps the Commission wants to reserve this path for the concrete negotiations.

In the case of so-called semi-public regulations, primarily including codes of conduct with a state-supported comply-or-explain mechanism such as § 161 of the German Stock Corporation Act, the EU Commission wants to take indirect action only. The Commission rightly rejected a separate European Corporate Governance Code in connection with the 2003 Action Plan. The High Level Group of Company Law Experts[290] had already recommended against this in light of the significant differences between the national corporate laws, such as those dealing with the management and supervisory boards, and this evaluation is overwhelmingly shared by the Association of German Jurists,[291] by polls, and in the academic

[287] In connection with corporate governance, *see* K.J. Hopt, *supra* note 3, AM. J. COMP. L. LIX (2011) 1 (8 f); similar fears are expressed by the (former) Reflection Group on the Future of EU Company Law (*supra* note 52), ECFR 2013, 305 (327). For more on the experiences with codification in connection with the European sales law recommendation, *see* R. Zimmermann, 'Codification', EUROPEAN REVIEW OF CONTRACT LAW (ERCL) 8 (2012), 367.
[288] Cf. also the so-called Open Method of Coordination (OMC) in the European Union; W. Kerber/V. Vanberg, 'Policy Learning in Europe: The Open Method of Coordination and Laboratory Federalism', JOURNAL OF EUROPEAN PUBLIC POLICY 14 (2007) 227; for a transmission into European corporate law, *see* H. Fleischer, *supra* note 256, ZGR 2012, 160 (178ff).
[289] For a comprehensive explanation, *see* K.J. Hopt, EUROPÄISCHES ÜBERNAHMERECHT, *supra* note 108, p. 99ff; G. Hertig/J. A. McCahery, 'Optional Rather than Mandatory EU Company Law: Framework and Specific Proposals', ECFR 2006, 341; M. Eckardt/W. Kerber, 'Horizontal and Vertical Regulatory Competition in EU Company Law: The Case of the European Private Company (SPE)', available at < http://ssrn.com/abstract=2307427 >.
[290] *Supra* I 2 a, note 30.
[291] Association of German Jurists 2012, *supra* note 222, Resolution 5b.

literature. It is to be expected, however, that the EU Commission may try again with comply or explain. Though the talk is currently of a non-legislative initiative, a Recommendation such as that related to the management board and supervisory board [292] is equally likely. Considering the significance that the Commission has granted corporate governance, however, on the long run a European directive or even a European regulation may be appropriate.

Measures related to a European Model Companies Act were not announced in the Action Plan. This is understandable given the very cautious reaction to the relevant consultation questions.[293] In fact, pushing through a European Model Companies Act may have few advantages compared to large national codifications such as the UK Companies Act of 2006 (1,300 articles, 700 pages), the German Aktiengesetz (410 paragraphs with 70 reforms since 1965), and French corporate law with its many special corporate forms.[294] Yet, for Member States without a well-developed and codified corporate law, for transition economies and for countries outside the EU, such model laws can be very useful.[295]

IV. Conclusions and Propositions

1. European corporate law is facing a revival. The EU Commission introduced a second Action Plan on 12 December 2012 that combines corporate law and corporate governance rules. The Action Plan was well carefully prepared through the Green Paper on the European Corporate Governance Framework, the Reflection Group Report of 5 April 2011, and the EU Commission's poll on the future of European corporate law of 20 February 2012. It contains 16 different and widely disparate initiatives, some to be implemented through Directives or amendments thereof but some of which are not to be legislatively enforced or are up for more consideration. As of mid-2015 considerable progress has been made, but the political fight on the Draft Shareholders Rights Directive and other initiatives continues.

[292] *Supra* notes 35 et s.
[293] *Feedback Statement, supra* note 118, p. 8, question 13: only one-third of the responses were positive. Unfortunately, the question confusingly lumped together the regulation of options and the Model Law. For more on the ongoing initiatives of a European Model Company Act, *see* M. Habersack/D. A. Verse, *supra* note 40, § 4 ref. no. 40.
[294] ECLE 2012, *supra* note 123, para 5d, p. 21. .
[295] For more on this, *see* J. Dine et al., *supra* note 40, Part II. Cf. also THE EUROPEAN MODEL COMPANY ACT (P.-H. Conac/C. Teichmann, eds., Berlin 2016, forthcoming).

