Company Law Harmonization Reconsidered: What Role for the EC?

Law Working Paper N°.53/2005
November 2005

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ECGI Working Paper Series in Law

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I wish to thank Paulo Câmara, Blanaid Clarke, Matteo Gatti and Stefano Lombardo for their helpful comments to an earlier draft. Usual disclaimers apply.

This paper is forthcoming in a book edited by Steef M. Bartman, 'European Company Law in Accelerated Progress', Kluwer Law International.

Abstract

Is there a case for (further) harmonization of EC company law? Should the EC play a central role in company lawmaking? If, as is often the case among lawyers, one looks at company law harmonization as an ideal, perfect objective that by hypothesis can only make things better, the answer to these questions is a definitely yes. However, if one treats company law harmonization as a real-world phenomenon, looking at its record thus far and scrutinizing its various rationales with the help of basic intuitions from economics and public choice theory, then the picture changes and the initial questions should be answered in the negative other than with regard to initiatives merely aiming to facilitate the free movement of companies across the EU. This paper provides such a picture. First, it shows that the possible justifications for harmonization in the company law area do not stand close scrutiny. It argues that, with no European Delaware in sight, it is premature to impose rules aimed at preventing a race to the bottom among EU jurisdictions. While recognizing that harmonization can be justified in theory to correct market failures if Member States alone are unable or unwilling to correct them and if the proposed harmonized rules would make society better off than in their absence (also taking the costs arising from the harmonized rules into account), it argues that there is no reason to believe that EC institutions are any better positioned than national lawmakers in performing the task of tackling market failures. Further, the paper analyzes the rationales related to the market integration objective and argues that in the real world negative harmonization (i.e. harmonization removing barriers to the four freedoms) is most often bundled with positive harmonization, so that what can be gained in terms of greater freedom of establishment is usually lost in terms of lower flexibility of rules. It criticizes level playing field as a possible rationale for company law harmonization, and argues that, far from lowering transaction costs, real-world harmonization has thus far raised them and hardly can be expected to do otherwise in the future. Finally, the rationales relating to scale economies in law production and to the correction of national governments' failures are dismissed as either implausible with regard to company law or unconvincing due to the fact that the EC is also prone to producing excessively rigid company law rules and to change them over-frequently.

The paper then highlights harmonization's drawbacks. Company law harmonization substitutes a single lawmaker for twenty-five different ones, or in other words a monopolist for twenty-five competitors, implying a higher risk of excessive regulation and innovation and a lower degree of experimentation in the company law field. A uniform law also rules out the possibility that divergent expectations and preferences at the national level are taken into account. Further, real-world harmonization turns out to increase the degree of complexity and uncertainty of national company laws. In addition, EC company law rules are hard to change and therefore little adaptable to new economic or technological developments. Finally, the harmonization process itself is costly in terms of lobbying expenditures and the rent extraction opportunities it grants EC officials and politicians.

The paper concludes that, ideally, the EC should only engage in free-choice and contractual freedom enhancing harmonization, while recognizing that EC lawmakers cannot be expected to espouse such a programme and expressing the no more realistic hope that they will have the courage, in Gérard Hertig's words, "of doing nothing" instead of pursuing their ambitious harmonization agenda.

Keywords: Corporate Law, European Union, EC Company Law, Harmonization, Corporate Governance, Company Law Action Plan, Regulatory Competition
JEL Classifications: G18, G38, K22

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1. Introduction: toward a general framework for the assessment of harmonization initiatives in the company law area

Is there a case for further harmonization of EC company law? Should the EC play a central role in company lawmaking? These questions may appear to be rhetorical in light of recent developments and current trends in this area. The EC is ever more exclusively the lawmaker in the field of issuers securities regulation within the EU; following the adoption of Regulation 2002/1606, it plays a key role in the area of accounting; it is about to issue new measures on auditing and cross-border mergers;[1] and it is engaged in an ambitious action plan covering core corporate law areas such as shareholders rights and corporate governance.[2]

However, it is precisely the EC institutions' increasing role in many company law areas and the European Commission's ambition to extend the EC's reach into new ones that makes it ever more important to ask whether there is indeed a role to play for the EC in this field and what it should be.

All the more so, if one considers that at least until today the EC's achievements in this area have been far from impressive, casting doubts on whether any kind of more effective (and efficient) intervention in this field can ever be possible. As I have argued in a recent paper,[3] despite the high number of harmonization measures adopted thus far, the EC company law harmonization programme has had little impact on EU companies' 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.[4]

Of course, I can only refer to my previous work for a demonstration of these (admittedly provocative) views. What is relevant here is that one may wonder whether the current efforts to further harmonize EU corporate laws can be any more effective than past attempts turned out to be.

This paper discusses company law harmonization by treating it as a real-world phenomenon ('real-world harmonization') instead of as an ideal, perfect objective that by hypothesis can only make things better. The hardly exciting results of real-world harmonization thus far are the best evidence of built-in problems with company law harmonization. Of course, one can learn from past mistakes and failures, and this must be true for EC lawmakers as well, but drawing both from past experience and from basic notions of public choice theory, this paper argues that optimistic expectations on harmonizing efforts in this area are misplaced.

