EC Company Law Directives and Regulations: How Trivial Are They?

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Luca Enriques
University of Bologna and ECGI

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Abstract

What role does EC legislation in the corporate law area play within the EU? How much does it shape Member States' corporate laws? And how relevant is it for the corporate governance of EU companies and their management? At first sight, the EC appears to have played and to be playing a central role in shaping EC corporate law, with the high number of directives and regulations covering a wide range of corporate law issues. One might then think that EC institutions have a strong influence upon Member States' corporate laws, whether because they have intervened in the area or because they may do so. Quite to the opposite, EC company law directives and regulations appear to have had thus far very little impact on national company laws and, more to the point, on EU businesses' governance and management. First, EC corporate law does not cover core corporate law areas such as e.g. fiduciary duties and shareholder remedies. Second, EC corporate law rules are underenforced. Third, in the presence of very sporadic judiciary interpretation by the European Court of Justice, EC corporate law tends to be implemented and construed differently in each Member State, i.e. according to local legal culture and consistently with prior corporate law provisions. Fourth, when it has introduced new rules, it has done so with respect to issues on which Member States would have most probably legislated even in the absence of an EC mandate. Last but not least, most EC corporate law rules can be categorized as optional, market mimicking, unimportant or avoidable. To the contrary, national corporate laws contain core corporate law rules, which do have an impact upon EU companies' governance and management. There are, of course, due qualifications to the triviality thesis. First of all, a few rules or sets of rules indeed have had or are bound to have a meaningful impact upon companies and their operations. Second, EC corporate law has increased the regulatory burden of corporate laws across the EU, correspondingly securing higher rents for certain interest groups. Third, secondary EC corporate law has had and will continue to have an impact on the evolution of European corporate laws and the dynamics of regulatory competition. Finally, its production has become an industry itself, employing many EC and national functionaires and lobbyists, and creating occasions for rent extraction by politicians.

Keywords: European Union, EC company Law, regulatory competition, interest groups, political economy of EC company law

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Luca Enriques
University of Bologna, Faculty of Law
Via Zamboni, 29
Bologna, I-40126
Italy
phone: 39-051-6449849, fax: 39-051-3396695
e-mail: luca.enriques@unibo.it

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I. Introduction

In a recent article on the dynamics of state competition for corporate charters in the US, Mark Roe argues that Delaware's main competitor in making corporate law is the federal government.[1] Since "Delaware players know that the federal government can take away their corporate lawmaking power in whole or in part,"[2] the federal government has a heavy influence on the state's corporate law.[3] This intuition, that, as

[1] Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, *passim* (2003).
[2] *Id*. at 592.
[3] *Id*. at 591.

Roe argues, is confirmed by the history of Delaware law and federal politics, law, and regulation,[4] carries significant implications for the debate on competition for corporate charters in the US.[5] And it is also relevant to the European debate on whether *Centros* and its progeny of cases[6] can trigger regulatory competition within the EU.[7] According to Roe, "those who analyze the EU's *Centros* debate need to understand that the full parallel [with the American race] brings Brussels … into the picture. Whether Brussels is effective, defective, or ineffectual affects the race."[8]

While Member States are not now engaged in competition for corporate charters, and cannot be expected to engage in one in the near future,[9] the very presence of a centralized policymaker within the EU appears to play a role in determining the likelihood of a US-style scenario, and more generally in the evolution of corporate laws[10] within the Union.

This article inquires into the role played by EC legislation in the sphere of corporate law. Parts II and III respond to the question of how far EC legislation actually shapes corporate laws in the various Member States, and, in short, how important it is for the governance and management of EU companies.

At first sight, the EC appears to play a central role in shaping EU corporate laws, here conceived broadly to include also accounting law and securities law regulating issuers. EC harmonization measures under Article 44(2)(g) of the EC Treaty,[11] now

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[4] *See Id*. at 600-34 (providing evidence supporting the view that the federal government "can displace corporate law," "[c]an [i]nspire [f]ear" in Delaware players, and "deeply and directly affects the corporate internal affairs that Delaware seeks to regulate"). *See also* William W. Bratton, *Corporate Law's Race to Nowhere in Particular*, 44 U. TORONTO L.J. 401, 418-25 (1994) (similarly providing evidence of the fact that the federal threat to intervene in the corporate law area affects Delaware law). For a strong critique of Roe's thesis *see* Roberta Romano, Is Regulatory Competition a Problem for Corporate Governance? 26-35, Jan. 14, 2005, unpublished manuscript (on file with the author).

[5] *See* Roe, *Delaware's Competition*, *supra* note 1, at 634-43.

[6] *See* Cases C-212/97, *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459; C-208/00, *Überseering BV v Nordic Construction Baumanagement GmbH* [2002] ECR I-9919; C-167/01 *Kamer van Koophandel v Inspire Art* [2003] ECR I-10155.

[7] Roe, *Delaware's Competition*, *supra* note 1, at 643-44.

[8] *Id*. at 644.

[9] *See, e.g.,* Luca Enriques, *EC Company Law and the Fears of a European Delaware*, 15 EUR. BUS. L. REV. 1259 (2004); Tobias H. Tröger, Choice of Jurisdiction in European Corporate Law: Perspectives of European Corporate Governance (July 24, 2004), *at* http://ssrn.com/abstract=568782 (both arguing that a scenario similar to the American one, in which one or more European States engage in chartermongering is highly unlikely).

[10] The terms "corporate law" and "company law" are used as synonyms throughout this article. The same is true for the terms "corporations" and "companies."

[11] Article 44(2)(g) of the Treaty establishing the European Community grants the Council the

cover a number of areas, including formation of companies, distributions to shareholders, new issues of shares, mergers, divisions, accounting, auditing, mandatory disclosure, insider trading, takeovers, and so on.[12] The EC has also created a European legal form, the European Company, which any medium-to-large EU business may adopt.[13]

One may think that, in the face of EC's pervasive intervention in the field, the European corporate law landscape is indeed similar to the American as recently described by Mark Roe; that is, that EC institutions in Brussels have a strong influence upon Member States' corporate laws and, by implication, upon EU companies, either because they have already intervened in the area or because they may do so in the future. But, as we shall see, this is not the case.

Quite the opposite, existing EC corporate law is mostly trivial, in the sense that, with due but limited exceptions, it has very little impact on the way companies, and especially medium and large ones, are directed, managed and controlled: first, EC corporate law does not cover such core areas as fiduciary duties and shareholder remedies; second, it is underenforced; third, given the very sporadic judiciary interpretation of the European Court of Justice, EC corporate law tends to be implemented and construed differently in each Member State, i.e. according to local legal culture and consistent with prior provisions; fourth, when it has introduced new rules, it has done so with respect to issues on which Member States would have most probably legislated even in the absence of an EC mandate; finally, most EC corporate law rules can be categorized as optional, market-mimicking, unimportant or avoidable.

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power to "coordinate to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community."

[12] Appendix 1 provides the list of all relevant EC directives and regulations.

[13] In 1985, the EC introduced another legal form, the European Economic Interests Grouping or EEIG (*see* Council regulation 2137/85/EEC of 25 July 1985). This legal form, which has been quite successful especially in France and Belgium (*see* http://www.libertas-institut.com/uk/uk_Vorlage.htm, whereby a list of 1447 EEIGs), will not be considered in here, because arguably it is not a company in any meaningful sense: Member States are free to "determine whether or not groupings registered at their registries, pursuant to Article 6, have legal personality" (Article 1, para. 3); members' "participations" in the grouping can only be transferred with the unanimous consent of other members (Article 22, para. 1); and grouping's members are jointly and severally liable for the grouping's debts and liabilities of whatever nature (Article 24, para. 1). On legal personality, free transferability of shares and limited liability as core features of corporations *see* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 6-11 (2004).

As a result, EC directives and regulations play no significant role in addressing the agency problems stemming from the corporate form, because there is very little they prohibit or require or enable to do. By contrast, national corporate laws, as argued in part IV.B, contain the core rules, which do have an impact upon EU companies' governance and management.

Of course, the triviality hypothesis which is tested in Parts II and III does not apply to European Court of Justice case law in the area of freedom of establishment. *Centros*, *Überseering* and *Inspire Art*[14] have in fact made it somewhat easier for start-up and closely-held companies to engage in regulatory arbitrage,[15] already prompting national reforms of the regulation of such companies.[16] However, these case law developments are beyond the scope of this article, which deals with *secondary* EC corporate law, i.e. directives and regulations.

Finding that, notwithstanding the steady stream of secondary EC corporate law rules over the last three decades, EC legislation is only marginally important for EU companies (other than smaller ones), Part IV qualifies the triviality thesis, by identifying exceptions to it and by highlighting the major impact of directives and regulations in this area: they raise the cost of doing business by making it compulsory or highly advisable to obtain the advice of some professionals, such as accountants and lawyers, thereby securing these professionals' rents. Further, EC corporate law does affect the evolution of European corporate laws and, to some degree, the dynamics of regulatory competition. Finally, it has developed as an industry itself, employing a number of EC and State officials and lobbyists, and creating occasions for rent extraction by politicians. Part V concludes.

II. The Triviality Thesis (1): Scope, Enforcement, Interpretation and Timing of EC Corporate Law Rules

[14] *See supra* note 7.

[15] *See, e.g.,* Luca Enriques, *EC Company Law and the Fears of a European Delaware*, *supra* note 9, at 1261.

[16] An overhaul of Dutch corporate law is currently at its final stage (*see* Harm-Jan de Kluiver, *Inspiring a New European Company Law?*, in 1 EUR. COMPANY & FIN. L. REV. 121, 132), while in France Loi No 2003-721 of August 1, 2003 got rid of the most apparent competitive disadvantage of French vis-à-vis English corporate law, i.e. minimum capital for (private) limited liability companies (sociétés à responsabilité limitée) (Article 1).

Since 1968, the EC has adopted 37 directives[17] and 10 regulations[18] in the area of corporate law,[19] and its output, after a decade or so of deep crisis,[20] has been significantly growing since 2001 (Table 1).

[Insert Table 1 approximately here]

Undeniably, national corporate laws have changed as a consequence of the harmonization measures.[21] As the European Commission itself put it in a recent Communication, "[o]ver the years, the EU institutions have taken a number of initiatives in the area of company law, many leading to impressive achievements. … [T]hese European measures have had an important impact on national company law."[22] This view is also shared by some European legal scholars. For instance, according to the Danish author of an EC company law treatise, "a quite comprehensive Community law regulation on most material aspects in the capital companies has been achieved."[23]

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[17] A directive is a legislative act which, according to Article 249, EC Treaty, "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." National authorities have to transpose directives, i.e. to introduce domestic laws and regulations consistent with them. In practice, the content of directives is often so specific as to leave national authorities little or no choice of form and methods.

[18] A regulation is a legislative act which, again according to Article 249, EC Treaty, "shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

[19] Eleven (including the Takeover Directive) are "core" corporate law directives (ten) or regulations (one), while eighteen measures deal with auditing and accounting issues (eleven directives and seven regulations). The remaining eighteen measures are in the securities law area (sixteen directives and two regulations); of these eighteen securities law measures, ten have been repealed by directives consolidating or updating them. *See* Appendix 1.A.

[20] *See* Klaus J. Hopt, *Common Principles of Corporate Governance in Europe?*, *in* THE CLIFFORD CHANCE MILLENNIUM LECTURES 105, 127 (Basil S. Markesinis ed. 2000) (describing the "political and other difficulties with company law harmonization" experienced by the European Commission during the Nineties).

[21] *See, e.g.,* Uwe Blaurock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L.J. 377, 383 (1998).

[22] *See* MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION - A PLAN TO MOVE FORWARD. COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT 6 (COM (2003) 284(01)) (emphasis and footnotes omitted).

[23] *See* ERIK WERLAUFF, EU-COMPANY LAW. COMMON BUSINESS LAW OF 28 STATES 100 (2nd ed. 2003) (emphasis omitted). *See also* Jan Wouters, *European Company Law:* Quo Vadis*?*, 37 COMMON MKT. L. REV. 257, 258-267 (2000) ("what has been realized by the Community in the field of company and accounting law is impressive"); Karl Gleichmann, *Perspectives on European Company Law*, 14 FORUM INTERNATIONALE 3, 3-4 (1991) ("the work of harmonizing national company law in the Community must be counted a success. This is shown not only by the number of directives that are in force … . It is also true when measured by the importance of the areas of the law that have been coordinated"). VANESSA EDWARDS, EC COMPANY LAW 1 (1999) (describing as "significantly realized"

Does this mean that EC rules have a real impact on the governance and management of EU corporations?[24] As this and the following part argue, the answer is no: a closer look at the relevant directives and regulations reveals that EC corporate law, especially with respect to well established companies, is trivial, due to its scope, sporadic enforcement and parochial interpretation, because it usually covers areas on which Member States had already or would have legislated anyway, and, as the next part argues, given that most of its rules are optional, market-mimicking, unimportant or avoidable.

A. Scope of EC corporate law. The efforts to cover the core areas of corporate law have thus far failed. The Commission proposals on the corporate governance of companies and on company groups have never even been close to adoption,[25] nor is there any evidence that they have affected national legislation in any way.[26] As Harald Halbhuber notes, the directives that have instead been approved

> do not purport to deal with crucial issues like fiduciary duties, exit, expulsion and redemption, transfer of shares etc. The legal rights and remedies of shareholders against the management of the company in the operation of the business, involving issues like derivative suits and directors' liability, and finally, the liability shield itself and ways to pierce it, remain matters of national law.[27]

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the prediction by Clive Schmitthoff according to which company law would "emerge as a truly European law"); PAUL DAVIES, GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW 112 (7th ed. 2003) (describing the impact of EC law on English company law as "substantial"); Benoît Lecourt, *L'avenir du droit français des sociétés: que peut-on encore attendre du législateur européen?*, 2004 REVUE DES SOCIÉTÉS 223, 225 (entire areas of company law are under EC influence; harmonized rules have been an important factor of modernization for European firms).

[24] Note that the question here is not whether EC secondary legislation in the corporate law area has helped achieve the objective of markets integration. For a sceptical assessment on EC securities law's role in the building of a single EU securities market *see* EILÍS FERRAN, BUILDING AN EU SECURITIES MARKET 36-41 (2004).

[25] *See, e.g.,* EDWARDS, EC COMPANY LAW, *supra* note 23, at 389, 391 (describing the legislative work done on these proposals and reporting that they have been abandoned).

[26] This is all the more true of the EC Commission's non-binding "recommendations." They are, in fact, usually ignored by Member States. *See, e.g.,* Luca Enriques, *Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911, 917 (2003). To be sure, whenever national policymakers happen to have the same policy agenda as the Commission, a recommendation may help make the case for that policy choice, lending it a European flavor and hence make it more appealing. But whenever EC and national policymakers' agenda differ, the impact of recommendations is nil. This justifies our decision here simply to ignore them. For the same reasons, also EC Commission's Communications in this area will be ignored.

[27] Harald Halbhuber, *National Doctrinal Structures and European Company Law*, 38 COMMON MKT. L. REV. 1385, 1406 (2001) [hereinafter: Halbhuber]. *See also* CHRISTIAAN W.A. TIMMERMANS,

B. Sporadic enforcement, parochial interpretation. The impact of EC corporate law on individual jurisdictions is lessened by the well known fact that the enforcement mechanisms of EC corporate law are imperfect to say the least.[28] Even more fundamentally, one can doubt that anything really worth calling EC corporate law exists "off the books."

1. Underenforcement. The Commission has traditionally lacked the resources to monitor Member States compliance with corporate law directives;[29] and no significant enforcement "from the bottom," in the form of European Court of Justice (ECJ) preliminary reference procedures from national courts has ever made up for this. Thus far, the ECJ (which has no docket control) has decided upon no more than twenty-five preliminary reference procedures dealing with secondary EC corporate law.[30]

COMPANY LAW AS IUS COMMUNE? 3 (2002) (similarly stating that "attempts to harmonise classic issues of company law such as the institutional structure of the public company, minority protection, and directors' liability, failed"); Jan Andersson, *The High Level Group and the Issue of European Company Law Harmonisation – Europe Stumbles Along?*, *in* THE REGULATION OF COMPANIES. A TRIBUTE TO KRÜGER ANDERSEN 183, 186 (Mette Neville & Karsten Engsig Sørensen eds. 2003) (suggesting that "the legislative efforts of the EU have to a large extent … been concerned with matters of lesser economic importance or at least with issues of relatively minor practical value").

[28] *See, e.g.,* Klaus J. Hopt, *Company Law in the European Union: Harmonisation and/or Subsidiarity*, 1 INT'L & COMP. CORP. L.J. 41, 57 (1999).

[29] *See* EDWARDS, EC COMPANY LAW, *supra* note 23, at 11. *See also* Gisbert Wolff, *The Commission's Programme for Company Law Harmonisation: The Winding Road to a Uniform European Company Law?*, in E.C. FINANCIAL MARKET REGULATION AND COMPANY LAW 19, 24 (Mads Andenas & Stephen Keynon-Slade eds. 1993). Thus far, the European Court of Justice has decided on no more than eleven proceedings against Member States for failure to implement corporate law directives (Lexis search of CELEX European Union Cases database, Jan. 2, 2005. *See* Appendix 2.A). Nine of them concerned failure to implement directives within the deadline provided for in the directives themselves. One of them concerned failure to transpose two articles in a directive and only one dealt with the more substantive issue of whether the implementing rules had correctly transposed the directive's provisions (*see infra* text accompanying note 37). The EC Commission website reports nine infringement procedures in the area of "Company Law and Financial Reporting" between 1998 and 2004 (of these, four were brought in 2004) (*see* http://www.europa.eu.int/comm/internal_market/financial-reporting/infringements_en.htm; last visited on Jan. 2, 2005). No infringement proceedings are reported with respect to securities directives and regulations (*see* http://www.europa.eu.int/comm/internal_market/en/finances/infr/index.htm; last visited on Jan. 2, 2005).