2. Of central importance is the European Court of Justice's case law on the freedoms of the Treaty for companies, and their opportunity to do business across national borders. The ECJ is not able to create European corporate law solely through primary law in the Treaties, however. This must be complemented with secondary law in the field of corporate law as demonstrated by the Sevic decision or the Merger Directive that ran parallel to this decision. One could speak of a necessary interaction between "negative integration" and "positive integration" in this respect.

3. There are opposing views among academics about the future of European corporate law. Opponents of European corporate law can be found among economists, who rely only on the market and competition, and among interest groups and Member States that want to cling to the status quo. On the other side partisans of European corporate law are often too quick to treat regulatory differences as market access restrictions related to fundamental freedoms. As is often the case, the truth lies in-between. The reactions to the EU Commission's Consultation of 20 February 2012 and similar statements on the future of European corporate law, in particular by the European Parliament and the European Company Law Experts (ECLE), suggest that harmonization of certain core areas of European corporate law and governance would be useful and should be undertaken.

4. Economic and subsidiarity issues make European corporate law in general less important than European financial, banking and capital market law. For this reason there should not be a European Stock Corporation Act nor an encompassing harmonization of corporate law. But there are definitely areas in which European corporate law is a necessary integration policy, and this is not limited to cross-border problems. In this way, the discussion is moving away from overgeneralized, theoretical, interest-driven, or ideological positions and arguments and toward an identification of core areas – as put forward in this article, seven – and toward concrete, factual integration issues.

5. The two primary goals of European corporate law are free mobility and a minimum level of protection for shareholders. Both goals are related. The EU Commission's method of choice for arriving at these goals is to increase transparency in a variety of different areas. In principle this is a good choice since transparency as a method of regulation strengthens private autonomy and supports market mechanisms. Yet there are diverse opinions on the scope of the various planned measures, ranging from a strict limitation to listed companies on to including all joint stock companies and even beyond. A European Model Companies Act,

beyond contributing to the discussion on general principles and inspiring some newly accepted Member States, promises little given the large national codifications in the UK, Germany and France.

6. When speaking of European uniform law, European corporate law forms rank first, and primary among these is the SE, which serves as the flagship of European corporate law. These legal forms are merely options (e.g., the 29th model), but they exert a useful competitive pressure on national lawmakers. This also applies in different ways to the EEIG, the SUP and, though the Commission has at least for the moment abandoned them, the SPE and the European Foundation.

7. Accompanying this optional uniform law is the harmonization of corporate law. The most important core area here is free cross-border trade and organization. The justifiable expectation in this respect is that the European Union will clear away the existing barriers to formations, mergers, transfers of seat, and divisions as far as possible. Unfortunately, however, the Commission has announced only further analyses and studies in this area despite action really being needed. The area of corporate finance is still covered by the practically unchanged content of the revised Capital Directive, which has been strongly criticized by economists and international experts.

8. The management and control of the corporate requires a legal framework. This would also be helpful on the European level. The Action Plan provides here for rather disparate measures, including the effective PR tools of diversity and the remuneration of supervisory board members. There is still no coherent approach for selecting the most important and promising from the many reform steps leading toward better corporate governance that are currently on the table.

9. The announced intention to involve shareholders – and especially institutional investors – more fully in corporate governance deserves support. The steps related to this action, however, apart from more transparency and giving shareholders a say on pay, are relatively cautious, and their outcome remains to be seen. This would have made it all the more reasonable to place more emphasis on the aspect of corporate governance.

10. It is especially interesting that, as of mid-2015, the EU Commission, the European Council and the European Parliament are in their deliberations on the Draft Shareholders

Rights Directive also addressing the issue of controlling shareholders and corporate groups, at first by regulating related party transactions and later on by specific rules on corporate groups. This has long been called for, and the necessary groundwork has been accomplished. It certainly will not and should not be a comprehensive European law governing groups such as the German corporate law of groups (Aktienkonzernrecht). Beyond the Action Plan's proposed measures for better information on group structures and the recognition of group interest, however, further items that should be discussed include the corporate-wide special investigation, regulations of the structure for groups of companies, a prohibition against listing corporate pyramids that are being misused, rules on entry and exit, and duties of management in a crisis such as wrongful trading. As to European takeover law, the EU Commission is shying away from reforming the 13th Company Law Directive on Takeovers. This is politically understandable, but unfortunate.

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