The purpose of this paper is to provide a general framework for the assessment of harmonization initiatives in the area of company law (broadly defined to comprise also accounting law and issuer securities regulation): therefore, no reference to specific company law issues that have been, currently are or may become the target of harmonization initiatives will be made other than to briefly illustrate the framework's features.

The paper proceeds as follows: part 2 provides a critical assessment of the various rationales for EC intervention in the company law area. Part 3 highlights the drawbacks of company law harmonization. Part 4 concludes, identifying a possible role for the EC in the facilitation of companies' mobility and in the enhancement of contractual freedom in the company law area, while recognizing that it is utterly unrealistic to expect that the EC institutions will ever espouse a similar policy agenda.

2. Rationales for harmonization

The legal basis for company law harmonization is found in EC Treaty's Article 44 (to which most company law directives refer to in their preamble), in Article 95 (as, e.g., in the preamble of Regulation 1606/2002/EC and Directive 2003/6/EC) or in both (as in the preamble of Directives 2001/34/EC, 2003/71/EC and 2004/109/EC). In the company law harmonization debate, such legal bases (or harmonization aims) are declined in various ways: Article 44's objective of equal protection for members and others is also viewed as underlying the idea that a race to the bottom among Member States should be avoided, and/or the idea that market failures should be corrected; Article 95 aims at removing barriers to free movement within the EU and at providing a single set of rules in order to get rid of the costs arising from doing business under 25 different business laws. These rationales for harmonization will be discussed below, together with two other possible rationales (namely, scale economies in law production and the correction of national governments' failures), that, although rarely referred to in the company law harmonization debate, are however discussed in the more general debate on EU harmonization of laws.

2. A. Preventing a race to the bottom.

The most traditional and most popular justification for harmonisation is that EC company law is needed to avoid the race to the bottom that would purportedly result from Member States' unchecked freedom to regulate (or deregulate) companies as they wish.[5]

The issues of whether anything like a race to the bottom can develop within the EU and whether any European Delaware might emerge are currently the subject of a wide debate among legal scholars. Like others,[6] I have taken the view that no such race is likely to develop, at least with respect to listed companies, not just because it is at least doubtful that its direction would be towards the bottom,[7] but also, and more fundamentally, because no State is likely to enter the market for incorporations, i.e. to activate in order to become a corporate law haven attracting foreign companies.[8]

On the demand side, the legal and tax obstacles to firms' free choice of corporate law are still substantial,[9] and at least the tax barriers cannot be expected to disappear any time soon.[10] Further, there are cultural and political pressures against reincorporations that, however hard to gauge, are certainly not negligible.[11] Even more importantly, on the supply side, venturing into the charters market to attract reincorporations would be unwise for any savvy politician: the rewards for success would be limited and long-term, while the investment would be relatively high and immediate.[12] There would also be a political problem, since judges, save in the smallest States, would undoubtedly oppose the creation of a specialised court.[13] Finally, the risk of failure would be substantial.[14]

At best, the greater freedom to shop for a friendlier company law resulting from recent ECJ case law on freedom of establishment[15] may somewhat increase regulatory arbitrage by European companies. National legislators may consequently feel some pressure to emulate other jurisdictions' friendlier rules. The outcome could therefore be a sort of 'defensive regulatory competition', no country seeking to attract reincorporations but all intent on retaining their own companies. This resembles what happens in the US today,[16] except that Europe would have no Delaware.

According to some scholars, regulatory competition would entail interjurisdictional 'externalities' or at any rate undesirable rules, because the 'attractive' jurisdiction would be one that only takes the interests of managers and dominant shareholders (i.e. of those making the (re)incorporation choice) into account.[17] This would be the case, because investors and creditors would be located in other jurisdictions and would therefore have no political clout in a European Delaware. Defensive regulatory competition in the absence of a European Delaware can raise no such worry, because Member States would 'internalise' the effects of any company law reform to this effect and because, even before that, the interests of relevant stakeholders would be taken into account no less than in any prior company law reform effort.[18]

To be sure, if ever both the legal and tax obstacles to reincorporations are removed, dominant shareholders (and managers) might reincorporate in order to take advantage of company laws allowing them to increase private benefits and/or to transfer value from weak, nonadjusting creditors[19] to shareholders.[20] This would allow them to 'capture the regulatory competition process'[21], or in other words to prompt States to adjust their laws to the company law most attractive in those respects.

With regard to creditors/shareholders issues, one may think that this is exactly what has been happening lately: continental firms, under this view, would be incorporating in the UK in high numbers[22] to escape minimum capital provisions for private limited companies and thus to transfer value from nonadjusting creditors to the shareholders. However, as many scholars now agree, legal capital rules and especially minimum capital rules hardly protect creditors, no matter how weak and non-adjusting they are.[23]

Further, one may seriously doubt whether it is realistic to expect that the EC (or any other policymaker, for that matters) can take the interests of weak, nonadjusting creditors at heart, and adopt effective measures to protect them. Thus far, harmonization measures purportedly aimed at protecting creditors reveal themselves to be, at a closer look, tools to protect or increase the rents of professionals and corporate law related services providers across the EU rather than anything else.[24] Intuitively, weak, nonadjusting creditors cannot coalesce in order to prompt EC action in their favour, while well-organized interests groups that might be harmed by proposed rules effectively protecting weak creditors, in light of past lawmaking experience in the company law field,[25] would easily succeed in preventing EC institutions from taking such a course of action.