[30] LexisNexis search of CELEX European Union Cases database, Jan. 2, 2005. *See* Appendix 2.B. The preliminary rulings had been requested by courts from Greece (nine requests, for a total of seven rulings: in two instances two cases were decided jointly), Germany (eight requests, for a total of seven rulings: in one instance two cases were decided jointly), the Netherlands (three), Austria (one), Belgium (one), France (one), and Spain (one). For comparison, just between 1998 and 2002 the Court decided upon or otherwise completed no fewer than 1129 preliminary reference proceedings. *See* EUROPEAN COURT OF JUSTICE, ANNUAL REPORT FOR YEAR 2002 158, *at* http://curia.eu.int/en/instit/presentationfr/rapport/stat/st02cr.pdf. It is also interesting to note that sixteen out of the twenty-five cases involved proceedings between private parties on the one hand and the State on the other (as prosecutor or law enforcer in three cases, as bankruptcy administrator in eight of the nine Greek cases, as tax authority in two cases, as company register in two cases, and as regulator of auditors in one case).

Of course, Member States do implement directives, although often with considerable delay. However, major instances of implementing rules that are clearly at odds with the text of the directives can be found throughout the EU. To mention but one, in implementing the Fourth Council Directive of July 25, 1978 ("Fourth Directive"),[31] Germany simply omitted a provision transposing Article 2, para. 5.[32]

More insidiously, Member States have sometimes failed to enforce implementing rules. Again, Germany is a case in point with respect to the obligation to disclose annual accounts, as imposed by the Fourth Directive.[33] Although most private companies (GmbHs) failed to comply, no sanction ever followed, because rules on sanctions had been crafted in such a way as to make them practically impossible to apply.[34] Fifteen

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[31] Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, 1978 O.J. (L 222) 11.

[32] *See* David Alexander, *A European True and Fair View?*, 1 EUR. ACCT. REV. 59, 64 (1993). *See also* Karel Van Hulle, *The True and Fair View Override in the European Accounting Directives*, 6 EUR. ACCT. REV. 711,716 (1997) ("Some Member States (Germany, Austria, Finland and Sweden) were so unhappy about [the true and fair view concept] that they refused to fully implement it"). Article 2, para. 5, provides that

> "[w]here in exceptional cases the application of a provision of this Directive is incompatible with the obligation laid down in paragraph 3, that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3. Any such departure must be disclosed in the notes on the accounts together with an explanation of the reasons for it and a statement of its effect on the assets, liabilities, financial position and profit or loss. The Member States may define the exceptional cases in question and lay down the relevant special rules."

Germany decided not to introduce a provision expressly transposing Article 2, para. 5, on the grounds that it was superfluous: such an implementing rule would only have stated explicitly what could be derived from the general principle in German law, according to which rules have to be construed consistently with the Directive's legislative intent as expressed in Article 2. *See, e.g.,* MATHIAS HABERSACK, EUROPÄISCHES GESELLSCHAFTSERCHT, 233 n.47 (2nd ed. 2003) (reporting that this view was endorsed by the Government commission in charge of drafting the rules implementing the Fourth Directive); Dieter Ordelheide, *True and Fair View: A European and a German Perspective. A Commentary on 'A European True and Fair View?' by David Alexander*, 2 EUR. ACCT. REV. 81, 86 (1993) ("The so-called functional interpretation of the law can be regarded as an equivalent to the overriding property of the true and fair view of Art. 2 (5)"). Although, as is argued immediately below, it is impossible to tell what the content of an EC corporate law provision is until the ECJ decides upon it, it would be surprising if Article 2, para. 5, were to be construed as simply meaning that the specific provisions of the Fourth Directive have to be construed according to the legislative intent. *See* Axel Haller, *Financial Accounting Developments in the European Union: Past Events and Future Prospects*, 11 EUR. ACCT. REV. 153, (2002) (hereinafter: Haller) ("[Article 2, para. 5,] ranks professional judgement higher than codified rules or standards").

[33] *See* Article 47.

[34] *See, e.g.,* EDWARDS, EC COMPANY LAW, *supra* note 23, at 26-27. Similarly, in Spain "the law does not establish a penalty for not … [depositing annual accounts in the Registro Mercantil] unless the company goes bankrupt. This implies that not all firms, especially the smaller ones, comply with this obligation …." María Gutiérrez & Josep A. Tribó, Private Benefits Extraction in Closely-Held Corporations: The Case for Multiple Large Shareholders 7 (October 2004) (ECGI Working Paper No. 53/2004), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=302756.

years after the deadline for the implementation of the relevant EC provisions,[35] the ECJ finally declared that Germany had failed to comply with its obligations under EC law.[36] Despite changes in the rules sanctioning the violation of the disclosure obligation so as to make it easier for sanctions to be applied,[37] many German companies still fail to disclose their accounts.[38] This warrants the suspicion (admittedly, only the suspicion) that the accounting rules implementing the Fourth directive may also be commonly violated: in the absence of disclosure to the public, the incentive to draw true and fair accounts is definitely less.[39]

EC securities law, as the Lamfalussy Report recognized,[40] is also a field in which Member States have often violated Community law with very little subsequent EC enforcement.[41] It is too early to tell whether the new wave of securities directives,[42] together with the Lamfalussy architecture and especially its level 3 and level 4 regulatory tools,[43] will change this state of affairs.[44]

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[35] *See* Article 55, para. 2(d), Fourth Directive.

[36] Case C-191-95, *Commission v. Federal Republic of Germany*, [1998] ECR I-5449.

[37] *See, e.g.,* HABERSACK, EUROPÄISCHES GESELLSCHAFTSERCHT, *supra* note 32, 69.

[38] *Cf.* Klaus D. Höfner, *Die Offenlegungsplicht bei der GmbH & Co. KG erneut auf dem Prüfstand*, 2004 NEUE JURISTISCHE WOCHENSCHRIFT 475, 476 (stating that, despite the absence of statistical data, it is clear that the majority of the 100,000 German GmbH & Co. KG – one of the legal forms available to German businesses to which the Fourth Directive applies – fail to disclose their accounts).

[39] Not to mention that in Germany annual accounts prepared according to company law rules are relevant also for tax purposes (*see e.g.* Haller, *supra* note 32, at 157), which of course does not encourage compliance with the true and fair view principle.

[40] *See* FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS 14-15 (Brussels, 15 February 2001).

[41] *See, e.g.,* Karel Lannoo, *A European Perspective on Corporate Governance*, 37 J. COMMON MKT. STUD. 269, 282 (1999) (with specific reference to the first insider trading directive and to Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, 1988 OJ (L 348) 62); NIAMH MOLONEY, EC SECURITIES REGULATION 153-54 (2002) (with respect to Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, 1980 OJ (L 100) 1). *See* also *supra*, end of note 29. Katharina Pistor suggests that accession countries may have adopted a "comply but don't enforce strategy" with respect to EC corporate law measures such as Directive 88/627/EEC (*supra*). Katharina Pistor, *Enhancing Corporate Governance in the New Member States: Does EU Law Help?*, *in* LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION 339, 352 (George A. Bermann & Katharina Pistor eds. 2004).

[42] For a complete list of these *see infra*, Appendix 1.

[43] Under the "Lamfalussy Process," "the key objective of level 3 [is] to ensure consistent, timely, common and uniform implementation of Level 1 and 2 acts in member states, via enhanced co-operation and networking among EU securities regulators," while "[a]t level 4, the Commission and the member states would strengthen the enforcement of community law" (Gérard Hertig & Ruben Lee, *Four Predictions about the Future of EU Securities Regulation*, 3 J. CORP. L. STUD. 359, 363 (2003)). *See infra* text preceding note 189 for a brief description of Lamfalussy approach's level 1 and level 2 measures.

A process of "intentional or unintentional erosion"[45] may also take place, by which new national laws modify rules implementing EC directives in a way inconsistent with the latter, a phenomenon "which may well occur without the Community authorities being aware of it or being in a position to evaluate its impact."[46]

Good examples of erosion can be found in recent corporate law developments in Italy. The comprehensive corporate law reform of 2003 blatantly violates the Second Directive[47] in several respects. For instance, contrary to its Article 18, para. 1, which bans subscription of own shares outright, Article 2357-*ter*, para. 2, of the Italian Civil Code now provides that the shareholders' meeting may authorize the company to exercise the pre-emptive rights pertaining to its treasury shares and thus to subscribe its own shares.[48] Or, against the Second Directive's Article 13, the provisions on conversion of companies do not require an expert report assessing that the value of the net assets of a private limited liability company ("società a responsabilità limitata") being converted into a public company ("società per azioni") corresponds at least to the transformed entity's legal capital.[49]

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[44] According to an experts group appraising the impact of the Financial Services Action Plan, "at present, enforcement is not sufficiently effective, in particular because of lack of political impetus, infringement procedures that are too time-consuming and insufficient allocation of Commission resources." Securities Expert Group, Financial Services Action Plan: Progress and Prospects. Final Report 17 (May 2004), *at* http://www.europeansecuritisation.com/pubs/FSAP_Stocktaking_Report.pdf. *See also* Hertig & Lee, *Four Predictions about the Future of EU Securities Regulation*, *supra* note 43, at 367 (expressing the view that the Lamfalussy method will fail to solve the problem of weak enforcement of EC securities law).

Similarly, it has been argued that the recent steps forward in EC accounting regulation, and especially the adoption of International Financial Reporting Standards, may have less impact than commonly expected, due to the fact that, as recent scandals in the US and in Europe have shown, proper enforcement of accounting rules is crucial and, at present, totally left to Member States. *See* Karel Lannoo, *The Emerging Framework for Disclosure in the EU*, 3 J. CORP. L. STUD. 329, 352 & 357 (2003).

[45] *See* RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE 265 (1988).

[46] *Ibid*.

[47] Second Council Directive 77/91 of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 1977 O.J. (L 26) 1.

[48] *See critically* Giuseppe B. Portale, *Riforma delle società di capitali e limiti di effettività del diritto nazionale*, 2003 LE SOCIETÀ 261, 264. *See also Ibid.* for another example of erosion concerning the EC rules on divisions.

[49] *See* Luca Enriques, *Spunti in tema di strumenti finanziari partecipativi e ibridi e di azioni correlate e riscattabili (con un caveat sulle trasformazioni elusive da S.r.l. a S.p.a.)*, *in* NUOVO DIRITTO SOCIETARIO 107, 112-13 (Maurizio de Tilla et al. eds. 2003).

Finally, the fact that directives have no "direct horizontal effect" further dulls the impact of EC legislation on corporate law within the Member States. As the ECJ so frequently reiterated, directives are addressed to Member States and private parties cannot invoke them in relationships with other private parties.[50] This means that national company laws that conflict with a directive remain in effect as regards private parties until they are repealed by the national legislator, even if in the meantime the ECJ finds that they are in violation of the directive. To be sure, the Court has also held that, in applying national law, national courts must construe the national law, "*as far as possible*, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter."[51] In fact, as the *Marleasing* case shows, such a requirement may actually produce an outcome that closely resembles direct horizontal effect.[52]

2. Does secondary EC corporate law really exist? An even more fundamental question may be raised about EC corporate law. Is there any secondary EC corporate law at all, apart from the interpretation the ECJ has provided in the nineteen rulings thus far issued on substantive grounds in this area?[53] Harald Halbhuber has convincingly shown that national doctrinal structures "filter European legal materials," so that one may question whether EC corporate law "means the same for lawyers from different

[50] *See, e.g.,* Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] E.C.R. 723, para. 48. Directives may have a direct "vertical effect," i.e. be applicable to the relationship between a private party and a Member State, possibly giving a private party harmed by the failure to implement a directive the right to claim damages from the State. *See, e.g.,* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW. TEXT, CASES, AND MATERIALS 115 (3rd ed. 2003).

[51] C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para. 8 (emphasis added).

[52] *Cf.* WERLAUFF, EU-COMPANY LAW. COMMON BUSINESS LAW OF 28 STATES, *supra* note 23, at 66-67. In *Marleasing* (*supra* note 51), the ECJ held that Article 11 of the First Directive (First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, 1968 O.J. (L 65) 43), at the time not yet implemented by Spain, required Spanish courts to *de facto* disregard the Civil Code provisions, otherwise applying also to the corporate contract, according to which contracts without cause (purpose), or whose cause is unlawful, are void (Article 11 contains an exhaustive list of grounds for a declaration of nullity of a company; lack of cause or unlawful cause are not included).

[53] Out of these nineteen rulings (one provided in an enforcement action against Germany by the Commission, *supra* note 36, and eighteen in preliminary rulings proceedings: *see* Appendix 2.B), six (those given in the Greek cases) deal with the same question, while three deal with very specific questions concerning the Fourth Directive. *See infra* note 62.

Member States."[54] More specifically, he shows how German lawyers' national legal culture led them to "misread crucial [ECJ] case law [on companies' freedom of establishment] … for over a decade,"[55] and to "overstate the harmonization actually achieved"[56] through corporate law directives.

A good example of this tendency to "nationalize" EC corporate law can also be found in Italian corporate law scholarship. Italian legal scholars tend to construe the Second Directive's provision that "[t]he subscribed capital may not be reduced to an amount less than the minimum capital laid down in accordance with Article 6,"[57] as adopting the recapitalize or liquidate rule[58] which the Italian Civil Code imposes upon Italian companies,[59] while in fact the Directive's provision "only forbids formal capital reduction below that threshold [by the shareholders' meeting]."[60]

Even apart from these nationalistic tendencies in the interpretation of EC corporate law, there are instances in which core provisions in the directives themselves cannot reasonably be construed uniformly, because different versions in different languages are incompatible. The most prominent case is Article 2 of the Fourth Directive, adopting the overriding principle that "[t]he annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss" (para. 3). As accounting scholars have shown, not only are the English and the German versions of Article 2 in no way direct translations of one another, but they "do not appear to say or mean the same thing."[61] If this is the case, it is no wonder that interpretations of Article 2, perhaps *the* core EC accounting law provision, are different in the various countries.[62]

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[54] Halbhuber, *supra* note 27, at 1385.

[55] *Id*. at 1386. *See also Id*. at 1387-99 (on German authors' idiosyncratic interpretation of ECJ company law cases from *Daily Mail* (*The Queen v. H.M. Treasury and Commissioner of Inland Revenue, ex parte Daily Mail and General Trust PLC*, [1988] ECR 5483) to *Centros* (*supra* note 7).

[56] Halbhuber, *supra* note 27, at 1407.

[57] Article 34.

[58] *See infra* text corresponding to notes 247-48.

[59] Article 2447, Civil Code (Italy). *See, e.g.,* Francesco Denozza, *Le società*, in 1 I CINQUANT'ANNI DEL CODICE CIVILE 321, 323 (1993).

[60] Luca Enriques & Jonathan R. Macey, *Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules*, 86 CORNELL L. REV. 1165, 1183 (2001) [hereinafter: Enriques & Macey].

[61] David Alexander, *A European True and Fair View?*, 1 EUR. ACCT. REV. 59, 63 (1993).

[62] *See Id*., *passim* (showing that the interpretation of the true and fair view principle is different in the UK, Germany and France). *See also* Haller, *supra* note 32, at 157:

To conclude on this point, with the possible exception of the few interpretative issues clarified by ECJ rulings, and no matter what truly EC-minded and ECJ-educated legal scholars argue, the prevailing interpretation of any given directive in each jurisdiction is, wherever possible, an interpretation compatible with the existing legal culture. In other words, tradition and pre-harmonization corporate law tend to prevail, trivializing EC corporate law.

C. The problem of "hindsight bias." As Brian Cheffins has argued, "the EU has typically done little more than superimpose a series of measures on domestic regulations already in place."[63] While this may be true with respect to many corporate law issues,[64] one has to concede that at least in certain policy areas the EC has issued directives before most of the Member States had legislation in place, prompting them to adopt new rules. The most prominent example of a proactive move by the EC is the first directive on insider trading.[65] Its proposal dates back to 1987, at a time when, among the then twelve Member States, only three (France, the UK and Denmark) had insider

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> the true and fair value concept "has been implemented and/or interpreted in the individual national laws in different ways. This has led to various European perceptions of [true and fair view], resulting in the possibility that financial statements may provide a [true and fair view] in the perception of one country, whereas the principle is essentially violated in another country;" footnotes omitted).

See further EUROPEAN BUSINESS LAW. LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION 299 (Richard M. Buxbaum et al eds. 1991) (statement of Klaus Hopt) ("[the true and fair view principle] is beautifully incorporated into the German commercial law statute. But … [e]verything is more or less like before. This is true even in the book. The new statutory text is generally interpreted in the light of the old legal situation;" footnotes omitted). The ECJ, presumably well aware of the far-reaching implications of any broad guideline on how to construe Article 2, has provided very narrow holdings when asked for a preliminary ruling involving its interpretation (the two relevant cases are *Tomberger v Gebrüder von der Wettern*, Case C-234/94 [1996] ECR I-3133, and *DE + ES Bauunternehmung GmbH v Finanzamt Bergheim*, Case C-275-97, [1999] ECR I-5331). *Cf.* also EDWARDS, EC COMPANY LAW, *supra* note 23, at 135 ("[in *Tomberger*, the ECJ] couch[ed] its ruling in terms which were both highly specific and extremely cautious").

[63] BRIAN R. CHEFFINS, COMPANY LAW. THEORY, STRUCTURE AND OPERATION 448 (1997).

[64] Of course, this claim cannot be made with respect to accession countries, and especially transition ones, which have in fact had to deeply revise their corporate laws before joining the EU. *See* Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325, 340 (2000) ("European harmonization guidelines have unleashed what some commentators have called a tornado of legislative activities in the countries wishing to join the EU"). This does not imply that EC corporate law has been non-trivial for the ten new accession countries. It only means that these new Member States have had to change their laws in order to introduce, as argued throughout this section, a set of trivial rules. *Cf. Id.* at 340-41 ("[w]ithout a proper understanding of the imported legal concepts [i.e. of the imported harmonized EC rules]… their role in infuencing economic behavior in the transition may be limited").