With respect to private benefit maximization-driven reincorporations (hereinafter, 'PBMD reincorporations'), it is impossible to anticipate what the successful features would be of the jurisdiction attracting foreign companies from this point of view. It may be attractive because it grants absolute freedom to separate cash flow rights from voting rights, or because it is unable (or unwilling) to police fraudulent self-dealing by dominant shareholders, or both, or even something else no one can now predict. If it is impossible to know what the attracting features might be, then the harmonizing authority may either pick a few potentially attractive features (and perhaps miss those that will indeed prove attractive) or try to ban all possible attractive features. In both cases, and especially in the latter case, such a move will impose a high degree of inflexibility and therefore significant costs on companies throughout the EU. In fact, no legal device exists that, as to differential voting structures, can ban all inefficient ownership structures while permitting all efficient ones (basically because what is inefficient for company A may well be efficient for company B), or, as to related party transactions, that can outlaw all value-decreasing transactions while sanctioning all value-increasing ones (if only because errors in judging whether transactions are good or bad are inevitable).

This is even truer in the EC context, where enforcement of company law is decentralised. Decentralised enforcement means that it would be pointless to tackle dominant shareholders' and managerial opportunism through broad, open-ended standards, because standards by definition 'leave the precise determination of compliance to adjudicators after the fact'[26], so that judges in a corporate law haven wishing to attract incorporations may simply apply them leniently with a very low risk of any successful reaction by EC institutions. A PBMD race to the bottom could therefore be prevented only through *rules*, and even better, in order to avoid their lenient interpretation by national judges, through bright-line rules. As Jonathan Macey has pointed out, the problem with rules is that, especially with regard to corporate governance issues policymakers, 'cannot benefit shareholders by developing rules that successfully regulate whole classes of transactions,'[27] since these will prove to be inevitably either overinclusive or underinclusive, i.e. costly and/or ineffective.

In short, in order to reduce the likelihood that a prospective evil may materialize, harmonization aimed at preventing a PBMD race to the bottom would have an immediate negative impact on corporations, by decreasing the degree of flexibility in their management and governance. The Italian expression for this is '*fasciarsi la testa prima di rompersela*' (literally, to bind up one's skull before one breaks it):[28] by doing so, one may possibly prevent skull breaking (depending on how thick the bandage is), but at the cost of freedom of movement (flexibility), impossibility to engage in some activities, and so on.

Furthermore, the past experience with EC company lawmaking clearly shows that it would be simply impossible to overcome the dominant shareholders and managers' resistance to EC-proposed private-benefits-reducing legislation. As the legislative history of the takeover directive has instructively shown, at best the European Commission and the European Parliament can *threaten* until the very end to enact provisions that would reduce the rents or quasi-rents that dominant shareholders and managers can extract, but they usually capitulate in front of the Council's tendency to listen to those interest groups' concerns.[29]

2. B. Correcting market failures.

Fears of a race to the bottom aside, harmonization can be justified if three conditions are met: first, that there are market failures to correct; second, that Member States alone are unable or unwilling to correct them; and, third, that the proposed harmonized rules would indeed correct them, by making society overall better off than in their absence, also taking the costs arising from the harmonized rules into account.

A thorough and complete attempt to answer the question of whether there can be instances in which all of the three conditions are met in the company law field is of course impossible, because it would entail an analysis of the very foundations of corporate law and of each of its policy issues. While it cannot be ruled out altogether that all of the three conditions are satisfied with regard to some specific issues, a general argument can however be made for the view that the EC lawmaker is not a good candidate for the task of correcting market failures Member States are unable to tackle.

Inefficient policy choices at the national level (here, the failure to correct market failures through regulation) can be the outcome of interest groups pressure, national policymakers' bounded rationality, not to say ineptitude, or path dependence.[30]

In the first case (interest group pressure), the EC could do better than national policymakers if the relevant interest groups were only local and therefore unable to lobby effectively at the EC level. It is however unconvincing that the EC would ever bother to introduce harmonized rules in order to trump the idiosyncratic company law provisions (or absence thereof) granting rents to local interest groups in one or even a few Member States. More likely, the EC would take issue with inefficient national policy choices favouring interest groups in a relevant number of Member States. Past experience suggests, however, that the EC will be unable to impose rules eliminating those rents and correcting those inefficient national policies. It has, in fact, usually done the opposite, i.e. introduced rules that have protected, if not increased, those rents.[31]

A similar line of argument can be made with respect to path dependence: if only one nation is locked-in in a suboptimal equilibrium due to path dependence, the EC is unlikely to bother. If the problem is common to many countries, it is hard to see how the EC could win the Member States' likely resistance to (costly) change.[32] To be sure, it is well-known that when national politicians are unable to adopt long-needed reforms due to internal opposition by well-organized interest groups, they sometimes resort to the EC in order to have those reforms imposed top-down. Frankly, however, it is hard to read any of the company law harmonization measures adopted thus far as the outcome of a similar phenomenon. It is also highly unlikely that anything of the kind can happen in the future in the area of company law. As the recent post-scandals activism by national policymakers shows, this is an area where Member States can and do act more promptly than the EC.