[65] Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, 1989 OJ (L 334) 30.

trading prohibitions already in place.[66] Recently, the European Commission came first in adopting a post-Enron policy agenda to respond to US corporate governance reforms and was quickly followed on the same path by many Member States,[67] some of which, to be sure, have succeeded in converting their reform efforts into law without waiting for the EC's implementation of the Commission's plans.[68]

Thus, EC institutions, at least at times, appear to play a proactive role within the EU, by setting the corporate law reform agenda. However, one should not overestimate the relevance of such pro-active moves. In fact, it happens very frequently that corporate law reformers around the world work on the same policy issues at the same time. In the second half of the eighties, this was the case with insider trading: pressure both from capital markets[69] and from US regulators[70] prompted a global "rush to prohibit insider trading, or to enforce dormant laws against the practice."[71] Arguably, the EC acted as a focal point for such pressures, but Member States were already considering a ban on insider trading at the time[72] and many of them would have adopted it even in the absence of the directive. Admittedly, this claim is impossible to prove or disprove. But, for instance, Germany's adoption in the nineties and at the beginning of the new century of a number of laws aiming to promote its financial center by adapting its legislation to international best practices strongly suggests that an insider trading prohibition would have been among those measures even in the absence of an EC mandate to implement the first insider trading directive.[73]

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[66] *See, e.g.,* Manning G. Warren III, *The Regulation of Insider Trading in the European Community*, 48 WASH. & LEE L. REV. 1037, 1040.

[67] *See* Enriques, *Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms*, *supra* note 26, at 916-25.

[68] Most notably, this is the case of France, which enacted the "Loi de securité financière," a French equivalent of the Sarbanes-Oxley Act, in July 2003. *See Id.* at 918.

[69] *See* Harvey L. Pitt & David B. Hardison, *Games Without Frontiers: Trends in the International Response to Insider Trading*, 55 L. & CONTEMP. PROBS. 199, 201-03 (1992).

[70] *See* Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 952 (1996) (the SEC exerted pressure on states, such as Japan, Switzerland and Germany, as well as on the EC itself, to criminalize insider trading).

[71] Pitt & Hardison, *Games Without Frontiers: Trends in the International Response to Insider Trading*, *supra* note 69, at 201.

[72] For instance, in 1989 the Italian Parliament was already discussing three bills aiming to criminalize insider trading. Only one of them made a reference to the Directive proposal in its explanatory memorandum. *See La disciplina dell'*insider trading *in Italia*, 1989 RIVISTA DELLE SOCIETÀ 116, 116-23.

[73] *Cf.* Daniel J. Standen, *Insider Trading Reforms Sweep Across Germany: Bracing for the Cold Winds of Change*, 36 HARV. INT'L L.J. 177, 200-01 (1995) (arguing that the strategic need to promote the

One may counter that other Member States would never have banned insider trading. This may well be true, but then one should not fail to consider that in some Member States insider trading prohibitions are so little enforced,[74] that the implementation of the first insider trading directive may have changed virtually nothing for them and their market players.[75]

In sum, policy issues are often on every policymaker's agenda at the same time. In some instances EU institutions are able to adopt directives ahead of Member States.[76] But this does not mean that such directives significantly change Member States policymakers' course of action.

To conclude, some general features of secondary EC corporate law confirm the hypothesis that such law is trivial, i.e. the limited scope of its provisions, which do not cover company law issues, the problem of underenforcement, the parochial interpretation given to it within Member States, and its timing, since it either covers areas already de facto harmonized from bottom up or regulates issues that were also in Member States policymakers' agenda at the time of their adoption.

German financial center ("Finanzplatz Deutschland") had the greatest impact on the policymakers' choice to ban insider trading in 1994).

[74] *See* Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, 57 J. FIN. 75, 81 (2002) (reporting data from 1999 showing that insider trading laws had never been enforced in Austria Ireland, and Luxembourg. Since then, there has been one conviction for insider trading in Austria (e-mail from Martin Gelter to the author (Nov. 30, 2004) (on file with the author)) and one in Luxembourg (e-mail from Françoise Thoma to the author (Nov. 30, 2004) (on file with the author)), and no conviction yet in Ireland (e-mail from Niamh Moloney to the author (Dec. 6, 2004) (on file with the author)). *See also* FERRAN, BUILDING AN EU SECURITIES MARKET, *supra* note 24, 33 (reporting that "only nineteen convictions for insider trading were achieved in Britain, Germany, France, Switzerland and Italy in the five years before 2002, contrasting sharply with the forty-six successful prosecutions achieved in the same period by a single district court in Manhattan").

[75] According to a recent study, the existence of an unenforced ban on insider trading may have actually made things worse for companies in those countries, at least until they enforce insider trading laws for the first time: *see* Utpal Bhattacharya & Hazem Daouk, When No Law is Better than a Good Law (June 2004), *at* http://ssrn.com/abstract=558021 (finding that the cost of equity rises when a country introduces an insider trading law, but does not enforce it).

[76] In other instances, they are not: at the end of the nineties virtually everywhere was corporate governance reform an issue, and of course the European Commission also studied whether to issue policy proposals (*see* Karel Lannoo & Arman Khachaturyan, *Reform of Corporate Governance in the EU*, 5 EUR. BUS. ORG. L. REV. 37, 42 (2004)), but before the American and European corporate scandals came to light in the first years of the century, the Commission was only able to issue a comparative study of existing corporate governance codes (*see* European Commission, Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States, *at* http://www.europa.eu.int/comm/internal_market/company/docs/corpgov/corp-gov-codes-rpt-summary_en.pdf (27 March 2002)).

III. The Triviality Thesis (2): Nature and Content of EC Corporate Law Rules

This Part argues that the provisions laid down by EC corporate law directives and regulations are optional, market-mimicking, unimportant, and/or avoidable,[77] or, in other words, that, with the exceptions outlined in Part IV, they fail to contain any meaningful prohibition, requirement, or enabling rule.

A. Optional rules. Optional rules are defined here as those that Member States can freely decide whether or not to implement, or that individual companies may choose whether or not to comply with, through opt-in or opt-out decisions. To be sure, opt-in provisions are not trivial, if they introduce a regime previously unavailable in one of the Member States and if companies in this State do opt into the new regime in significant numbers.[78] Most EC directives contain optional rules or even allow Member States to choose from a menu of alternatives.[79]

Two prominent examples of optional rules are Articles 9 and 11 of the Takeover Directive.[80] As is well known, the EC succeeded in adopting a directive on takeovers only after the Council and the European Parliament had agreed not to harmonize target

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[77] The classification of trivial rules as optional, market-mimicking, unimportant, or avoidable resembles that proposed by Bernard Black, who distinguishes between market-mimicking, avoidable, changeable, and unimportant rules (*see* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, especially at 551-52 (1990) [hereinafter: Black, *Is Corporate Law Trivial?*]). "Changeable" rules are not included here for two reasons: first, in general, all rules are changeable, but this does not mean that they are trivial until they are repealed. And it is unreasonable to expect that they will soon be repealed in the absence of regulatory competition (*see Id.* at 559: rules are trivial if they are changeable and they are changeable if jurisdictions compete); second, and more specifically, EC rules are less changeable than others, due to the well known petrification of Community law: once a directive or regulation has been adopted, it is very difficult to amend it, let alone repeal it (*see especially* BUXBAUM & HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE, *supra* note 45, at 243).

[78] Optional rules may also be non-trivial, if the default option is "sticky," i.e. if it is costly for firms to opt into the optional regime or to opt out of it. *See* Gérard Hertig & Joe McCahery, Revamping the EU Corporate and Takeover Law Agenda – and Making it a Model for the U.S. (Feb. 23, 2004), *at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1104&context=berkeley_law_econ. None of the examples provided in the text of EC corporate law optional rules appear to lead to a sticky outcome (perhaps with the exception of the provision granting pre-emption rights as regards widely held companies with active institutional owners). In fact, such rules usually allow companies to stick to their (or their Member States') previous practices.

[79] *See critically* BUXBAUM & HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE, *supra* note 45, at 235-36.

[80] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, 2004 OJ (L 142) 12.

companies' defensive tactics, i.e. the only politically hot issue in the directive proposal and the one that had led to the European Parliament's rejection of the earlier proposal.[81]

The final text still contains two provisions laying down a modified passivity rule, according to which shareholders' meetings must authorize defensive tactics in advance (Article 9), and a breakthrough rule trumping restrictions on transfers of shares and providing for a one-share-one-vote rule in the meeting called to authorize defensive tactics and in the first meeting following the bid, provided that, in the latter case, the bidder holds 75 percent of the shares or more following the bid (Article 11). Article 12, however, deprives both provisions of practical significance by allowing Member States not to require companies to apply them. The only condition for this course to be taken is that the Member State allow its companies to opt into the modified passivity and/or breakthrough regimes.

Of course, the modified passivity rule, although optional, might prove not to be completely trivial if, as suggested above, two conditions are met:[82] first, it allows companies to choose the new, supposedly shareholder-friendlier regime, when this regime was unavailable under national law. This appears in fact to be the case in Germany: under German law public companies' (*Aktiengesellschaften*) statutes may not deviate from the allocation of powers among the different organs as determined by the law.[83] Therefore, a company statute may not require that frustrating actions, such as a defensive acquisition, falling under the scope of the management board's powers according to the law, be authorized by the shareholders' meeting. The second condition is that a non-trivial number of companies from jurisdictions previously precluding such a choice of regimes do opt into the directive's new regime. It is easy to foresee that companies with dominant shareholders will have no incentive to do so, because granting the shareholders' meeting the power to decide on defences would be a useless and

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[81] *See, e.g.,* John W. Cioffi, *Restructuring "Germany Inc.": The Politics of Company and Takeover Law Reform in Germany and the European Union*, 2002 L. & POL'Y 355, 384-85.

[82] As noted by Magda Bianco & Bruna Szegö, *Le riforme del diritto societario e dell'OPA a livello europeo*, *in* LA GOVERNANCE DELL'IMPRESA TRA REGOLE ED ETICA 101, 125 (Fabrizio Carotti et al. eds. 2004), the breakthrough rule only applies to companies having made contractual choices such as restricting the transfer of shares or voting rights, so that these companies may already opt into a substantially similar regime by simply abandoning those choices.

[83] *See generally, e.g.,* KARSTEN SCHMIDT, GESELLSCHAFTSRECHT 770 & 869-70 (2002). *See also* Bianco & Szegö, *Le Riforme del Diritto Societario e dell'OPA a Livello Europeo*, *supra* note 82, at 125 (with specific reference to defensive tactics).

perhaps legally troublesome formality.[84] For obvious reasons, management-controlled companies are unlikely to opt into the shareholder-friendlier regime, unless coalitions of institutional shareholders prompt them to do so.

In the field of accounting, it is also well known that the directives leave Member States with plenty of leeway on which accounting rules to impose upon their companies. In their current version, the Fourth and Seventh[85] Directives contain respectively 45 and 57 opt-in or opt-out provisions, while both also provide for further options for individual companies. Legal scholars agree that this menu of options has "allow[ed] member states to preserve their accounting tradition."[86] However, one should add that at least in some countries, such as Italy and Spain, the directives have significantly upgraded accounting practices.[87] For instance, before the Seventh Directive, only listed companies were required to prepare consolidated annual accounts in Italy,[88] while no such requirement existed for any company in Spain.[89]

Up to a point, even minimum capital and capital maintenance rules in the Second Directive can be described as optional.[90] There is nothing to prevent Member States

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[84] It would be troublesome in countries, such as Germany itself, where shareholders may easily challenge the validity of shareholders' meetings resolutions in court. *See, e.g.,* Ulrich Noack & Dirk Zetzsche, Corporate Governance Reform in Germany: The Second Decade 18-19 (Jan. 14, 2005) (*at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=646761) (discussing current reform initiatives aimed at restricting the often abused shareholders' right to challenge the validity of shareholder meeting resolutions in court).

[85] Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, 1983 OJ (L 193) 1.

[86] *See* Werner F. Ebke, *Accounting, Auditing and Global Capital Markets*, *in* CORPORATIONS, CAPITAL MARKETS AND THE BUSINESS IN THE LAW. LIBER AMICORUM RICHARD M. BUXBAUM 113, 119 (Theodor Baums et al. eds. 2000); Eddy Wymeersch, *About Techniques of Regulating Companies in the European Union*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 145, 166 (Guido Ferrarini et al. eds. 2004); FRANK WOOLRIDGE, COMPANY LAW IN THE UNITED KINGDOM AND THE EUROPEAN COMMUNITY: ITS HARMONIZATION AND UNIFICATION 13 (1991).

[87] *See* A. Russo & F. Siniscalco, *The Fourth Directive and Italy*, *in* EEC ACCOUNTING HARMONISATION: IMPLEMENTATION AND IMPACT OF THE FOURTH DIRECTIVE 63, 64 (S.J. Gray and A.G. Coenenberg eds. 1984).

[88] *See, e.g.,* GIAN FRANCO CAMPOBASSO, DIRITTO COMMERCIALE, 2, DIRITTO DELLE SOCIETÀ 473 (5th ed. 2002).

[89] *See, e.g.,* Araceli Mora & William Rees, *The Early Adoption of Consolidated Accounting in Spain*, 7 EUR. ACCT. REV. 675, 681 (1998). *See also* Haller, *supra* note 32, at 156 ("group accounts … – which have been heavily neglected prior to the Seventh Directive in many Member States (e.g. Austria, Belgium, Italy, Greece and Spain) – have increasingly become recognized as a solid basis for investment decisions").

[90] *Cf.* Gérard Hertig, *Efficient Fostering of EU Regulatory Competition*, 2004 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 369, 371 (referring to capital maintenance rules as opt-in provisions). *See also* Wolfgang Schön, *The Future of Legal Capital*, 5 EUR. BUS. ORG. L. REV. 429, 438-39 (2004) (similarly describing capital maintenance rules as opt-in provisions).

from imposing a minimum capital as low as that prescribed by the Second Directive (25,000 euro)[91] nor individual companies from fixing a legal capital equal to the minimum and counting further contributions as share premiums.[92] As a matter of fact, the Second Directive does not require that the share premium account be treated as share capital or as a non-distributable reserve for capital maintenance purposes.[93] To be sure, if net assets fall below 25,000 euro a company will be unable to make distributions to shareholders.[94] Since a company may have negative net assets with no lower bound for an indefinite time (at least in theory, and unless of course the national company law has the recapitalize or liquidate rule),[95] this limitation may seem to be non-trivial. However, even in the absence of the Second Directive, often a company in such a situation would still be unable to distribute assets to shareholders due to covenants imposed by sophisticated creditors,[96] so that legal capital rules of this kind can also be described as market-mimicking to some degree.

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[91] Article 6, Second Directive. Consider also that the Second Directive only requires that at least one-quarter of the subscribed capital be paid up at the time of incorporation (Article 9).

[92] It is however true that most existing public limited liability companies' legal capital is much higher than the Second Directive's and even than the Member States' prescribed minimum, due to choices made in the past and possibly prompted by banks. It would be difficult for them to reduce their capital to the statutory minimum, unless of course banks agreed. For banks, it would mean to switch from a system in which the law, following a company's decision to have a high legal capital, provides a cap on distributions, to one in which they agree on a cap with each individual corporate borrower. For obvious reasons, they prefer to stick to the current system, which also managers and dominant shareholders like, because it allows and even requires them to retain more free cash (*see* Enriques & Macey, *supra* note 60, at 1202). This appears to be a major qualification to the idea that legal capital rules are trivial (*see also infra* text accompanying notes 181 & 190 for further qualifications). However, one should consider, first, that most Member States had legal capital rules already in place at the time companies chose to have a high legal capital, and second, that the repeal of legal capital rules would not change things significantly for existing companies with a high legal capital. Banks would most probably reserve a veto power on capital reductions, which managers and controlling shareholders, unless their interests are aligned with outside shareholders', will be willing to accept in order to control a larger pie. Finally, arguing that the overall impact of legal capital rules is trivial (with due qualifications) does not mean that they are anyhow justified from an economic point of view, because they impose some costs, however trivial for any individual company, while having no offsetting benefits, whether for creditors or society as a whole (*see Id., especially* at 1185-95).

[93] *See Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance* (Jonathan Rickford ed), 15 EUR. BUS. L. REV. 919, 939-940 (2004).

[94] Note that the recent adoption of IASB's IFRS by the EC and the consequent obligation to treat stock options and pension scheme deficits as expenses (*see Id.* at 948-50, 958-60) has no impact upon the Second Directive rules on distributions as a matter of EC law. In fact, according to Regulation 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (2002 OJ (L 243) 1), IFRS are only mandatory for consolidated accounts, while restrictions on distributions are related to the annual accounts of individual companies.

[95] *See infra* text accompanying note 247.

[96] *See, e.g.,* Clifford W. Smith, Jr. & Jerold B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 131-35 (1979).

A cornerstone of the Second Directive is the shareholders' right (subject to exceptions) to pre-emption on newly issued shares (Article 29). As a matter of fact, this provision boils down to a default rule from which companies may opt out through a resolution of the shareholders' meeting to be taken from five years to five years. The resolution must be taken at least by either of the majorities prescribed in Article 40 (two thirds of the shares represented at the meeting or, if a majority of the shares is present, a simple majority of the shares present). This is indeed a protection for qualified minorities that may try to block the meeting's resolution if less than a majority of the shares are represented, but hardly an insurmountable obstacle for most companies,[97] at least in continental European countries, where ownership is concentrated.[98]

A further instance of an optional rule is in Article 9 of the First Directive. This article aims to protect third parties by "restrict[ing] to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid."[99] As the Swedish experience illustrates, this article "formally only applies to company organs, i.e., in Swedish law, the board of directors and managing directors."[100] What happens in Sweden is that

> in everyday business life it is common for major contracts to be concluded by an authorised signatory, and not by the board of directors as such or by the managing director. …. Since an authorised signatory is not a company organ, the old rule still applies, which is the same as in Swedish agency law. The result is that the old doctrine of *ultra vires* can still be invoked against a third party who acts in culpable bad faith.[101]

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[97] *Cf.* DAVIES, GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW, *supra* note 23, at 635 ("the statutory pre-emptive rights can be disapplied with relative ease and afford an individual equity shareholder precious little assurance that his existing pre-emptive rights will be preserved unless his shares carry sufficient votes to block the passing of a special resolution").

[98] In the UK, institutional investors have agreed upon a strict policy with respect to proposals to disapply pre-emption rights, while companies think that pre-emption rights increase the cost of raising capital. *See Id.*, at 637-38.

> "it would seem that the real issue is more to do with the level of underwriting fees and whether the fees connected with capital issues should go predominantly to the institutions, in their capacity as underwriters of rights issues, or to investment banks carrying out book-building exercises in connection with general issues, than with the inherent costs of rights issues as against general issues").

[99] First Directive, Preamble.

[100] *See* Andersson, *The High Level Group and the Issue of European Company Law Harmonisation – Europe Stumbles Along?*, *supra* note 27, at 191.

[101] *Ibid*.

In other words, it is common practice in Sweden to opt out of the EC derived rule on companies' authority.[102]

Another set of totally optional rules is the European Company Statute,[103] which introduced an additional legal form, regulated partly by the Statute itself, partly by national corporate laws. The impact of the Statute might prove to be non-trivial, if companies start using the new form as a means to implement cross-border mergers or to reincorporate in another jurisdiction.[104] It is too early to predict whether this will be the case.[105] For certain, however, there are still tax obstacles that may make it practically impossible to use the new legal form for cross-border mergers or reincoporations.[106] And according to most observers, the legal regime of the European company itself is too complex and too rigid to make the new legal form attractive.[107]

Finally, rules on mutual recognition and more generally aiming to facilitate cross-border transactions, such as cross-border offerings and listings, are enabling rules, i.e. optional: they only apply when companies want to take advantage of them. Therefore,

[102] *See* Swedish Companies Act, Ch. 8, Section 35(2). One may counter that Article 9 is not trivial, since it dictates what the default rule is across the EU, thereby reducing the risks associated with the fact that companies can only act through agents and that it is often difficult, especially in cross-border settings, to find out what the law regulating companies' authority is. While this may be true for limits "arising under the statutes or from a decision of the competent organs" (Article 9, para. 2, First Directive), Article 9, para. 1, itself, however, allows Member States to choose either of two regimes on *ultra vires*. *Cf.* Gianluca La Villa, *The Validity of Company Undertakings and the Limits of the E.E.C. Harmonization,* 3 ANGLO-AM. L. REV. 346, 347 and *passim* (1974) (arguing that Article 9 fails to provide "a unitary principle which completely harmonizes the various legislations of member states [relating to the powers of the company's representatives]"). Further, the First Directive does not cover limits deriving from domestic laws nor does it harmonize rules on corporate agents' conflicts of interest, as the ECJ itself clarified. *See* Case C-104/96, *Cooperatieve Rabobank "Vecht en Plassengebied" BA v Erik Aarnoud Minderhoud* [1997] ECR I-7211.

[103] Regulation (EC) 2001/2157 of 8 October 2001 on the Statute for a European company (SE), 2001 OJ (L 294) 1, and Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees 2001 OJ (L 294) 22.

[104] *See* Luca Enriques, *Silence Is Golden: The European Company As a Catalyst for Company Law Arbitrage*, 4 J. CORP. L. STUD. 77, 79-80 (2004).

[105] The European Company Statute entered into force on October 8, 2004 (Article 70, Regulation 2001/2157), but only five Member States had at the time already taken the necessary measures to allow European Companies to be founded on their territory. *See* Company Law: European Company Statute in Force, But National Delays Stop Companies Using It (press release by the European Commission, Oct. 8, 2004, IP/04/1195, *at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/1195&format=HTML&aged=0&language=EN&guiLanguage=en).

[106] *See, e.g.,* Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40 COMMON MKT. L. REV. 661, 691 (2003).

[107] *See, e.g.,* Evanghélos Pérakis, *SE: Une société pour quelles entreprises?*, *in* LA SOCIETE EUROPEENNE. ORGANISATION JURIDIQUE ET FISCALE, INTERETS, PERSPECTIVES 227, 229-31 (Klaus J. Hopt et al. eds. 2003).

even these rules can be evaluated as trivial or not, depending on whether companies across the EU indeed take advantage of the newly available opportunities.

From this point of view, the new Prospectus Directive[108] is seen by many "as a big step forward as compared to the previous measures in place."[109] The previous regime was in fact unanimously held to be a failure, since cross-border public offerings were extremely rare.[110]

It is of course too early to tell whether the new regime will work, i.e. if the number of cross-border public offerings will significantly increase.[111] However, practitioners have already identified some features in the Prospectus Directive that could determine its failure: in short, it is suggested that, while it will be possible to make a cross-border public offering relying on a prospectus in English and, if the host or the home Member State so requires, on a translation in the local language of the summary only, "the summary is required to contain a wording that 'it should be read as an introduction to the prospectus and any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor.'"[112] The problem is that it is impossible for an investor who does not speak English to base her decision on consideration of the prospectus as a whole. Further, the summary must have a maximum length, so that it will be impossible to incorporate "a 10 to 15 page section on risk

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

[109] Lannoo, *The Emerging Framework for Disclosure in the EU*, *supra* note 44, at 346.

[110] *See* Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999–Part I*, 56 BUS. LAW. 653, 684 (2001); Lannoo, *The Emerging Framework for Disclosure in the EU*, *supra* note 44, at 340; MOLONEY, EC SECURITIES REGULATION, *supra* note 41, at 140, 209-10 (describing the obstacles faced by issuers willing to make a cross-border offering under the previous regime).

The directives on listing conditions and particulars (Directive 80/390/EEC, *supra* note 41, and Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing, 1982 O.J. (L 48) 26) are also commonly held to have been ineffective with respect to their purpose of facilitating multiple listings. And, in any event, they have become obsolete following market and technological developments: *see* Guido Ferrarini, *The European Regulation of Stock Exchanges: New Perspectives*, in 36 COMMON MKT. L. REV. 569, 577 (1999) (with specific regard to Directive 82/121/EEC, *supra*).

[111] The new regime goes into force after July 1, 2005, the deadline for the Prospectus Directive's implementation by the Member States (Article 29). *See*, however, FERRAN, BUILDING AN EU SECURITIES MARKET, *supra* note 24, at 201 (reporting "informed market opinion [according to which] retail equity offerings that make use of the passport are likely to remain rare").

[112] Jim Bartos & Michael Lippert, *Why Europe's New Prospectus Regime May Fail*, INT'L FIN. L. REV., Aug. 2003, at 18, 18 (quoting from Article 5, para. 2, of the Prospectus Directive) (emphasis omitted).

factors."[113] Putting two and two together, the risk of civil or criminal liability for publishing a misleading summary[114] might lead issuers either to translate the whole prospectus or to keep marketing their securities in their domestic market only.[115] In other words, the practical outcome might be the same as under the previous regime.

B. Market-mimicking rules. Market-mimicking rules are rules that most private parties would adopt even in the absence of statutory provisions imposing them. As Bernard Black acknowledges, it is hard to prove that a rule is market-mimicking: "The force of the arguments for why a particular rule is market mimicking will depend on analogies, on the background and prior beliefs of the reader, on guesses about transaction costs, and on the force of alternative arguments."[116] As examples of market-mimicking rules, Black cites those requiring approval by a majority of shareholders of major corporate changes, such as mergers and liquidations. Requiring a shareholders' vote on mergers and divisions, as Articles 7 and 5 of the Third and Sixth Directives[117] respectively do, can reasonably be categorized as market-mimicking.[118]

Rules granting creditors the right to obtain security for their claims or adequate safeguards in case certain transactions are undertaken, such as reductions of capital, mergers or divisions,[119] are in part market-mimicking and in part unimportant. They are (timidly) market-mimicking with regard to sophisticated creditors, who normally reserve the far more effective right to veto such transactions (usually in broader and more detailed terms) or insert an acceleration clause applying if these transactions are

[113] *Id*. at 19.

[114] *See* Article 6, para. 2, Prospectus Directive.

[115] Bartos & Lippert, *Why Europe's New Prospectus Regime May Fail*, *supra* note 112, at 19. Bartos and Lippert also doubt whether another enabling feature of the Prospectus Directive, incorporation by reference, will work. According to the two authors, in the absence of an integrated system of disclosure such as the one in place in the US, it will not (*Ibid*.).

[116] Black, *Is Corporate Law Trivial?*, *supra* note 77, at 552.

[117] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, 1978 OJ (L 295) 36, and Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, 1982 OJ (L 378) 47.

[118] To be sure, all of the provisions in the Third and the Sixth Directives also fall under the category of avoidable rules. *See infra* text accompanying note 169.

[119] *See* Article 32, Second Directive, Article 13, Third Directive, and Article 12, Sixth Directive.

entered into.[120] And they are unimportant with regard to other creditors, as explained below.[121]

Arguably, the fact that a rule is present in all of the US states' corporation codes is evidence of its market-mimicking character. In fact, although today in the US the market for corporate charters is not particularly active,[122] it has been at least in the past, leading most states to converge on a very limited set of rules. Those surviving in each US jurisdiction are thus, intuitively, rules that very few corporations would not choose. William Carney has found that thirteen EC corporate law provisions are adopted in all 50 US states.[123] Assuming that what is market-mimicking in the US is also in the EU, these thirteen provisions can be categorized as such.[124]

C. Unimportant rules. Black defines "unimportant rules" as those that "can be complied with at nominal cost, or involve situations that almost never occur."[125] Rules granting rights that will almost never be exercised also qualify as such.

Among rules that can be complied with at nominal (or at least negligible) cost is Article 17 of the Second Directive, according to which, when a company suffers "a

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[120] Smith, Jr. & Warner, *On Financial Contracting: An Analysis of Bond Covenants*, *supra* note 96, at 128-36.

[121] *See infra* text accompanying notes 131-32.

[122] *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002); Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553 (2002). *But see also* Roberta Romano, Is Regulatory Competition a Problem for Corporate Governance?, *supra* note 4, at 12-25 (criticizing the view that there is currently no regulatory competition in the corporate law area).

[123] *See* William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 320 (1997) (providing a table according to which fourteen EC provisions are adopted by all US states; actually, the list of EC provisions that the author has kindly provided contains thirteen such provisions. These are the provisions requiring (1) "[p]ublication of articles of constitution and amendments;" (2) "[p]ublication of identity of official agent;" (3) "[p]ublication of winding up of company;" (4) "[p]ublication of any declaration of nullity by the courts;" and those providing (5) that "[c]ompletion of formalities of incorporation is a bar to personal liability of agents;" (6) that "[l]imits on powers of organs (governing bodies) may not be relied on against third parties even if disclosed;" (7) that "[n]ames of companies shall be distinctive;" (8) that the "[a]rticles of incorporation must identify [the] [r]egistered office [and (9) the] [i]dentity of the incorporators; (9) that "[i]f reduction of subscribed capital by comulsory withdrawal of shares is permitted, it must be authorized in the articles of incorporation before the shares are issued, and must be approved by the shareholders;" (10) that the "[r]ights and obligations of redeemable shares must be specified in articles of incorporation before issuance; (11) that [b]oard of directors must approve and publish an agreement and plan of merger;" (12) that "[n]otice of the merger must be published;" (13) that [t]he effect of a merger is to transfer all assets and liabilities to the surviving company." *See* WILLIAM J. CARNEY, APPENDIX A, ADOPTION OR REJECTION OF EC COMPANY LAW DIRECTIVES IN U.S. (unpublished manuscript, on file with the author), whereby references to the relevant EC and US law provisions).

[124] Many of them also appear to be unimportant. *See supra* note 123.

[125] Black, *Is Corporate Law Trivial?*, *supra* note 77, at 560.

serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken." Nothing appears to prevent Member States from requiring that this discussion take place at the next annual meeting at the latest, so that companies will not even have to incur the costs of calling an extraordinary meeting for the purpose.

Similarly, the cost of disclosing well-specified facts or documents such as the fact that a company has only one shareholder,[126] the articles of constitution and its amendments,[127] or the identity of the persons authorized to represent the company[128] will normally be trivial both in monetary terms and with regard to some hypothetical interest in keeping those facts secret.

Finally, the provision in the Twelfth Directive, that contracts between the sole owner and the corporation "shall be recorded in minutes or drawn up in writing" (Article 5, para. 1) can also be complied with at nominal cost.

Rules that involve situations that almost never occur include provisions on the nullity of companies.[129] In Vanessa Edwards's words, "[a] declaration of nullity was a rare occurrence even in those original Member States which recognized the concept, so that these provisions are relatively unimportant."[130]

Among rules granting rights that will almost never be exercised are those entitling unsophisticated creditors to obtain security for their claims or adequate safeguards if certain transactions are undertaken, such as reductions of capital, mergers or divisions.[131] In fact, either such creditors have bargaining power vis-à-vis the company or they lack it. If they have bargaining power, but failed to contract for such protections at the outset, possibly because they are unsophisticated, they will be able to protect themselves against the negative consequences of such transactions without the need for a *right* to obtain those safeguards. If they have no bargaining power, they will be *de facto* unable to exercise their right, because the company would otherwise retaliate

[126] Article 3, Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies, 1989 OJ (L 395) 40.

[127] Article 2, para. 1(a), First Directive.

[128] Article 2, para. 1(d), First Directive.

[129] Section III, First Directive.

[130] EDWARDS, EC COMPANY LAW, *supra* note 23, at 46.

[131] *See supra* note 119.

against them.[132] And in any event, should a creditor in fact exercise the right to obtain security or an adequate safeguard, the instances in which the resulting cost for the companies involved will be such that the transaction will not go through will be so rare as to make this hypothesis, again, trivial.

D. Avoidable rules. Avoidable rules are, in Black's terminology, those that can "be avoided through proper planning."[133] In our setting, the planning can take place at the company level, at the national level, or at both: at the company level, when it is private parties who carefully design transactions so as to avoid the application of a given rule; at the national level, when the planning is at the implementation stage as the result of choices made, whether implicitly or explicitly, by the policymakers transposing the EC rules.

To be sure, proper planning at the company level can be costly: as Black acknowledges, "[t]he greater the costs of avoidance, relative to a rule's importance, the less avoidable the rule. … At some point, the cost of avoiding a rule is large enough so that we can't call the rule trivial."[134] As a matter of fact, avoidance costs may be high, especially in light of the legal advise which is normally necessary to obtain in the process. Since the costs of avoidance have a strong fixed component, avoidable rules may therefore prove to be non-trivial for smaller businesses, as conceded also in part IV.[135]

An example of rules avoidable at the company level can be found in Article 11 of the Second Directive, according to which a special procedure has to be followed in order for a company to acquire any asset belonging to one of the company's founders for consideration of more than one-tenth of the company's subscribed capital within two years of incorporation. This provision is easily avoided by starting a business by acquiring an existing, possibly dormant, company incorporated more than two years

[132] *Cf.* Enriques & Macey, *supra* note 60, at 1191 (with specific regard to reductions of capital). Note that such provisions do not provide that the company must obtain creditors' consent to execute certain transactions. They require creditors to activate in order to obtain protection, thus making it less plausible that a bargaining problem connected with an endowment effect will arise.

[133] Black, *Is Corporate Law Trivial?*, *supra* note 77, at 555.

[134] *Id*. at 557.

[135] *See infra* text following note 182 and text accompanying note 190.

before,[136] or "by entering into one of the many kinds of … transactions that Article 11 of the Second Directive does not cover."[137] True, there is the risk that Member States' laws will qualify such transactions as indirectly falling under the scope of the national provision implementing the Directive.[138] But it is far from certain that this will be the case, depending also on the care the company and its shareholders have taken in planning the transaction. And, more to the point, this treatment of evasive transactions will be an application of national laws and local judges' activism, not of EC corporate law.[139]

Similarly, the prohibition against the issue of stock in exchange for "an undertaking to perform work or supply services"[140] does not impinge upon the validity of a contract by which the company reserves the right to pay workers' salaries or advisers' fees in shares. Once the work or service has been performed, the workers or the advisers will have a credit with the company. Pursuant to their previous agreement, the company will issue shares as payment for the services. Instead of contributing new money to the company, the workers or advisers will simply offset their debt to the company for the payment of their shares with the company's liquid and due debt for the performed work or services.[141] Such an arrangement would solve any cash constraint by start-up companies. Further, suppose there are two parties, a financier and an entrepreneur, who are willing to form a company in which the former will hold 49 percent and the latter 51 percent, and that the entrepreneur has no assets that can be validly contributed to the company according to the Directive. Leaving tax issues aside, nothing prevents the financier from paying up the entrepreneur's capital in her stead.[142]

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[136] For a description of the various ways by which Article 11 can be circumvented *see* Marco S. Spolidoro, *Gli acquisti pericolosi*, *in* 1/3 TRATTATO DELLE SOCIETÀ PER AZIONI 679, 724-25 (Giovanni E. Colombo & Giuseppe B. Portale eds. 2004).

[137] Enriques & Macey, *supra* note 60, at 1186.

[138] *See* Spolidoro, *Gli acquisti pericolosi*, *supra* note 136, at 725-26.

[139] *See Meilicke v ADV/ORGA*, Opinion by Advocate General Tesauro, Case C-83/91, [1992] ECR I-4871, Para. 21. Member States in fact differ as to the reaction against evasive transactions. *See* Halbhuber, *supra* note 27, at 1406.

[140] Article 7, Second Directive.

[141] *Cf. Meilicke v ADV/ORGA*, Opinion by Advocate General Tesauro, *supra* note 139, para. 15-16 (Article 10 does not apply to contributions by waiver of a liquid and due debt).

[142] *See* Marco S. Spolidoro, *Conferimenti e strumenti partecipativi nella riforma delle società di capitali*, 2003/I DIRITTO DELLA BANCA E DEL MERCATO FINANZIARIO 205, 209 (with specific regard to Italian law).