As for inefficient policies that are the outcome of policymakers' bounded rationality or ineptitude, it is hard to see why EC policymakers should be less prone to them. EC policymakers face a lower degree of accountability to voters and public opinion[33] and a lower exposure to yardstick competition[34] than national ones. This justifies the view that wrong policy choices would be (and indeed are) at least no less frequent at the EC level than at the national level.

2. C. Market integration.

A very broad rationale for company law harmonization is market integration: if obstacles to the four fundamental freedoms can be found to exist in national company laws or if the same arise from the very fact that divergent company law regimes co-exist within the EU, then there is a prima facie case for harmonization.

2.C.1. Company law-related obstacles to the four freedoms.

Some national company law provisions constitute an obstacle to freedom of establishment and to the free movement of capital, while it is much harder to find any such provision having more than an 'indirect and uncertain' impact on the free movement of goods and persons.[35] Harmonization aimed at banning such law provisions is justified, provided of course that the costs it entails are no greater than its benefits. We will deal with the costs related to harmonization extensively in part 3. Here, it is worth emphasizing that, in most cases, real-world harmonization measures do not simply curb Member States' freedom to impose restrictions of some kind ('negative harmonization'). In addition to this, they usually positively impose common rules for EU companies and/or explicitly reduce the scope for regulatory competition that may stem from a simple removal of trade barriers ('positive harmonization'). Politically, the removal of barriers would be a very difficult, if not impossible, goal to achieve in the absence of positive harmonization. Therefore, in practice even the best-minded harmonization attempts may lead to inefficient outcomes. This will be the case whenever the (political) price to pay for the removal of barriers[36] is an excessively rigid set of common rules or an excessive curb on regulatory competition.

A case in point is the Prospectus Directive: while making mutual recognition of prospectuses easier, the Directive has reduced the scope of regulatory competition in primary securities markets to an arguably excessive degree. In fact, with no reasonable justification, it has banned goldplating (i.e. the possibility for Member States to introduce stricter or additional rules) even with respect to purely domestic offerings (where no cross-border issue can by hypothesis be identified),[37] and ruled out regulatory competition among securities authorities altogether by requiring that prospectuses for equity offerings[38] be approved by the State of origin's competent authority, i.e. the authority from the State where the issuer has its registered seat, no matter whether the issuer intends to offer its securities in the State of origin (Article 13).[39]

Company law provisions raising obstacles to the cross-border offering and trading[40] of financial instruments are intuitively good candidates for harmonization. Not surprisingly, these are areas where the EC already has legislated, albeit, to be sure, with very limited results in terms of market integration thus far.[41]

National rules hindering cross-border mergers and acquisitions, by making it very difficult and costly for companies from different Member States to merge and/or by imposing barriers to hostile takeovers, also appear to be good candidates for negative harmonization.[42] Finally, rules hindering companies' mobility across the EU, i.e. making it more difficult or less attractive to transfer the real seat or to reincorporate (and therefore to shop for a better company law), should of course be primary targets for harmonization initiatives. Interestingly, little has been achieved in this respect until today, although one should hasten to add that the directive on cross-border mergers is close to adoption and that, as is well-known, the European Company Statute can serve the purpose of letting companies reincorporate in another intra-EU jurisdiction.[43]

It is worth emphasizing here that the national provisions deserving the EC's attention in the perspective of market integration should be those *imposing* barriers to takeovers rather than those just enabling private parties to adopt them. In fact, EC provisions aimed at banning antitakeover private party arrangements would tackle a market failure (the fact that companies spontaneously adopt purportedly inefficient antitakeover measures) rather than Member States' protectionism against (foreign) hostile takeovers. Therefore, any EC's attempt to ban such arrangements is justified only if the three conditions outlined above for market failure-correcting intervention are satisfied.

2.C.2. Divergence as an obstacle to market integration.

Harmonization may serve three further aims: first, it may level the playing field, i.e. rule out the possibility that companies from a given State are in a better position on the market thanks to their company law rather than to their superior ability of delivering better product and services; second, harmonization may lower transaction costs in inter-corporate relationships and in the relationships between companies and (prospective) investors; finally, it may achieve uniformity in areas where the value of a single set of rules is much higher than the content of the rule itself. These three aims are sometimes referred to under the single heading of standardization, but they are treated here separately because each of them refers to distinct features of a standardized set of rules.

2.C.2.a. Level playing field.

In an environment in which firms are not free to choose their corporate law and relocation of plants and/or headquarters is costly, it would seem to be unfair that companies from Member States where company law is inflexible or more generally unfavourable to businesses have to compete on the EU market with companies from Member States with more flexible and business-friendly corporate laws.[44] The latter company law may be viewed, in other words, as a sort of State aid. This line of reasoning is troubling to say the least, because it is far from self-evident that the laxer rules should always be the less efficient ones.