Once the company is formed the entrepreneur may enter, as the case may be, an employment relationship of some kind with the company.[143]

Proper planning will also allow avoidance of the Second Directive provision capping the number of own shares a company may hold at any given moment at 10 percent (Article 19(1)(c)). In fact, a company having reached that cap may acquire further shares after reducing the share capital and cancelling the treasury shares in excess. This will of course be cumbersome, because a shareholder meeting will have to be convened to decide on this, but it is far from having a chilling effect.[144]

Article 23 of the Second Directive is perhaps the most telling example of an avoidable EC company law rule. This sweeping prohibition against firms providing financial assistance to those acquiring their shares is said to render leveraged buyouts illegal.[145]

The sheer volume of private equity buyouts in Europe indicates that the hindering effect of Article 23 cannot be as great as is often contended:[146] In 2003, a total of 945 private equity buyouts were completed – 24 per cent fewer than in 2002 – for a total value of 61,691 million euro – 8 billion less than the previous year,[147] while in 2004 "[a] record $40 billion of loans for leveraged buyouts have been arranged in Europe …, compared with $29 billion for … 2003."[148] In the last few years the European buyout market has grown even bigger than that of the US. Since 2001 buyout activity in Europe has been 70 percent greater than in the US in terms of announced deal value.[149]

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[143] Article 11 does not apply to the employment contract, because it refers to "asset[s]" (or "élément[s] d'actif" in the French version), while the credit for future work is not an asset from an accounting point of view.

[144] The provisions granting creditors the right to obtain adequate security in the process, as argued *supra* text accompanying notes 119-22 & 131-32, will be either market-mimicking or unimportant, having therefore no chilling effect either.

[145] *See, e.g.,* Eddy Wymeersch, *Article 23 of the Second Company Law Directive: The Prohibition on Financial Assistance to Acquire Shares of the Company*, *in* FESTSCHRIFT FÜR ULRICH DROBNIG ZUM SIEBZIGSTEN GEBURTSTAG 725, 734 (Jürgen Basedow et al. eds. 1998).

[146] *Cf., e.g., Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance*, *supra* note 93, at 945 ("The prohibition [on financial assistance] … remains for public companies a major and costly impediment to wholly legitimate and desirable commercial transactions, for example leveraged buy-outs").

[147] *See* INITIATIVE EUROPE BAROMETER Q4 2003 4, *at* http://www.initiative-europe.com/press/downloads/Q42003.pdf.

[148] *See Record Debts in European Buyouts Spur 'Credit Bubble' Concerns*, Bloomberg.com (Dec. 29, 2004), *at* http://www.bloomberg.com/apps/news?pid=10000085&sid=arzvgEO2dYs4&refer=europe#.

[149] *See* Peter Smith, *Buy-out Groups on the Spree in Europe*, in FIN. TIMES (Europe), August 2, 2004, at 18 (reporting data collected by JP Morgan).

In the face of Article 23, how can this be? First, some Member States, and notably the UK, have introduced exemptions.[150] Second in all Member States "intricate … evasion techniques have been invented by smart lawyers,"[151] which national courts, for better or for worse, have usually judged to be in line with the prohibition on financial assistance.[152]

Avoidable rules can be found in securities regulation as well. First, there are certainly ways around the obligation to disclose major holdings as required once by Directive 88/627/EEC[153] and now by Directive 2001/34/EC.[154] One is reported by Marco Becht and Ekkehart Böhmer:[155] when a stake is held by a company, the disclosure obligation applies to owners exercising control over it. Since the definition of control does not include joint control,[156] in Germany "shares held by unlisted firms with two 50%-owners are never attributed beyond the level of the unlisted firm, because neither of the owners is deemed to be 'controlling'."[157]

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[150] *See, e.g.,* EILÍS FERRAN, COMPANY LAW AND CORPORATE FINANCE 391-92 (1999).

[151] Wymeersch, *About Techniques of Regulating Companies in the European Union*, *supra* note 86, at 177.

[152] Wymeersch, *Article 23 of the Second Company Law Directive*, *supra* note 145, at 735, 738-39 (reporting arguments developed in various Member States in order to construe the prohibition restrictively). *See also* Niccolò A. Bruno, *Il leveraged buy out nella casistica giurisprudenziale*, 2002/I BANCA BORSA TITOLI DI CREDITO 806, 814 (finding that no Italian court has ever declared the illegality of a merger leveraged buy out). A recent decision by the English Court of Appeal (*Chaston v. SWP Group plc*, [2002] EWCA Civ 1999, [2003] 1 B.C.L.C. 675), however, failed to accommodate restrictive interpretations of the financial assistance prohibition. As Eilís Ferran notes (Eilís Ferran, *Corporate Transactions and Financial Assistance: Shifting Policy Perceptions But Static Law*, 63 CAMBRIDGE L.J. 225, 226 (2004)), this decision has reminded corporate finance practitioners that they must

> continue to operate on the basis that financial assistance is a pervasive and serious problem and must grapple to find ways round it that have not been undermined by the case law. It seems inevitable that the processes involved in avoiding financial assistance problems will continue to involve significant costs. There is anecdotal evidence that many law firms have already consulted leading company law barristers for advice on the implications of *Chaston* and it seems reasonable to assume that this will be a continuing source of revenue for a few specialists. The amounts involved are necessarily a matter of speculation, but it is safe to say that the advice of leading members of the corporate Bar certainly does not come cheap.

[153] Council Directive 88/627/EEC, *supra* note 41.

[154] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, 2001 OJ (L 184) 1.

[155] *See* Marco Becht & Ekkehart Böhmer, *Ownership and Voting Power in Germany*, in THE CONTROL OF CORPORATE EUROPE 128, 151 (Fabrizio Barca & Marco Becht eds. 2001).

[156] Article 87, Directive 2001/34/EC.

[157] *Ibid*. This will hold true also under Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending

A further example of avoidable rules can be found in the prospectus regime in place prior to the adoption of the Prospectus Directive. As Howell Jackson and Eric Pan report,[158] it was common practice for issuers to offer their securities in other Member States to professionals only, relying upon the exemption for such offerings in the relevant directive.[159] The professionals would then resell the securities to retail investors.[160] This was possible because neither Directive 89/298/EEC nor securities law of at least some Member States[161] imposed resale restrictions similar to S.E.C.'s Rule 144.[162]

The new Prospectus Directive would appear to impose a prospectus for any resale which may fall under the broad definition of offer to the public provided for in Article 2(1)(d).[163] However, it is expected that the UK (and possibly other Member States) will include a carve-out in the definition of "offer to the public" for communication in connection with screen trading on, inter alia, multilateral trading facilities.[164] If this will be the case, it may prove easy for qualified investors to resell securities to retail investors through these trading venues without a prospectus. Further, each resale will be regarded as a separate offer,[165] so that "a resale addressed to fewer than 100 persons, whatever their status, would fall outside the prospectus requirement for resales."[166]

Directive 2001/34/EC, 2004 OJ (L 390) 38, whose provisions on major holdings will come into force on January 20, 2007. *See* Articles 2(1)(f) and 9.

[158] Jackson & Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999–Part I*, *supra* note 110, at 681-82.

[159] *See* Article 2, para. 1(a), Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public, 1989 OJ (L 124) 8.

[160] Jackson & Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999–Part I*, *supra* note 110, at 688. *See also generally* MOLONEY, EC SECURITIES REGULATION, *supra* note 41, at 68 (highlighting that "the Securities Directives contain substantial escape opportunities for Member States from their harmonizing effects in the form of a network of exemptions, derogations, and generally worded obligations").

[161] *See, e.g.,* RENZO COSTI & LUCA ENRIQUES, IL MERCATO MOBILIARE 59-60 (2004) (Italian securities laws impose no resale restrictions).

[162] 17 C.F.R. § 230.144 (2000).

[163] *See* Article 3(2).

[164] HM Treasury & FSA, UK Implementation of the Prospectus Directive 2003/71/EC. A Consultation Document 22 (Oct. 2004) (*at* http://www.hm-treasury.gov.uk/media/DFE/27/DFE27339-BCDC-D4B3-16FD311B308ABF54.pdf).

[165] *See* Article 3(2).

[166] FERRAN, BUILDING AN EU SECURITIES MARKET, *supra* note 24, at 201 n.257. *See also Id.*, at 200-01 ("Preventing seepage from wholesale to retail markets through resales of securities that were offered originally on an exempt basis remains an issue that EU policy-makers appear disinclined to address vigorously").

To be sure, the New Prospectus Directive is also a maximum harmonization measure. As such, it will definitely have an impact upon any offer to the public, by exclusively identifying what will have to be disclosed in the prospectus. However, as Eilís Ferran has suggested, Member States may "side step the maximum harmonization effect of the Prospectus Directive by recasting disclosure requirements that are outside the Directive in the form of substantive criteria that must be satisfied by issues seeking admission to trading on a regulated market."[167]

A good example of secondary EC corporate law rules that can be avoided by efforts at the national level are those in the Third and Sixth Directives on mergers and divisions respectively. The UK has in fact implemented these directives through provisions that cover a very limited set of transactions, *de facto* leaving parties free to achieve the same results as those normally sought through "mergers" or "divisions," by choosing transactional structures not covered by the directives.[168] The fact that at least one Member State was able to reduce the impact of these directives practically to nothing, and apparently without breaching them, is evidence that they have no bite.

Some rules are avoidable thanks to planning both by the Member State at the implementation stage and by private parties. The best example of this kind of rule is perhaps the provision requiring Member States to have a mandatory bid rule in place (Article 5 of the Takeover Directive). This provision allows the measure to be implemented through easily avoidable rules. First, according to Article 4, para. 5, "[p]rovided that the general principles set out in Article 3(1) are respected, Member States may grant derogations from the Directive's rules," including the mandatory bid rule, "in order to take account of circumstances determined at national level." They may also grant their supervisory authority "the power to waive national rules."[169] Second, the

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[167] *Id.*, at 145.

[168] *See* DAVIES, GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW, *supra* note 23, at 799-800; EDWARDS, EC COMPANY LAW, *supra* note 23, at 91.

[169] As I have noted elsewhere (Luca Enriques, *The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization As Rent-Seeking?*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 86, 767, 774),

> "unjustified or over-ample use of this power may constitute a breach of Article 3(1)(a) (protection of minority shareholders in case of control transfer), unless of course some other equivalent form of protection is provided. In any event, the grey area in which a reasoned decision may be judged to be consistent with the directive is broad enough to leave Member

Directive does not identify the threshold for the mandatory bid obligation (Article 5, para. 1). It only states that the shares held have to confer on the acquirer "the control of that company" (para. 3). Nothing appears to prevent Member States from fixing the threshold at, say, 50 percent plus one share, making it easy for control to change hands without triggering the requirement. Further, as I have argued elsewhere, the few, patchy provisions on the mandatory bid contained in Article 5 "leave plenty of room for more or less ingenious ways to avoid the requirement, depending of course on how national implementing rules are drafted and enforced."[170]

E. Conclusions. This Part and the previous one have provided arguments in favour of the triviality thesis. It has shown that such rules are trivial, i.e. have very little impact upon EU companies' governance and management: they do not cover core areas such as fiduciary duties and shareholder remedies; they are underenforced and normally construed in such a way as to be compatible with pre-existing national rules and practices. Finally, most EC corporate law can be categorized as optional, market-mimicking, unimportant, or avoidable. In other words, there is (almost)[171] nothing non-trivial that EC corporate law requires to do, forbids, or enables to do.

IV. Some Qualifications to the Triviality Thesis and One Possible Objection

It would be an overstatement to conclude that secondary EC corporate law is trivial without any qualification. This part provides the necessary qualifications to the triviality thesis and counters a possible objection to it, i.e. that the same kind of analysis would justify the conclusion that even EU national corporate laws are trivial.

A. Qualifications to the triviality thesis. A few qualifications have to be made to the triviality thesis. First, a few provisions or sets of rules are non-trivial. Second, EC corporate law has increased the regulatory burden of corporate laws across the EU, correspondingly securing higher rents for certain interest groups. Third, EC corporate

State and local supervisory authorities considerable influence in the administration of the national mandatory bid regime."

[170] *Id*. at 776.

[171] *See infra* section IV.A.1.

law plays a role in the evolution of corporate law within the EU, prompting pre-emptive changes in national corporate laws, creating the scope for excessive regulation, acting as a curb to experimentation, and making it somewhat less likely that a European Delaware will emerge. Finally, its production has become an industry itself, employing many EC and national functionaires and lobbyists, and creating occasions for rent extraction by politicians.

1. The exceptions. The analysis in the previous parts has not provided an exhaustive list of the existing secondary EC company law provisions in order to show that each of them is trivial. Instead, it has provided some general reasons why secondary EC company law is trivial (part II) and categorized most of its provisions as optional, market-mimicking, unimportant, or avoidable (part III). However, one has to concede that a few specific rules or sets of rules have indeed had, or can be predicted to have, an impact on companies and their behavior.

First, we can cite the Takeover Directive provision granting a successful bidder the right to purchase shares from minority shareholders (Article 15):[172] unless Member States find ways to make this right de facto impossible to exercise, e.g. by making it extremely easy for minority shareholders to challenge the fairness of the squeeze-out price and/or block the squeeze-out procedure, one can predict that highly successful bidders will often exercise their squeeze-out right. One can also mention the Eighth Directive's[173] provisions defining the professional qualifications of persons in charge of the auditing of a company's accounts (as imposed by the Fourth and Seventh Directives),[174] because in comparison with the requirements until then in force in at least some of the Member States (e.g., Italy), the Directive's requirements involved an upgrade of the professional qualifications requested.[175]

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[172] The corresponding sell-out right provision (Article 16) appears to be at least as easily avoidable as the provision on mandatory bids (*see supra* text accompanying notes 169-70), since it presupposes a voluntary or mandatory bid made to all the holders of the offeree company.

[173] Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, 1984 OJ (L 126) 20.

[174] *See* Articles 51 and 37 respectively.

[175] Of course, the Eighth Directive contained grandfathering provisions for auditors in practice at the time of implementation and with lower qualifications than those required by the Directive itself. *See* Articles 12-18.

Further, despite the optional character of most of the Fourth and Seventh directives' provisions and the tendency to construe them according to local practices and traditions, the accounting directives have had, and, in the case of the IAS Regulation, are already having, a significant impact on companies.[176] Of course it remains to be seen whether and how uniformly the international accounting standards will be enforced.[177]

Finally, one may argue that the mandatory disclosure rules in securities directives have also implied an upgrade of national regulations. However, the enforcement issue in this area may be so serious as to make such rules trivial.[178]

Recent developments in securities law, with the EC's new approach to legislation and enforcement of securities laws, could increase the impact of EU action, although it is still too early to say whether this will indeed be the case.[179]

2. Impact on the cost of doing business and on professionals' rents. As argued in part III, most corporate law rules are trivial in the sense that there is almost nothing meaningful that EC corporate law requires to do, forbids, or enables to do. The main qualification to this claim is that many EC corporate law rules impose a small burden on each company, by requiring it to pay for the services of a professional or of a public body. Examples are:

a. the First Directive's requirement that "the company statutes and any amendments to those documents … be drawn up and certified in due legal form" (i.e.

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[176] *See* Haller, *supra* note 32, at 159 (describing the impact of the accounting directives as "enormous").

[177] *See supra* note 44.

[178] *Cf.* Eric Nowak, *Investor Protection and Capital Market Regulation in Germany*, *in* THE GERMAN FINANCIAL SYSTEM 425, 432 (Jan P. Krahnen & Reinhard H. Schmidt eds. 2003) (reporting that in Germany "disclosures [as mandated by the first insider trading directive] have been misused by some issuers as a public relations tool, while many other issuers have not disclosed a single statement." To be sure, the author so continues: "Nevertheless, ad hoc disclosure activity of domestic issuers increased sharply, rising from 991 notifications in 1995 to 5057 disclosures in 2000, and falling … to 3781 in 2002").

[179] *See* Gerard Hertig & Joseph A. McCahery, *Company and Takeovers Law Reforms in Europe: Misguided Harmonizazion Efforts or Regulatory Competition?*, 4 EUR. BUS. ORG. L. REV. 179, 190-91 (2003) (doubting that the EU plays and will any time soon play any central role even in the areas of securities and accounting law); Hertig & Lee, *Four Predictions about the Future of EU Securities Regulation*, *supra* note 43, at 359 (doubting that EC action in the area of securities law will ever be meaningful until a European S.E.C. is created). *See also supra* note 44.

through public notaries in countries where this category of professionals exists), or must be subject to "preventive control, administrative or judicial;"[180]

b. the First, Second, Third, Sixth, Eleventh[181] and Twelfth Directives' provisions imposing publicity in the company register of certain facts or documents, because companies have no choice but to buy the "disclosure services" provided by the relevant public bodies and will find it helpful to turn to professionals or corporate services firms in complying;

c. the accounting directives, that at least in some of the Member States have led to an upgrade of accounting rules and practices, thereby inflating the demand for accountants' services;

d. the mandatory bid rule: given the sums at stake, potential acquirers will inevitably seek the help of a top law firm in order to avoid it, unless of course they want to acquire all of the target's shares for cash anyway.[182]

Even avoidable rules can induce companies to pay for professional services for compliance. When the compliance costs, including the fees for the professional services, are lower than the avoidance costs (again, including the cost of legal advice), avoidable rules will be complied with and the professional services acquired. Such is often the case, in practice, with the Second Directive's rules requiring an expert opinion for non-cash contributions.

While the burden of such rules is mostly trivial from the point of view of an individual company, and especially for well-established ones, in the aggregate, by inflating the demand for professional services, they secure significant rents for the professionals and public officials providing those services. Further, since the burden on businesses has a fixed component, these rules have a disproportionate impact on smaller

[180] Article 10, First Directive. In Spain, public notaries and especially Company Registrar's officials extract significant rents from the preventive control of the validity of company statutes. *See* Jesús Álfaro Aguila Real, *Lowering Legal Barriers to Entry Through Technology Without Touching Vested Interests: The Spanish* Sociedad Limitada-Nueva Empresa, 5 EUR. BUS. ORG. L. REV. 449, 456-67 (2004).

[181] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, 1989 OJ (L 395) 36.

[182] *See* Enriques, *The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization As Rent-Seeking?*, *supra* note 169, at 794-95 (highlighting that the directive potentially increases the scope for exemptions and price discounts and for national supervisory authorities' discretion in granting them).

firms. Therefore, their overall effect is to raise, if only marginally, the barriers to entry into the European markets, by making it more expensive to adopt the corporate form.

The same ultimate effect of increasing the cost of doing business derives of course from the Eighth Directive, which defines the professional qualifications of persons in charge of the compulsory auditing of a company's accounts[183] and therefore raises a legal barrier to entry into the market for auditing services, intuitively with an impact on the price for such services.

A general feature of EC corporate law also leads to higher costs: it undeniably increases the complexity of national corporate laws,[184] making them more institutionally differentiated.[185] Secondary EC corporate law adds two layers of rules to those at the national level. Member States' law must be consistent with EC directives and regulations, which in turn must be consistent with the EC Treaty.

Lawyers can reap economic benefits from the complexity of the law.[186] As Gillian Hadfield aptly points out, complexity is one of the causes for the substantial deviation of the market for legal services from the competitive model.[187] Among other things, complexity "is responsible for the credence nature of legal services … mak[ing] price and quantity in the market predominantly the result of beliefs and wealth, rather than of cost."[188]

In the case of securities law directives and regulations adopted under the Lamfalussy approach, the picture is even more complex than in other corporate law areas. We have here are two layers of secondary EC law and yet a third one of "quasi-

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[183] Article 51 of the Fourth Directive and 37 of the Seventh Directive, with due exceptions, mandate the audit of annual accounts.

[184] *Cf.* CHEFFINS, COMPANY LAW. THEORY, STRUCTURE AND OPERATION, *supra* note 63, at 448 ("the changes that have taken place have often made it more difficult for a resident of a Member State to know what the situation is with his own legislation while doing little to inform him about what the law is in other EU countries").

[185] Peter Schuck identifies four features of a complex legal system: density, technicality, indeterminacy and, what is relevant to our purposes, institutional differentiation, i.e. the fact that a legal system "contains a number of decision structures that draw upon different sources of legitimacy, possess different kinds of organizational intelligence, and employ different decision processes for creating, elaborating, and applying the rules." Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 3-4 (1992).

[186] *See* Halbhuber, *supra* note 27, at 1412 ("[s]uch complexity is bound to benefit lawyers able to handle it").

[187] Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 995 (2000).

[188] *Ibid. See also Id.*, at 995-96 for further insights on the beneficial effects of legal complexity upon lawyers' welfare.

law:" framework (or level 1) directives and regulations contain the main principles and rules; level 2 measures, i.e. directives and regulations contain more detailed provisions and, thanks to the smoother legislative process, can be modified more often to adapt to market and technological changes. In addition to these two layers, the Lamfalussy approach also provides for a third level, in which CESR issues guidelines for the implementation and uniform interpretation of level 1 and level 2 measures.[189] Arguably, the documents produced by CESR to fulfil its level 3 tasks also have to be taken into account by national securities regulators and, as a consequence, by lawyers when construing national rules. Note that here, not only is the law more complex because there is an additional layer of rules, but since the legislative landscape is bound to change more often, keeping up with it will be a further justification for charging a higher price for legal advice: new rules always imply greater uncertainty, and hence a higher legal risk, due to the absence of precedents and widely shared interpretations.

Finally, Part III has shown that many EC corporate law provisions are more or less easily avoidable. When compliance costs (including lost profit opportunities) are higher than the avoidance costs, companies will avoid them. To do so, as hinted before, advice from a lawyer will be necessary and usually sufficient.[190] Therefore, avoidable rules too raise the cost of doing business and corporate lawyers' rents. On the margin, they may also raise the cost of some transactions to the point that it is not convenient to carry out them.

Secondary EC corporate law provisions such as those described can finally be seen as aiming to protect the rents extracted by interest groups in individual Member States by eliminating the risk of domestic companies' (re)incorporating in other EC jurisdictions without such rules.[191]

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[189] For a more detailed description of the Lamfalussy approach *see* FERRAN, BUILDING AN EU SECURITIES MARKET, *supra* note 24, 61-84. *See also Id.*, at 100 for the prediction that level 3 standard and guidelines will "move into the foreground" once the level 1 and level 2 measures implementing the Financial Services Action Plan will be adopted, possibly also extending to areas uncovered by secondary EC legislation.

[190] *See also supra* note 152 and especially the quotation from Eilís Ferran's comment on *Chaston v. SWP Group plc*.

[191] *See* Carney, *The Political Economy of Competition for Corporate Charters*, *supra* note 123, at 317.

To conclude, EC intervention in this area is like a cartel aiming to protect or increase the monopolistic rents of well-defined interest groups, especially professionals providing corporate-law-related services.

3. EC corporate law and the dynamics of EU national laws. The presence of a centralized lawmaker affects how corporate law is produced and evolves within the EU in various ways.

a. Pre-emptive changes of national corporate laws. First of all, Member States have sometimes pre-emptively reformed their company laws so as to anticipate, guide, or in any event affect the outcome of, harmonization efforts. For instance, back in the sixties, Germany and France enacted their corporate law reforms also with the purpose of displaying more modern laws, from which the Commission, in their view, might have drawn inspiration for its first harmonization steps.[192]

More recently, a good example of a pro-active move by a Member State with the clear purpose of affecting the outcome of harmonizing efforts at the EC level is that of Germany and its rules on takeover defences. In Jeffrey Gordon's reading, the anti-takeover provision in the German law on takeovers was "a bargaining chip in a kind of trade negotiation, a raising of barriers designed to precipitate a crisis and force a new round of negotiations that would lower trade barriers – here, takeover protections – across the board."[193]. Of course, an alternative and more straightforward reading is that the anti-takeover provision was a reaction to the Mannesmann takeover and to prior pro-takeover policy choices made by the German Government.[194] Even in this perspective, however, the 2001 anti-takeover policy choice can at the same time be viewed as an effective way to contrast the Commission's attempt to adopt the modified passivity rule EU-wide, by credibly putting Germany's weight on a different policy choice.

In the US, according to Roe's thesis, the federal authorities shape corporate law either by direct intervention or because "Delaware players know that the federal government can take away their corporate lawmaking power in whole or in part,"[195] and

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[192] *See* ERIC STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS 92, 102 (1971).

[193] Jeffrey N. Gordon, *An American Perspective on Anti-Takeover Laws in the EU: The German Example*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 86, 542, 547.

[194] *See* Cioffi, *Restructuring "Germany Inc.": The Politics of Company and Takeover Law Reform in Germany and the European Union*, *supra* note 81, at 385-87.

[195] Roe, *Delaware's Competition*, *supra* note 1, at 592.

therefore act in ways that federal authorities will not dislike.[196] Something close to the reverse seems to be true in Europe, where Member States reform their corporate laws in order to affect the outcome of EC institutions' initiatives, let these adopt rules that they have already in place or that they would introduce anyway, and are usually able to block EC developments they (or better their businesses) dislike.[197] In other words, while in the US, according to Roe, Delaware adapts to federal law and politics, in the EU it is the EC that adapts to Member States' laws and politics. In the interaction between Member States and the EC, however, national laws may change in anticipation of possible policy initiatives at the EC level, as takeover law developments in Germany suggest.

b. EC corporate law as a cartel. Further, EC corporate law can also be viewed as a cartel among national legislators.[198] Like any anticompetitive agreement, it may secure monopoly rents, increase consumer (societal) welfare, or have both effects. It is impossible to say whether EC corporate law provisions, as a whole or one by one, would stand scrutiny under a "rule of reason" analysis. But at least three implications can be drawn from the characterization of EC corporate law as a cartel.

First, the risk exists that, like any cartel, EC institutions may abuse their monopoly power. What is taking place in the securities law area, with over-active EC institutions issuing level 1 and level 2 measures and level 3 guidelines every other month or so, with no realistic prospect that this is only a temporary phenomenon,[199] can be seen as an illustration of how the EC monopoly power may be abused by engaging in excessive innovation.[200] An ever-changing legal environment greatly increases the compliance costs of EC securities law. In fact, businesses and their consultants have to make the organizational and operational changes required by every regulatory update. Further, the Lamfalussy method may, as an outcome, worsen the already questionable quality of EC securities law. That is, if rules are easy to change, it may be seen as more

[196] *See Id.* at 632.
[197] *See also infra* text accompanying notes 230-31.
[198] *See supra* text following note 191.
[199] *See* Editorial, *When in Doubt Just Do Nowt*, in FIN. TIMES (Europe), January 24, 2005, at 10 (reporting the new Internal Market Commissioner's pledge not to issue important legislative proposals in 2005 in the financial markets area, but also citing a report by Houston Consulting, a company that tracks the Financial Services Action Plan, according to which "78 EU financial services measures are in the pipeline").
[200] *Cf.* Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 KAN. L. REV. 541, 558-59 (1995) (suggesting that Delaware may engage in excessive innovation of its corporate law thanks to its market power).

acceptable for them to be badly worded, inconsistent or simply wrong. In other words, given the chance to legislate more swiftly, EC institutions, which are already prone to produce bad-quality rules, due to the complex art of reaching far-fetched political compromises and to the absence of regulatory competition restraining them, may just end up producing bad rules more often than before.[201] This risk may well balance the positive effect of greater changeability of rules, i.e. the fact that mistaken rules can themselves be repealed more easily.

Second, from a dynamic perspective, in areas covered by harmonization, experimentation with new regulatory solutions by single jurisdictions is more difficult, if not ruled out altogether.[202] Poison pills provide a good illustration of this point. These defensive devices are said to be unfeasible under European corporate laws, due to the "protection for pre-emptive rights and barriers to discriminatory issuances [which] … are buttressed by the Second Company Law Directive."[203]

Recent developments in Italian law show that there may be ways around such protections and barriers, depending on how broadly the Second Directive's provisions are construed. Under the 2003 Italian corporate law, companies may issue "participating financial instruments,"[204] i.e. non-voting or limited voting securities with cash flow rights possibly identical to those pertaining to shares, but explicitly not treated as shares according to the law.[205] Thus, a company's board of directors, provided that the company's charter authorized it do so, may issue such "non-share shares" with no need to grant existing shareholders pre-emption rights and possibly in favor of shareholders holding less than a specified percentage of the company's capital.[206] They may also issue securities incorporating an option to purchase such non-share shares at a heavy discount and grant the board the power to redeem such rights. In a word, a device quite

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[201] *Cf.* FERRAN, BUILDING AN EU SECURITIES MARKET, *supra* note 24, at 57 (similarly highlighting the "risk that a system that makes it easier to make laws could remove a de facto check on excessive legalism and increase the overall regulatory burden").

[202] *See, e.g.,* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 132 (1993).

[203] Gordon, *An American Perspective on Anti-Takeover Laws in the EU: The German Example*, *supra* note 193, at 551 n.23.

[204] Artiche 2346(6), C.C.

[205] *See, e.g.,* Luca Enriques & Giuseppe Scassellati Sforzolini, *Adeguamenti statutari: scelte di fondo e nuove opportunità nella riforma societaria*, 2004 NOTARIATO 69, 79.

[206] *Cf.* MATTEO GATTI, OPA E STRUTTURA DEL MERCATO DEL CONTROLLO SOCIETARIO 360-63 (2004) (considering the hypothesis of a new issue of shares and warrants similarly discriminating against a bidder and concluding that it would not violate the principle of equality of treatment of shareholders).

similar to a poison pill would now seem available to Italian companies. The most important difference would of course be that the general meeting, that is competent on charter amendments, would have to entrust the board with the power to adopt the Italian-style poison pill. However, this could be easily done at the IPO stage or before the dominant shareholder divests its controlling stake.

Yet, the risk of a court declaring the Italian-style poison pill illegal would be high, especially in light of the provision granting shareholders the pre-emption right on newly issued shares.[207] In fact, Italian corporate law scholars and judges often tend to argue that mandatory corporate law rules should apply by analogy to cases similar to those explicitly covered.[208] The presence of an EC directive imposing pre-emption rights would add further arguments in favour of the illegality of this defensive device, thus increasing the legal risk attaching to it. And this would be despite that, as a matter of EC law, it is far from certain that such a device would violate the Second Directive provisions on equality of treatment[209] and pre-emption rights,[210] as Belgian corporate law also appears to suggest with regard to the latter.[211] To conclude, even avoidable EC company law rules may increase the legal risk attached to innovation in company law, thereby acting as a curb to it.[212]

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[207] *See* Luca Enriques, Quartum non datur*: appunti in tema di "strumenti finanziari partecipativi" in Inghilterra, negli Stati Uniti e in Italia*, forthcoming in BANCA BORSA TITOLI DI CREDITO.

[208] *See critically* Luca Enriques, Uno sguardo cinico sulla riforma del diritto societario: più rendite; meno rigidità? 25, Working Paper Indret 15 (July 2004), *at* http://www.indret.com/rcs_articulos/cas/231.pdf.

[209] Article 42 of the Second Directive provides that "[f]or the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position." Arguably, if "non-share shares" are not covered by the Second Directive's provisions on new issues of shares, then Article 42 does not apply to them. And, in any event, it is at least doubtful that the bidder and the other shareholders would be "in the same position."

[210] If the reasoning in Advocate General's opinion in *Meilicke* applies (*see supra* note 139 and accompanying text), then it would be for the Member States to decide, according to their domestic laws, whether to strike down these "poison pills" on the ground that the company, by issuing them, has avoided the rules granting shareholders equal treatment and pre-emption rights.

[211] Under Belgian law, other than during a takeover, the general meeting may authorize the board to issue *parts bénéficiaries*, i.e. non-share shares, giving existing shareholders no pre-emption rights on them. *See* Cristiano Cincotti, *L'esperienza delle parts* bénéficiaries *belghe e gli strumenti finanziari partecipativi di cui all'art. 2346 c.c.*, 2004 BANCA BORSA TITOLI DI CREDITO I, 221, 229; e-mail from Christoph van der Elst to the author (Feb. 14, 2005) (on file with the author)..

[212] *Cf.* Stefan Grundmann, *The Structure of European Company Law: From Crisis to Boom*, 5 EUR. BUS. ORG. L. REV. 601, 612-13 (2004) (emphasizing the advantages of regulatory competition "as a 'discovery device'").

Finally, even in a post-*Centros* world it is most unlikely that any Member State will become active in the market for corporate charters.[213] One reason why the Delaware-like scenario is unrealistic is that any Member State considering such a move must allow for the possibility that the EC would intervene to ban any corporate law feature that might actually attract incorporations.[214] So, the very existence of EC lawmaking power in the corporate law area—together with the fact that this power has been exercised fairly often over the decades—may work as a barrier to competition among jurisdictions.

This article's thesis that EC corporate law consists principally of rules designed to safeguard the rents of specific interest groups in part reinforces and in part weakens the claim that the EC's power to legislate in the corporate law area has a chilling effect on regulatory competition. On the one hand, should a Member State ever succeed in attracting reincorporations by devising rules that eliminate well-organized interest groups' rents (other than those already secured by EC corporate law, if there are any), there is a very good chance that the EC would step in to outlaw the attractive features of any such competing jurisdiction. On the other hand, the competing jurisdiction may be successful thanks to rules which attract businesses for other reasons (like a greater respect for private parties' determinations or even their pro-management tilt) without touching the interests of well-organized groups. In this case, provided that the chartermongering State succeeds in attracting a relevant number of companies, any attempt to rule out the attractive features of the competing jurisdictions would predictably fail, in light of the EC's inability thus far to win businesses' resistance against non-trivial harmonizing rules.

4. EC Corporate law legislation: a flourishing industry. Finally, no matter how trivial the outcome, legislation in the corporate law area is indeed something serious: its ever more active production machinery matters not only to those who are directly engaged in the supply of EC corporate law, but also to businesses and professionals, who, normally through their associations, lobby EC and national institutions for or against the adoption of new EC measures.

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[213] *See supra* text accompanying note 9.

[214] *See, e.g.,* Enriques, *EC Company Law and the Fears of a European Delaware*, *supra* note 9, at 1269-70.

As Table 1 and Appendix 1 show, after a slow start in the Sixties and Seventies, the output of EC corporate law has been steady and is now increasing fast. EC legislation needs continuous updating and maintenance. Further, according to many, and especially according to the EC Commission, EC corporate law has to cover more areas and to become more important.[215]

In short, EC corporate law matters as an active and growing lawmaking enterprise, first and foremost to those involved in supplying it, and second to those who may gain or lose from new rules and therefore lobby for or against them.

The following are the groups involved in the supply of EC corporate law:

1. politicians at the EC level (Commissioners and Members of the European Parliament), especially with regard to those rare policy issues that are politically sensitive, such as, recently, takeover defences;

2. EC officials in charge of corporate law issues within the Internal Market Directorate General,[216] now together with officials working at the Committee of European Securities Regulators (CESR) in Paris;

3. officials working on these issues within the European Council's Permanent Representatives Committee (COREPER);

4. national politicians dealing with such issues, again especially with regard to politically sensitive issues;

5. national public officials having a part in Council meetings, in their preparation and/or in the implementation of directives once approved;

6. lawyers and law professors involved as advisers to lawmakers at the EC level (when EC measures are drafted) and at Member State level (both when EC measures are drafted and when they are to be transposed);[217]

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[215] *See* MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION - A PLAN TO MOVE FORWARD. COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT, *supra* note 22, at 24-26 (table displaying fourteen legislative initiatives extending the scope of EC corporate law and three changing the existing framework).

[216] Directorate General G (Financial Markets) has a Unit in charge of "Company law, corporate governance and financial crime," a Unit in charge of "Accounting and auditing," and a Unit in charge of "Securities markets and investment services providers."