If this is the case, the level playing field rationale first presupposes to assess whose laws are the wrong ones that the EC should ban. In other words, this rationale tells the lawmaker nothing about the direction it should take in levelling the playing field: i.e. whether the levelling should take place 'towards the bottom', imposing deregulation on all Member States ('levelling-down'), or 'towards the top', imposing regulation to all of them ('levelling-up'). Levelling-up should be warranted, again, only in the presence of the three conditions under which harmonization to correct market failures is justified. Levelling-down, in turn, quite apart from the fact that it would be quite unheard of in this area, would seem to be justified unless of course there are good idiosyncratic reasons for a given jurisdiction to impose more stringent rules than others.[45]

In any event, the more companies are free to choose the company law they prefer, the less convincing the level playing field rationale for harmonization.[46]

2.C.2.b. Lower transaction costs from harmonization?

Persistent differences in national company laws supposedly imply higher transaction costs, because private parties from other Member States have to learn the relevant company law rules applying to a company before contracting with it or investing in its securities.[47] This may hinder cross-border trading and investment.[48]

Even leaving aside the dynamic inefficiencies which would arise from having a single set of rules possibly comprising all the main aspects of corporate law,[49] this rationale is totally unconvincing if we look at real-world harmonization. It is a well-known fact that thus far EC harmonization of company law has made the company law framework across the EU highly complex and uncertain, perhaps even more than it would have been if left to itself: as Brian Cheffins has put it, 'the changes that have taken place [following harmonization] 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'[50]. As it is totally unrealistic to expect exhaustive and maximum harmonization of this area of law, the set of harmonized rules is bound to be patchy anyway, leading also to uncertainties as to the boundaries between areas covered by EC law and those still covered by national law.[51] Further, Member States often construe directives and regulations according to their own traditions or previous laws[52] and may also cheat and fail to enforce violations of EC company law provisions by their companies.[53] Therefore, if one looks at how harmonization has worked and can reasonably work in practice, the general aim of reducing transaction costs stemming from differences in national company laws is unattainable through top-down harmonization.

Finally, the freer the choice of corporate law by private parties, the less relevant the transaction costs problem.[54] Private parties can spontaneously converge to the most appealing jurisdiction, thus making differences between the preferred jurisdiction's corporate law and the other jurisdictions' ones less frequently an issue for cross-border trade and investment. Further, such a development should induce bottom-up harmonization, i.e. it should prompt the unattractive jurisdictions to adopt the main features of the leading one(s).[55] In other words, a better way to deal with the problem of transaction costs would seem to be to promote firms' choice of corporate law.[56]

2.C.2.c. Standard-setting.

If it is unrealistic to expect a reduction in transaction costs thanks to the adoption of company law harmonization measures, it may still be possible to identify specific areas in which it may be worth its while to impose a single standardized solution (a 'focal point rule')[57] across the EU. This can be the case with issues for which the benefits from uniformity are great, while the content of the rule has little implications from an efficiency perspective.[58]

The problem with this rationale for harmonization is simply one of being rigorous in identifying the issues for which uniformity has great benefits compared to the intrinsic merits of the harmonized rules. One can easily agree that the choice among accounting conventions 'is arbitrary'[59], so that what counts is that the content of an accounting convention is known to market analysts and other users of accounting data: a uniform language has in fact the benefits of allowing greater comparability and of eliminating the cost of finding out what the accounting conventions are in each Member State.[60]

Much more questionable is that '"rules of the road" for corporate decisionmaking'[61], i.e. 'rules on such matters as annual elections of directors, periodic board meetings, majority rule on boards, and so forth'[62], also fall under this category.[63] According to David Charny, the 'important task' of such rules 'is to spare parties the costs of verifying what any given corporation is actually doing, and of trying to decide whether reported differences among corporations actually reflect differences in the fundamental value of their shares. … Rather than put the analysts to these costs, legal decisionmakers should simply specify a uniform rule'[64]. The problem with this reasoning is that, as Charny acknowledged in general terms, '[t]he hard question is whether a mandatory rule is required'[65]. And the idea that mandatory rules are justified on issues such as those Charny labelled 'rules of the road' is unconvincing. Quite apart from the fact that few Member States impose annual election of directors[66] and that at least some of them do not impose periodic board meetings,[67] such rules may prove sensible for some companies and totally unjustified for others. Should the EC provide for uniform rules of this kind, they might prove sensible for most companies in State A and cumbersome or counterproductive for most companies in State B, if only because the public limited liability company is used mostly by listed companies in State A while it is widespread among closely-held corporations in State B.[68]

2.D. Scale economies in law production?

A possible, general justification for harmonized lawmaking is that a single lawmaker can achieve scale economies in the supply of rules: as Esty and Geradin put it, '[w]hen regulatory economies of scale are present, centralized standard-setting procedures may … be … efficient'[69]. This is especially true with respect to those 'aspects of regulation [that] are more technically complicated or analysis-intensive, making them susceptible to economies of scale'[70], and even more so for elements of regulation that 'are driven heavily by "facts" that do not vary geographically – e.g. the safe level of human exposure to carcirogens'.[71] Therefore, in Roger Van den Bergh's words, '[i]f the data needed to formulate and/or enforce legal rules are relevant for the entire European Community, centralization may save on information costs',[72] and more generally on lawmaking costs.

This line of argument is little convincing with regard to company law.[73] First of all, company law can hardly be included among technical, fact-intensive sets of rules, perhaps with the notable exceptions of issuer securities regulation and accounting law. Further, there is recurring evidence of regulatory emulation, i.e. that Member States tend to reproduce other States' innovations, so that newly-adopted corporate law rules are seldom the product of new efforts to find better rules from scratch.[74] Third, as we shall see in the next part, it is far from clear that corporate law is an area where the facts to ascertain and the rules to be adopted can equally fit the diverse corporate environments of the various Member States. It is arguably due to this diversity that harmonization measures adopted thus far, with due exception, are mostly directives and leave plenty of space for Member States' choices at the implementation stage. Hence, the costs related to the search for the best rules by national regulators at the implementation stage will be at best reduced.[75] To be sure, this is less true with regard to the law of accounting after adoption of Regulation 2002/1606/EC (and hence for listed companies only) and for securities regulation following the adoption of the Lamfalussy method, i.e. in light of the increased role of comitology, level-2 measures and co-ordination efforts at the implementation stage and in enforcement. However, one may well argue that at least with respect to issuer securities regulation (but perhaps no less with regard to accounting law),[76] due to the differences in the structure of the various markets and in their actors' sophistication, a unique set of rules does not properly account for the diversity among Member States.[77]

2.E. Correcting government failures.

In theory, one may also attempt to justify harmonization on the grounds that national policymakers have a monopoly power in the production of company law and may abuse their monopoly power, e.g. by engaging in excessive regulation[78] (perhaps in order to grant rents to specific interest groups) or in excessive innovation.[79] Such a monopoly power has been greatly reduced, of course, for newly formed companies after *Centros*, *Überseering* and *Inspire Art*, but, as hinted above, it is still almost untouched with regard to existing companies.

Germany's strict rules on legal capital for limited liability companies and its policymakers' hyper-activism in company law reform since the Nineties[80] are good illustrations of over-regulation and of excessive innovation respectively.

It is hard to see, however, how the EU could be better off by substituting a centralized monopolist supplier of company law rules for twenty-five decentralized suppliers whose market power is being eroded thanks to the ECJ's negative harmonization efforts. Further, as we shall see below, abuse of market power can be feared and can indeed be observed at the EC level as well.[81]

Of course, the problems outlined here do not exist with regard to cases when the EC issues directives or regulations that enables private parties to do something that is not allowed by any or all of the national laws or, similarly, when it introduces a 26th regime, that Member States have to provide as an alternative to their current one and that private parties can freely choose. An example of this is of course the European Company Statute, that is purely enabling in character, although of course if a company does choose it, it has to follow a number of mandatory rules that make it less attractive.

2.F. Summary.

This part has analysed the possible justifications for harmonization in the company law area. It has argued that, with no European Delaware in sight, it is premature to impose rules aimed at preventing a race to the bottom. It has also cast doubt on the ability of EC institutions to tackle market failures better than national lawmakers. Further, it has analyzed the rationales related to the market integration objective and argued that in the real world negative harmonization is most often bundled with positive harmonization: in most cases, what can be gained in terms of greater freedom of establishment is normally lost in terms of flexibility of rules. It has criticized level playing field as a possible rationale for company law harmonization and argued that, far from lowering transaction costs, real-world harmonization has thus far raised them and hardly can be expected to do otherwise. Finally, the rationales relating to scale economies in law production and to the correction of national governments' failures were dismissed as respectively implausible with regard to company law and unconvincing due to the fact that the EC is also prone to producing excessively rigid company law rules and to change them over-frequently.

To conclude, a prima facie case can only be made for purely negative harmonization measures aimed at removing barriers to the free movement of companies and of capital, i.e. to companies' mobility and to cross-border mergers and acquisitions. The same is true for rules aimed at setting standards in the (arguably few) areas where the benefits of uniformity are much more important than the content of the rule itself. In all other cases, no prima facie evidence can be found in favour of harmonization. If there are costs attaching to it, then the case for harmonization is even harder. Part 3 shows that these costs exist, and that they can be substantial.

3. Harmonization's drawbacks

Harmonization does not come cheap. A number of problems arising from it deserve attention whenever the merits of company law harmonization proposals are to be assessed. These problems are described below with reference to the imposition of mandatory rules on EU companies via harmonization. Thus, the analysis only marginally applies to rules that are purely enabling (i.e. that require Member States to allow freedom of contract in a given area) or do nothing more than removing barriers to cross-border movement of capital and companies.[82] Unfortunately, this kind of rules are seldom the outcome of harmonization initiatives, so that the analysis that follows encompasses most of real-world past and prospective harmonization attempts.

3.A. Harmonization as a cartel.

Harmonized lawmaking can be viewed as a cartel among national legislators.[83] Viewed in this perspective, there are at least two problems with it: first, there is a risk that regulation will be excessive and that it will change over-frequently. Second, experimentation of new solutions becomes more difficult.

3.A.1. Over-regulation, excessive innovation.

First, the risk exists that, like any monopolist, the EC lawmaker may abuse its market power by engaging in excessive regulation or in excessive, wasteful innovation.

Many features of the EC lawmaking process make excessive regulation, i.e. the imposition of more rules than are justified in economic terms, a likelier outcome than excessive regulation by individual States. In fact, for various reasons, the EC lawmaker has stronger market power than individual States.