[217] The importance of lawyers and law professors in the debate and in the process of EC corporate law production can hardly be overestimated. Traditionally, the Commission has requested the advice of prominent corporate law professors and practitioners around Europe in drafting directives and getting ideas on how to proceed towards more comprehensive harmonization. *See* STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS, *supra* note 192, at 316 (reporting that already in the mid-Sixties "a number

7. Brussels-based lobbying professionals and people working for EC-level industry associations.[218]

EC corporate law matters to these groups in various ways. First of all, these groups (plausibly with the exception of lobbying professionals) usually share a genuine belief in the virtues of harmonization of EU corporate laws, seeing it as a tool both to achieve the objective of market integration and to have better corporate laws in place across the EU.

Second, and more cynically, all these groups also have an interest in keeping an active lawmaking process going and, even more, in expanding the areas covered by EC

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of national company law experts […] was commissioned to prepare comparative studies on selected aspects of national laws. These studies would contain more or less specific suggestions as to which rules could or should be coordinated and in what way"). *See also* Pierre Van Ommeslaghe, *La Première Directive du Conseil du 9 Mars 1968 en Matière de Sociétées*, 5 CAHIERS DE DROIT EUROPÉEN 495, 498 (1969) (describing the primary role played by such company law experts in the drafting of the early company law directives). Most recently, the Commission renewed this tradition when it appointed the High Level Group of Company Law Experts, comprising seven leading European lawyers (*see* REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 86, 925, 1058). The Group helped the Commission draft a new takeover directive proposal (*see* REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON ISSUES RELATED TO TAKEOVER BIDS, *ibid*., 825, *passim*) and then provided it with an ambitious agenda for post-Enron reforms and for the modernization of EC corporate law (*see* REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE, *Ibid.*, 933-54). Unsurprisingly, the Group advocates the creation of "a more permanent structure which could provide the Commission with independent advice on future regulatory initiatives in the area of EU company law" (*Id*. at 961. *See critically* Hertig & McCahery, *Company and Takeovers Law Reforms in Europe*, *supra* note 179, at 192). In October 2004, the Commission has created a European Corporate Governance Forum "to help the convergence of national efforts, encourage best practice and advise the Commission" (Frits Bolkestein, Corporate Governance in the European Union (Oct. 18, 2004), *at* http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/460&format=HTML&aged=0&language=EN&guiLanguage=en). More recently, the Commission has declared its "intention to set up a consultative committee called the Advisory Committee on Corporate Governance and Company Law that would enable it to obtain technical advice on the implementation of the 2003 Company law and Corporate Governance Action Plan." *See* Call for applications for the establishment of the Advisory Committee on Corporate Governance and Company Law, *at* http://www.europa.eu.int/comm/internal_market/company/docs/advisory-committee/call-applications-2004-12_en.pdf.

The centrality of lawyers is far from peculiar to EC corporate law making. The same is in fact true, for instance, of lawyers in the US (*see* Kahan & Kamar, *The Myth of State Competition in Corporate Law, supra* note 122, at 705 ("The driving force behind many corporate statutes is corporate lawyers"), in Germany (*see* Christian Kirchner et al., Regulatory Competition in EU Corporate Law after Inspire Art: Unbundling Delaware's Product for Europe 11 (2004), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617681 ("Law professors, through the participation on government appointed commissions, play a significant role in law reform in … Germany")), and in Italy (*see* Luca Enriques, Uno sguardo cinico sulla riforma del diritto societario: più rendite; meno rigidità?, *supra* note 208, at 11 (reporting that 33 out of the 35 components of the Commission in charge of drafting the Italian corporate law reform of 2003 were lawyers, and among them 24 were also law professors)).

corporate law, whatever its content. This is the case of politicians and bureaucrats at the EC level, of lobbyists as a group,[219] and of lawyers and law professors involved as advisers. Not only a greater scope for EC corporate law[220] but also a more active EC corporate lawmaking industry will increase the power and prestige of all these groups. This is also the case of national-level bureaucrats in charge of implementation and of lawyers and law professors serving as their advisors, often the same people following the legislative works leading to the adoption of the directives for their respective countries. As a matter of fact, most changes in national corporate law in the last 35 years have been the result of EC directives, so that apparently EC corporate law production has inflated the national "demand" for legislative work in this field,[221] leading in turn to greater support for new EC initiatives from national legislative bureaucracies and corporate law scholars. Some of the national bureaucrats, politicians, and advisers will also favor EC legislation so as to develop a pro-European reputation, with a view to being promoted to a position in Brussels.[222]

For lawyers and legal scholars involved in the production of EC corporate law as advisers to the Commission or to national Governments, the process itself may have a consumption-good component, such as "the chance to reflect and consult with peers in a nonadversary setting about ideal statutory solutions to various problems – the counterpart of academic conferences."[223]

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[218] *See generally* Roland Vaubel, *The Political Economy of Centralization and the European Community*, 81 PUB. CHOICE 151, 154 (1994).

[219] *See generally Id.* at 153-54. Individual lobbyists will do their best to avoid EC legislation on behalf of their clients/employers and with a view to increase the chances to be assigned the same work again later on in light of the EC Commission's insistence on its harmonization projects (as exemplified by the story of the Takeover Directive). As a group, however, Brussels lobbyists can only gain from an ever greater amount of EC legislation, because interest groups opposing it will sooner or later take action in order to have it repealed or changed and because EC legislation usually generates further legislation in the form of amendments, attempts to reach a higher level of harmonization, updates and so on.

[220] As Giandomenico Majone observes, "the desire of the Commission to increase its influence [is] a fairly uncontroversial behavioral assumption" (Giandomenico Majone, *Regulating Europe: Problems and Prospects*, *in* JAHRBUCH ZUR STAATS- UND VERWALTUNGSWISSENSCHAFT 1987/88 159, 167 (Thomas Ellwein et al. eds. 1989).

[221] This does not contradict the view that EC corporate law is trivial. It only shows that EC corporate law inflates the demand for corporate law reform services by requiring Member States to review their corporate laws, however trivially, more often than they would otherwise do.

[222] *See generally* Vaubel, *The Political Economy of Centralization and the European Community*, *supra* note 218, at 157; *Id.*, *The Public Choice Analysis of European Integration: A Survey*, 10 EUR. J. POL. ECON. 227, 233 (1994).

[223] Carney, *The Production of Corporate Law*, *supra* note 123, at 725. EC corporate law has a consumption good component for European corporate law professors in general, because it provides a

Politicians and bureaucrats at national and EC level alike will further favor EC legislation which allows specific interest groups to extract rents, the former to secure their votes and/or campaign contributions, the latter to increase their power and prestige among such groups, possibly with a view to jobs in the private sector later on.[224]

National politicians and bureaucrats may also favor EC legislation in this area whenever it may raise the cost of doing business in other Member States to the same level as in their home state, thereby securing the rents extracted by the relevant national interest groups.[225]

Turning from the suppliers of EC corporate law to those who are bound to gain or lose from it, section IV.A.2 identified the interest groups that benefit most. These groups actively demand EC corporate lawmaking. Accounts of the legislative process leading to the adoption of corporate law directives confirm that organized interest groups, such as accountants and their associations, have always played an active role in the production of EC corporate law,[226] consistent with the more general finding that interest groups play a prominent role in the EC lawmaking process.[227]

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common ground for research in this area of law. *See* STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS, *supra* note 192, at 193 (reporting that even back in the Sixties "[t]he interest generated by the Commission's [early] work has led to what one may call a flowering of comparative company law studies in the universities and in the some forty new centers of European studies"). EC company law also justifies (and helps find funding for) cross-border work and international conferences much better than mere comparative curiosity. Similarly, as Harald Halbhuber notes, "[f]ar from deploring the confusion created by directives, some German authors praise it as an intellectual challenge, a veritable comparative lawyer's paradise that would see national lawyers competing for influence on the ECJ's interpretation of the directives" (Halbhuber, *supra* note 27, at 1412).

[224] For anecdotal evidence *see* STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS, *supra* note 192, at 189-90 (reporting the case of a German civil servant who joined the Commission staff in 1958, became "director of the Directorate dealing with harmonization of company law … [and] resigned in 1969 to become a member of the board of an insurance concern").

[225] *See generally* Vaubel, *The Political Economy of Centralization and the European Community*, *supra* note 218, at 158. Belgium and Italy, which already imposed the publication of annual accounts by their companies (*see* Van Ommeslaghe, *La Première Directive du Conseil du 9 Mars 1968 en Matière de sociétées*, *supra* note 217, at 498-99) were among the most active proponents of a similar obligation at EC level. *See* STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS, *supra* note 192, at 232 (Belgian and Italian experts pushed for immediate mandate of the obligation to disclose annual accounts).

[226] *See Id*. at 195-235, for an account of the legislative history of the First Directive highlighting how much the various interest groups were involved in the process. *See also* EDWARDS, EC COMPANY LAW, *supra* note 23, at 118-19 on the proactive role of the German Institute of Public Accountants in the lawmaking process leading to the adoption of the Fourth Directive; Peter Walton, *The True and Fair View and the Drafting of the Fourth Directive*, 6 EUR. ACCT. REV. 721, 722 (1997) ("In 1965 the Commission asked the accounting profession in the … six member states ... to constitute an expert group to prepare a report on the harmonization of accounting for listed firms," the work of which constituted the basis for the first draft of the Fourth Directive).

[227] *See, e.g.,* Roland Vaubel, *The Public Choice Analysis of European Integration: A Survey*, *supra* note 222, at 238; J. Andrés Faiña Medin & Pedro Puy Fraga, *A Framework for a Public Choice Analysis*

EC corporate law also serves lawyers' and law professors' interests,[228] not only thanks to the increased complexity of the legal framework, but also because it may reduce "the regulatory surplus that parties could exploit by engaging in regulatory arbitrage."[229] Lawyers' and law professors' human capital is heavily invested in their domestic corporate laws and deeply connected with the mastery of their native language. Should private parties massively decide to opt out of their domestic laws, they would lose money and prestige.[230] This helps explain why lawyers and law professors, quite aside from their genuine belief in the virtues of harmonization, usually favor it.[231]

Other groups, such as businesses and their associations or families holding controlling blocks in EU companies, far from pushing for EC intervention,[232] have usually *resisted* EC's attempts to harmonize areas of law (in a non-trivial way).[233] As

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of the European Community, 1988 ECONOMIA DELLE SCELTE PUBBLICHE 141, 154. *See also* Clive M. Schmitthoff, *The Success of the Harmonization of European Company Law*, 1976 EUR. L. REV. 100, 100 ("The eventual form in which the Council of Ministers approves an important legislative measure has often, in fact, been agreed between the officials of the Commission and the representatives of interested circles in the Member States").

[228] It is perhaps worth pointing out that lawyers (and law professors) play a two-fold role in (corporate) lawmaking, both on the supply side and on the demand side. *See* Larry E. Ribstein, *Delaware, Lawyers and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, especially at 1014-15 (1994) (with specific regard to Delaware's corporate lawmaking process).

[229] STEFANO LOMBARDO, REGULATORY COMPETITION IN COMPANY LAW IN THE EUROPEAN COMMUNITY 193 (2002); Halbhuber, *supra* note 27, at 1413.

[230] *See Id*. at 1413; LOMBARDO, REGULATORY COMPETITION IN COMPANY LAW IN THE EUROPEAN COMMUNITY, *supra* note 229, at 193.

[231] What is argued here is, again, not inconsistent with the claim that directives and regulations issued thus far are mostly trivial. First of all, they may be trivial due to the unsuccessful attempt to harmonize in a more effective way. Second, those advocating the adoption of corporate law directives and regulations plausibly perceive them to be less trivial than they are.

[232] Desmond McComb makes this point with regard to accounting directives: "The accounting directives have been a prime example of legislation from above in the almost total absence of evident social need or demand." Desmond McComb, *Accounting. A. Report*, *in* EUROPEAN BUSINESS LAW. LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION, *supra* note 62, 266, 283.

[233] For instance, both the U.N.I.C.E. (the main association of European industrialists) and the Féderation Bancaire opposed most proposed rules to be inserted in the Second Directive (*see* STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS, *supra* note 192, at 319-26). *See also generally* Lannoo, *A European Perspective on Corporate Governance*, *supra* note 41, at 292 ("Member States and businesses prefer to keep control over corporate control in their hands"), and, with specific regard to accounting directives, Graham Diggle & Christopher Nobes, *European Rule-making in Accounting: The Seventh Directive as a Case Study*, 24 ACC'T & BUS. RES. 319, 330 (1994):

> "Governments will also respond to strong lobby groups. … These groups will be aiming to preserve the status quo, to maintain flexibility, to minimise costs, and so forth. One powerful example of the influence of corporate lobbyists is the inclusion of special Articles in the Seventh Directive that enable the unique consolidation practices of Unilever and Royal Dutch Shell to continue (Article 12 and 15)."

One may see an exception to this in so-called global players' pressure for an EC regime allowing them to use the International Accounting Standards (*see e.g.* Haller, *supra* note 32, at 168). However, one should note that for global players the first best solution would have been simply to have EC accounting parts II and III have shown, on the whole their resistance has been effective, leading, with few exceptions, to a fair amount of trivial EC corporate law.

The most common view, at least among lawyers, is that the EC's failure to harmonize EC corporate law more meaningfully is the outcome of a game in which a public-interest-minded European Commission attempts to improve the fairness and efficiency of corporate law within the EU, while Member States, captive to the interests of national businesses, block or water down the proposals. And it may well be that the resistance by dominant interest groups at the national level has always prevented the adoption of non-trivial EC rules.[234]

Once we take the interests of suppliers of EC corporate law into account, however, one may take a more cynical view at the EC company law production process. One may regard the EC institutions' failure to issue non-trivial rules as the result of a different game, in which EC politicians and public officials (no matter whether, as the case may be, in perfect good faith) propose controversial, non-trivial rules often with the tacit or explicit support of one or more Member States already having such rules in place, while politicians and bureaucrats from Member States in which the proposed rules would harm specific interest groups oppose them on those groups' behalf. Eventually, this is a game Member States will always be pleased to play: not only are they usually able to block any meaningful legislation in this area, thereby acting as champions of the organized national interests opposing the EC measure. But, should they fail to block it, they can always put the blame on the EC and on other Member

directives scrapped so as to be able to use IAS, as opposed to the current EC regime in which individual accounts are still regulated by the Fourth Directive (unless Member States exercise the option Article 5 of regulation 2002/1606 grants them to have individual accounts drawn according to IAS), while consolidated accounts must be drawn up according to the IAS principles as endorsed by the EC. As a matter of fact, the adoption of IAS accounting principles by the EC mainly reflects the EC institutions' (and especially the Commission's) aim "to keep itself in the game of taking future influence in international accounting harmonization" (*Id*. at 164), also in the face of Member States' pro-active moves to allow global players to use International Accounting Standards (for instance, in 1998 Germany allowed its listed companies to prepare consolidated annual accounts in accordance with internationally accepted accounting principles: *see, e.g.,* Nowak, *Investor Protection and Capital Market Regulation in Germany*, *supra* note 178, at 435).

[234] *Cf.* Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 165 (1999):

> "British managers, French and Italian controlling shareholders, and German codeterminated firms may each prefer a system of corporate governance that radically differs from that preferred by the others. But … [t]hey might wish to preserve their positional advantage in their own firms and as such might all prefer to prevent European Union officials from imposing a common set of corporate rules."

States. While it is debatable whether the EU economies would be better off with more relevant EC corporate law rules in place, it is certain that, in the process, the interest groups resisting EC intervention will have spent time and money in national and European lobbying.[235]

A good illustration is the process that resulted in toothless rules on takeover defences. The EC first proposed a modified passivity rule clearly inspired by the English City Code. This was strongly opposed by corporate Germany, following the traumatic takeover of Mannesmann by Vodafone, and German Members of the European Parliament followed suit.[236] The European Parliament's rejection led the Commission to raise the stakes and, on the advice of the High Level Group of Company Law Experts,[237] to propose even more controversial rules, which would hit dominant shareholders and incumbent managers around the EU unevenly, *de facto* prohibiting some structural defences against takeovers, while leaving others untouched.[238]

The European Parliament, following the advice of two academics,[239] proposed amendments that would have extended the negative impact of the directive to other structural defences, namely multiple voting capital structures, while again leaving others untouched.[240] The strong opposition from Member States with dominant shareholders and incumbent managers who might lose the quasi-rents stemming from their uncontestable control positions was finally successful: the rules were made optional, i.e. trivial.[241] In the meantime, these groups conducted an impressive lobbying campaign

[235] *Cf.* Mary E. Kostel, *A Public Choice Perspective on the Debate over Federal Versus State Corporate Law*, 79 VA. L. REV. 2129, 2153-54 (1993) (federal lawmaking involves greater lobbying expenditures by managers, while the legislative outcome will be at best no less pro-managers than state corporate statutes, the added expense of managerial lobbying at the federal level being thus "pure waste").

[236] *See* Cioffi, *Restructuring "Germany Inc.": The Politics of Company and Takeover Law Reform in Germany and the European Union*, *supra* note 81, at 384.

[237] *See supra* note 217.

[238] *See* Article 11, Proposal for a European Parliament and Council Directive on takeover bids (COM(2002) 534) of 2 October 2002 (declaring restrictions on the transfer of shares and on voting rights respectively unenforceable and ineffective during the bid and imposing the breakthrough rule; no provision in the proposal addressed structural defences such as pyramids, cross-holdings or even multiple voting structures).

[239] *See* Barbara Dauner Lieb & Marco Lamandini, The New Proposal of a Directive on Company Law Concerning Takeover Bids and the Achievement of a Level Playing Field, European Parliament Working Paper 57 (2003), *at* http://www.jura.uni-duesseldorf.de/dozenten/noack/texte/sonstige/study.pdf.

[240] *See* European Parliament Report on the Proposal for a European Parliament and Council Directive on Takeover Bids, Final A5-0000/2003 (Dec. 3, 2003) (extending the breakthrough rule so as to neutralize multiple voting structures, but again addressing neither pyramids nor cross-holdings).