First of all, the recipients of harmonized rules within the EU will find escape from the EC's regulatory reach even more difficult than escape from the Member States' reach has been thus far.[84] This is even more so in the post-*Centros* world, in which some degree of intra-EU regulatory arbitrage is available to EU firms. Second, EU companies have lower incentives to escape and, *ex ante*, to lobby against excessive regulation, if they are harmed more by a higher level of regulation relative to other EU competitors than by its absolute level.[85] In other words, excessive regulation may happen to be, in a way, more tolerable and hence less strongly opposed at the EC level than at the national level. Third, the transparency of the EC lawmaking process is generally lower than at the national level.[86] Similarly, few could dispute that the accountability of EC officials and of EU politicians for matters decided in Brussels is weaker than at the national level.[87] Fourth, the EC level of regulation may work as a catalyst for lobbying efforts by EU-wide interest groups wishing to extract higher rents: in fact, the lobbying effort can be concentrated at the EC level, thereby securing the desired outcome in each of the Member States.[88] Finally, lobbying at the EC level is likely to be more costly for less-well organized local interest groups or firms opposing the legislation EU-wide interest groups want,[89] so that the latter will encounter less opposition in Brussels than at the State level. Hence, the EC lawmaker has greater leeway than national ones to engage in excessive, interest group-prone regulation.

But why, one may naïvely ask, should a less constrained lawmaker want to impose excessive regulation favouring specific interest groups? Public choice theory provides a convincing explanation. On the one hand, the wider the scope of EC intervention and the greater its impact on businesses, the greater the EC officials and politicians' power and prestige.[90] Given a choice between a laissez-faire approach and a pro-regulation one, they will be naturally inclined toward the latter.[91] On the other hand, they will only hear the voice of well-organized interest groups, whose lobbying efforts will produce studies and analyses in favour of a given regulation, whenever it can protect or raise their rents, not to mention that the same interest groups may well contribute with money and votes to the campaigns of politicians having a say in EC company law matters.[92]

These features of EC lawmaking (and of lawmaking in general) help explain the tendency of EC lawmakers to accommodate interest groups' requests for rules aimed to protect or even raise their rents. As I have argued elsewhere, the main impact of EC company law measures has thus far been in terms of their ability to protect or raise some well-identified interest groups' rents.[93]

A good illustration of how the EC monopoly power may be abused by engaging in excessive innovation can be found in the current wave of EC securities legislation, 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.[94]

An ever-changing legal environment greatly increases the compliance costs of EC securities law. In fact, businesses and their consultants have respectively to implement the organizational and operational changes required by every regulatory update and to advise on them.

3.A.2. Less experimentation.

From a dynamic perspective, in areas covered by harmonization, experimentation with new regulatory solutions by individual jurisdictions is more difficult, if not ruled out altogether,[95] while the monopolist lawmaker itself is less likely to engage in fruitful innovations. In fact, '[j]ust as monopolistic markets tend to be inflexible and unresponsive to consumer demands, so, by analogy, a single set of harmonized rules is less responsive [to change] than competition among rules and a "market for regulation"'[96] Further, with twenty-five (albeit possibly slightly) different solutions to a given policy issue, as Rodolfo Sacco has noticed, we shall have '[as many] new solutions with wide possibilities for experimentation, transplant, and so on. If, to the contrary, the point of departure were only one … we would have to look for the new solution from only one perspective so that our chances of effective innovations would be much reduced'.[97]

With specific reference to company law harmonization, it is well-known that the Second Company Law Directive is commonly viewed as a measure that has chilled innovation in various areas of corporate law such as creditor protection[98] and takeover defences.[99]

3.B. What price uniformity?

People's preferences vary across the EU, and the more so the larger the Union. Financial markets and ownership structures are also different across the EU. In general, a strong argument against harmonization is that a uniform set of rules will necessarily be less able to satisfy people's preferences or to prove adequate to divergent economic features than a decentralized system in which laws are made at the State or local level.[100]

Is company law an area in which harmonization can create problems of this kind? The answer is yes. Not only are of course financial markets far from uniformly well-developed within the EU and ownership structures far from equally dispersed, but even national preferences with respect to company law issues are different. So, for instance, in Italy private benefits of controls are tolerated much more than, say, in the UK,[101] so that a lenient regime for self-dealing transactions is acceptable in the former and inconceivable in the latter. In continental Europe and especially in Germany, the role of stakeholders in corporate governance has been far more central than, again, in the UK. Similarly, in continental Europe there is a widespread consensus on the idea that stakeholders should be protected through company law rules, which is arguably absent or far less strong elsewhere. Shareholder value maximization is a steady concept in English corporate governance, while it has been a fad more than anything else in the rest of Europe in the last decade. Investor education levels are different across the EU,[102] and therefore the need for rules protecting investors is also different.

3.C. The problems with real-world company law harmonization.

If one looks at how the company law harmonization programme has worked out in the last forty years or so, a number of further drawbacks come to the foreground: first, the complexity of EU company laws has increased, leading to greater legal uncertainty; second, in areas where the EC has intervened, EU company law is little adaptable to changes in the economy due to petrification; finally, the harmonization itself is costly.

3.C.1. Higher complexity and uncertainty.