[241] *See supra* text accompanying notes 81-85.

both at the national and at the EC level.[242] In other words, they spent a lot of money and effort to obtain what they wanted—that is… nothing.[243]

Undeniably, the one provided here is a cynical view of why EC corporate law matters. One may of course paint a more idealistic picture, in which what little has been achieved despite Member States' and businesses' resistance improved the quality of companies' disclosure, prevented companies from entering into value-destroying transactions, and, at the end of the day, improved the quality of corporate law and governance within the EU, also to the benefit of their (often too myopic) businesses or, in any event, of their economies. In other words, the higher cost of doing business deriving from EC corporate law would be justified on efficiency grounds, the benefits more than offsetting the costs. This may well be. The point is that while the benefits of secondary EC corporate law, also in the light of the triviality of most of its rules, are debatable at best,[244] it is hard to deny that the cost of setting up a company and of carrying out certain transactions is higher as a consequence of EC law, that EC corporate law helps certain interest groups secure their rents, that the corporate law landscape is more complex than it would otherwise be, that EC corporate law has a curbing effect upon the dynamics of regulatory competition in this area of law, and finally that its lawmaking industry is busy and flourishing.

B. One possible objection: Are Member States' corporate laws also trivial? Before concluding, it may be worth countering a possible objection to our analysis thus far, i.e. that the same analysis with regard to individual Member States might well conclude that their corporate laws are no less trivial. Undeniably, many national provisions are trivial, but not all; and some of them do matter greatly for businesses.

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[242] *See, e.g.,* Christopher Brown-Humes & Francesco Guerrera, *Wallenberg Attacks EU over Takeover Proposals*, in FIN. TIMES (London), January 31, 2002, at 10 (giving voice to Wallenberg family's opposition to plans to extend the breakthrough rule to multiple voting shares and reporting that a member of the family and vice-chairman of the family holding company Investor AB, Jacob Wallenberg, would meet the Commissioner for Internal Market on that day).

[243] *See generally* FRED S. MCCHESNEY, MONEY FOR NOTHING. POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997) (providing a theory of how politicians may threaten legislative action in order to appropriate private actors' rents or quasi-rents).

[244] As Part IV has argued, one of the few achievements of EC corporate law is the requirement that companies over a given size to prepare annual accounts according to certain rules, have them audited and make them public. Brian Cheffins provides an excellent critique of the policy of imposing such requirements on smaller companies, mainly on grounds valid in general for closely-held companies. *See* CHEFFINS, COMPANY LAW. THEORY, STRUCTURE AND OPERATION, *supra* note 63, at 512-21.

First of all, in some jurisdictions rules implementing trivial EC corporate law provisions are non-trivial, simply because their policymakers, lawyers and judges take them seriously. This is the case of rules on contributions in kind, for instance, in Germany.[245]

Second, though not technically part of corporate law, rules on co-determination do matter in countries that impose them, and it is no coincidence that no attempt to export co-determination through directives and regulations has ever succeeded.[246]

Third, domestic rules and doctrines on structural and non-structural defences against takeovers are self-evidently relevant. Further, it is hard to deny that rules and doctrines on directors' duties and liability, related-party transactions and shareholder suits against directors and dominant shareholders are non-trivial.

The same is true of a rule found in some Member States, which Jonathan Macey and I have termed the "recapitalize or liquidate rule,"[247] requiring that when losses push net assets below some specified minimum, the company must either recapitalize or reorganize as a company with capital requirement no smaller than its remaining net assets. If it fails to do so promptly, it must be wound up, and if the company is not liquidated, the directors are personally liable. Self-evidently, this rule plays a major role for "asset-light" companies and especially for companies in the proximity of insolvency.[248]

To be sure, after the recent ECJ decisions on companies' freedom of establishment (*Centros* etc.), one may argue that State corporate laws have become trivial in the sense that companies may avoid national rules simply by (re)incorporating elsewhere.[249] For the present, however, legal, tax and other barriers to corporate law arbitrage, especially for already existing companies, are still high enough to preserve

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[245] *See* Halbhuber, *supra* note 27, at 1406.

[246] *See, e.g.,* BUXBAUM & HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE, *supra* note 45, at 259-62.

[247] *See* Enriques & Macey, *supra* note 60, at 1183-84 (citing such rules in place in Italy, France, Spain and Sweden).

[248] *Cf.* Roberto Weigmann, *Società per azioni*, in 14 DIGESTO DISCIPLINE PRIVATISTICHE, SEZIONE COMMERCIALE 338, 423 (1997) (loss of capital is the most frequent event of dissolution in Italy together with insolvency).

[249] *Cf.* Black, *Is Corporate Law Trivial?*, *supra* note 77, at 556 & 558 (arguing that reincorporation renders avoidable every rule that is mandatory in one state and optional in another, provided that the costs of reincorporating are low enough).

national corporate laws' relevance.[250] And in any event, the trivialization of national company laws due to the ECJ decisions would not itself make EC directives and regulations less trivial.

V. Conclusion

This article has argued that secondary EC corporate law has thus far been trivial, i.e. has had and is having very little impact upon EU corporations' governance and management. First, it fails to cover core corporate law areas, such as e.g. fiduciary duties and shareholder remedies. Second, the rules are underenforced. Third, in the presence of very sporadic judiciary interpretation by the European Court of Justice, EC corporate law tends to be implemented and construed differently in different Member States, i.e. according to local legal culture and consistently with pre-existing corporate law. Fourth, when it has introduced new rules, it has done so with respect to issues on which Member States would have most probably legislated even in the absence of an EC mandate. Finally, most of its rules are optional, market-mimicking, unimportant or avoidable. This cannot be said of national corporate laws, which still regulate core issues, sometimes even in an intrusive way, as in imposing passivity upon managers of target companies during a takeover or requiring companies to recapitalize or liquidate as assets fall below some specified minimum.

There are, of course, due qualifications to the triviality thesis. First of all, a few rules or sets of rules indeed have had or are bound to have a meaningful impact on companies and their operations. Second, EC corporate law has increased the regulatory burden of corporate laws across the EU, correspondingly securing higher rents for certain interest groups. Third, secondary EC corporate law has an impact on the evolution of European corporate laws and the dynamics of regulatory competition in various ways. In short, Member States interact with EC institutions in order to affect the outcome of its harmonization efforts and, in the process, alter their company laws to this purpose. EC institutions may abuse their monopoly power to impose rules on EU companies, especially by overfrequent legislative innovation; in areas covered by EC

[250] *See* Enriques, *EC Company Law and the Fear of a European Delaware*, *supra* note 9, at 1260-

law (no matter how trivial), experimentation by (however mildly) competing jurisdictions is ruled out, or at least more difficult, especially when the EU measures involve comprehensive harmonization; the mere possibility of intervening in the area of corporate law may curb regulatory competition. Finally, its production has become an industry itself, employing many EC and national functionaires and lobbyists, and creating occasions for rent extraction by politicians.

EU institutions have recently become over-active in all areas of corporate law as defined here: in securities regulation, a number of level 1 and level 2 directives and regulations have been issued, that attempt to completely harmonize securities law and to ensure greater uniformity in its enforcement as well. In accounting law, the Commission is playing an active role in the shaping of international accounting principles[251] and has proposed to reshape the regulation of auditing and accounting following the example of the Sarbanes-Oxley Act.[252] In core corporate law, an ambitious action plan is being transformed into directive proposals.[253] Such activism might soon render the main thesis of this article obsolete. If the experience so far is of any guidance, however, the final impact of all these efforts on national corporate laws and EU companies may well prove to be weaker than expected. Further, whatever the final outcome of the new trend toward harmonization, this article provides a framework to assess whether the forthcoming wave of EC legislation can escape the destiny of triviality thus far characterizing EC company law directives and regulations.

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[251] *See, e.g.,* Frits Bolkestein, *End the Carping over Accounting Standards*, FIN. TIMES (Europe), Nov. 9, 2004, at 9 (reporting that the EC Commission has interacted with the International Accounting Standard Board in order to obtain "improvements" of the International Financial Reporting Standards). *See also* Commission regulation 2086/2004 of 19 November 2004 (endorsing IAS 39, but carving out its "full fair value option" and its hedge accounting provisions).

[252] *See* Proposal for a Directive on Statutory Audit of Annual Accounts and Consolidated Accounts and Amending Council Directives 78/660/EEC and 83/349/EEC (COM/2004/0177 final), and Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC Concerning the Annual Accounts of Certain Types of Companies and Consolidated Accounts (*at* http://www.europa.eu.int/comm/internal_market/accounting/docs/board/prop-dir_en.pdf)

[253] *See* MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION - A PLAN TO MOVE FORWARD, *supra* note 22. For the first implementation steps, *see* Proposal for a Directive of the European Parliament and of the Council on Cross-Border Mergers of Companies with Share Capital (COM (2003) 703(01)), and Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 77/91/EEC, As Regards the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital (*at* http://www.europa.eu.int/comm/internal_market/company/docs/capital/2004-proposal/proposal_en.pdf).

Appendix 1: EC Corporate law directives and regulations[254]

- First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, as amended by
    - Directive 2003/58/EC of 15 July 2003;
- Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, as amended by
    - Council Directive 92/101/EEC of 23 November 1992;
- Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies;
- Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies as amended by
    - *Seventh Council Directive 83/349/EEC of 13 June 1983* (*infra*);
    - Council Directive 84/569/EEC of 27 November 1984;
    - *Eleventh Council Directive 89/666/EEC of 21 December 1989* (*infra*);
    - Council Directive 90/604/EEC of 8 November 1990;
    - Council Directive 90/605/EEC of 8 November 1990;
    - Council Directive 94/8/EC of 21 March 1994
    - Council Directive 99/60/EC of 17 June 1999;
    - Directive 2001/65/EC of 27 September 2001;
    - Council Directive 2003/38/EC of 13 May 2003;
    - Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003;
- [Directive 79/279/EEC coordinating the conditions for the admission of securities to official stock exchange listing, as amended by
    - Council Directive 82/148/EEC of 3 March 1982;
    - *Council Directive 88/627/EEC of 12 December 1988* (*infra*); and as repealed by
    - *Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001* (*infra*);]

[254] Updated to Dec. 31, 2004. In italics are measures that have already been cited in the Appendix

- [Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, as amended by
    - *Council Directive 82/148/EEC of 3 March 1982*;
    - Council Directive 87/345/EEC of 22 June 1987;
    - Council Directive 90/211/EEC of 23 April 1990;
    - Directive 94/18/EC of the European Parliament and of the Council of 30 May 1994; and as repealed by
    - *Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001* (*infra*)*;*]
- [Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing, as repealed by
    - *Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001* (*infra*)*;*]
- Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies;
- Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts as amended by
    - *Eleventh Council Directive 89/666/EEC of 21 December 1989* (*infra*);
    - *Council Directive 90/604/EEC of 8 November 1990*;
    - *Council Directive 90/605/EEC of 8 November 1990;*
    - *Directive 2001/65/EC of 27 September 2001;*
    - *Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003*;
- Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents;
- [Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, as repealed by
    - *Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001* (*infra*);]
- [Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public, as repealed by

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or which will be cited further below. In square brackets are measures that have been repealed.

    - *Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003* (*infra*);]
- [Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, as repealed by
    - *Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003* (*infra*);]
- Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State;
- Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies;
- Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, as amended by
    - *Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003* (*infra*);
    - *Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003* (*infra*);
    - *Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 (infra);*
- Regulation (EC) 2001/2157 of 8 October 2001 on the Statute for a European company (SE);
- Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees;
- Regulation 1606/2002/EC of the European Parliament and of the Council of 19 July 2002, as implemented by
    - Commission Regulation 1725/2003 of 29 September 2003 and Annexes, adopting certain international accounting standards in accordance with Regulation 606/2002/ EC, as amended by
        - Commission Regulation 707/2004/EC of 6 April 2004;
        - Commission Regulation 2086/2004 of 19 November 2004;
        - Commission Regulation 2236/2004 of 29 December 2004;
        - Commission Regulation 2237/2004 of 29 December 2004;
        - Commission Regulation 2238/2004 of 29 December 2004;
- Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) as implemented by

- Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation;
- Commission Regulation (EC) 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilisation of financial instruments;
- Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions;[255]

- Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as implemented by
  - Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements;[256]
- Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (yet to be implemented with level 2 measures);
- Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

[255] Directive 2003/6/EC is also implemented by Commission Directive 2003/125/EC of 22 December 2003. The latter directive, which implements the former "as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest," does not deal with corporate law issues and is therefore not included in the list.

[256] *See also* CESR's Recommendations for the Consistent Implementation of the European Commission's Regulation on Prospectuses No. 809/2004, Feb. 2005 (CESR/05/054b) (available on CESR's website), a Lamfalussy-approach level 3 measure.

Appendix 2: ECJ Cases Involving Secondary EC Corporate Law Issues

A. Proceedings concerning failure by Member States to implement directives

1. C-136/81, *Commission v Republic of Italy* [1982] ECR 3547 (failure to transpose Second Directive);
2. C-148/81, *Commission v Kingdom of Belgium* [1982] ECR 3555 (failure to transpose Second Directive);
3. C-148/81, *Commission v Grand Duchy of Luxembourg* [1982] ECR 3565 (failure to transpose Second Directive);
4. C-151/81, *Commission v Ireland* [1982] ECR 3573 (failure to transpose Second Directive);
5. C-390/85, *Commission v Kingdom of Belgium* [1987] ECR 761 (failure to transpose three securities law directives);
6. C-17/85, *Commission v Republic of Italy* [1986] ECR 1199 (failure to transpose Fourth Directive);
7. C-157/91, *Commission v Kingdom of the Netherlands* [1992] ECR I-5899 (failure to transpose two Articles of Eighth Directive);
8. C-95/94, *Commission v Kingdom of Spain* [1995] ECR I-1967 (case removed from the register);
9. C-191/95, *Commission v Federal Republic of Germany* [1998] ECR I-5449 (failure to transpose First and Fourth Directives by failing to provide appropriate penalties as prescribed by those Directives);
10. C-272/97, *Commission v Federal Republic of Germany* [1999] ECR I-2175 (failure to transpose directive 90/605/EEC);
11. C-185/98, *Commission v Hellenic Republic* [1999] ECR I-3047 (failure to transpose Directive 92/101/CEE).

B. Preliminary rulings

1. C-32/74, *Friedrich Haaga GmbH* [1974] ECR 1201.
2. C-136/87, *Ubbink Isolatie BV v Dak- en Wandtechniek BV* [1988] ECR 4665 (First Directive);
3. C-38/89, *Ministère public v Guy Blanguernon* [1990] ECR I-83 (Fourth Directive, but generally holding that national law implementing a directive has full force, even if other States have failed to implemented it yet);
4. C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 (First Directive, but generally holding that national law has to be interpreted consistently with EC law);

5. C-381/89, *Syndesmos Melon tis Eleftheras Evangelikis Ekklissias and others v Greek State and others* [1992] ECR I-2111 (Second Directive);
6. C-19/90 and C-20/90, *Karella and Karellas v Minister for Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheiriseon AE* [1991] ECR I-2691 (Second Directive);
7. C-83/91, *Meilicke v ADV/ORGA F. A. Meyer AG* [1992] ECR I-4871 (decided on procedural grounds);
8. C-134/91 and C-135/91, *Kerafina-Keramische-und Finanz Holding AG and Vioktimatiki AEVE v Hellenic Republic and Organismos Oikonomikis Anasygkrotissis Epicheirisseon AE*. [1992] ECR I-5699 (Second Directive);
9. C-441/93, *Pafitis and Others v TKE and Others* [1996] ECR I-1347 (Second Directive);
10. C-234/94, *Tomberger v Gebruder von der Wettern GmbH* [1996] ECR I-3133 (Fourth Directive);
11. C-42/95, *Siemens AG v Henry Nold* [1996] ECR I-6017 (Second Directive).
12. C-97/96, *Verband deutscher Daihatsu-Handler eV v Daihatsu Deutschland GmbH* [1997] ECR I-6843 (First and Fourth Directives);
13. C-104/96, *Cooperatieve Rabobank "Vecht en Plassengebied" BA v Erik Aarnoud Minderhoud* [1997] ECR I-7211 (First Directive);
14. C-367/96, *Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I-2843 (Second Directive);
15. C-275/97, *DE + ES Bauunternehmung GmbH v Finanzamt Bergheim* [1999] ECR I-5331 (Fourth Directive);
16. C-373-97, *Dionysios Diamantis v Elliniko Dimosio (Greek State) and Organismos Ikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [2000] ECR I-1705 (Second Directive);
17. C-28/99, *Criminal proceedings against Jean Verdonck, Ronald Everaert and Edith de Baedts* [2001] ECR I-3399 (first Insider Trading Directive);
18. C-306/99, *Banque internationale pour l'Afrique occidentale SA (BIAO) v Finanzamt für Großunternehmen in Hamburg* [2003] ECR I-1 (Fourth Directive).
19. C-182/00, *Lutz GmbH and Others* [2002] ECR I-547 (decided on procedural grounds);
20. C-167/01, *Kamer van Koophandel v Inspire Art* [2003] ECR I-10155 (Eleventh Directive).
21. C-435/02 and C-103/03, Axel Springer AG v Zeitungsverlag GmbH & Co. Essen KG and Hans Jürgen Weske [2004] ECR I-(9.23.2004) ((First and Fourth Directives).
22. C-255/01, Panagiotis Markopoulos and Others v Ypourgos Anaptyxis and Soma Orkoton Elegkton [2004] ECR I-(10-7-2004) (Eleventh Directive).

Table 1

Number of EC company law directives and regulations per year

1968	1
1977	1
1978	2
1979	1
1980	1
1982	3
1983	1
1984	2
1987	1
1988	1
1989	4
1990	3
1992	1
1994	2
1999	1
2001	4
2002	1
2003	8
2004	9
Total	47

Uptated to December 31, 2004.Years in which no directives or regulations were adopted are omitted.

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