As already hinted before, EC company law undeniably increases the complexity of national corporate laws.[103] 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. 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 two layers of secondary EC law and yet a third one of 'quasi-law:' framework (or level 1) directives and regulations contain the main principles and rules; level 2 measures 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.[104] 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.

Further, as Harald Habhuber has noticed, EC company law directives raise a 'myriad new and highly technical domestic legal issues'.[105] In Germany, this has led to 'numerous academic controversies about the exact implications of certain directives for specific provisions of German company law'[106], 'thereby adding potential arguments to the arsenal of sophisticated German commercial lawyers in purely domestic issues'[107].

Finally, it is well known that EC legislation, as any piece of international lawmaking, is compromise-prone,[108] with a high risk that on politically sensitive issues the outcome will be vague, obscure or even outright unreasonable.

Complexity, obscurity and uncertainty entail higher costs, especially in the form of fees that EU companies have to pay for legal advice in the company law area.

3.C.2. Petrification.

It is well known that once an EC measure has been approved, it is difficult to repeal it or to change it.[109] This petrification effect is well illustrated by the time it is taking to get rid of the numerous Second Company Law Directives' provisions that are now widely held to be obsolete and excessively rigid.[110]

Petrification is a problem, because it implies that rules remain in place that are no longer justified due to technological or market developments and, what is even worse, that rules that were unjustified from the outset will take a long time to repeal, i.e. regulatory mistakes become very hard to correct.

One may counter that the petrification problem is being solved in the securities law area thanks to the Lamfalussy method and that it may be possible to extend this method to core company law. As previously suggested, however, the Lamfalussy method has its own drawbacks itself: it may lead to excessive regulation and innovation in company law.[111]

3.D. The costs of the harmonization process.

As I have argued elsewhere, EC company lawmaking is a flourishing industry itself, which employs a number of national and EC officials, advisers and lobbyists, and provides opportunities for rent extraction by national as well as EC politicians.[112] While the benefits of real-world company law harmonization measures are highly uncertain, in light of their triviality and drawbacks, maintaining and letting this industry prosper has obvious costs, especially in terms of lobbying efforts by EU enterprises and other special interest groups, such as accountants, public notaries and so on. Not only does EC legislation implies an additional layer of lobbying activity[113] (or even more: think of how securities regulation is produced nowadays), but EC legislation usually requires implementation, so that each new directive provides an opportunity for lobbying on how to implement the EC provisions and on whether to change existing laws even in areas not covered by the relevant EC measures, possibly with the excuse of a better co-ordination between prior laws and the new regime.[114]

3.E. Summary.

This part has shown that company law harmonization comes at a cost: harmonization substitutes a single lawmaker for twenty-five different ones, or in other words a monopolist to twenty-five competitors, implying a higher risk of excessive regulation and innovation and a lower degree of experimentation in the company law field. A uniform law also rules out the possibility that divergent expectations and preferences at the national level are taken into account. Further, real-world harmonization turns out to increase the degree of complexity and uncertainty of national company laws; in addition, EC company law rules are hard to change or repeal, and therefore little adaptable to new economic or technological developments. Finally, the harmonization process itself is costly in terms of lobbying expenditures and rent extraction opportunities by EC officials and politicians.

4. Conclusions

This paper has argued that the case for company law harmonization is, to put it mildly, uneasy. After identifying a number of possible rationales for harmonization, it has argued that practically none of them justifies real-world harmonization, i.e. harmonization as past experience has shown to be politically and technically feasible. This conclusion has been reached by outlining that these rationales do not stand close scrutiny in light of the present status of EC company law, taking into account the dynamics of EC company lawmaking, and once harmonization’s drawbacks are duly considered.

There are a few exceptions to this general conclusion. Harmonization of focal point rules can be justified, provided that focal point rules are narrowly defined and rigorously identified. Further, if only purely negative harmonization were a real-world possibility, it would be desirable in order to enhance freedom of establishment (or, better, free choice in corporate law) and even to increase contractual freedom in corporate law more generally. In the same vein, optional harmonization (a 26th regime in which private parties, as opposed to Member States, may opt into)[115] might also be desirable, although not entirely problem-free.[116]

However, it is unrealistic to expect the Commission to issue purely freedom-enhancing harmonization proposals. Even less realistic is the prospect that the Parliament and the Council will adopt them. To the contrary, purely freedom-enhancing proposals face the serious risk of being 'diluted' in the lawmaking process, i.e. of being converted into freedom-reducing measures. While it is true that the Commission can always withdraw its proposals, it may accept a freedom-reducing outcome for a variety of reasons, including the successful lobbying efforts of special interest groups or its inclination (as evidenced by the final outcome of the Takeover Directive's negotiations) to accept whatever outcome to the lawmaking process.

To conclude, as Gérard Hertig put it at a conference in Brussels, at present the EC, and the Commission to begin with, should 'have to courage of doing [almost] nothing'[117] in the area of company law.[118] Unfortunately, this is even less realistic than the expectation that purely negative and contractual freedom-enhancing harmonization measures can ever be adopted.

[1] 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); *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)).
[2] 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* (COM (2003) 284(01)).
[3] See L. Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?', forthcoming in *University of Pennsylvania Journal of International Economic Law* (also available as ECGI Law Working Paper n. 39/2005 at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=730388>).
[4] There are, of course, due qualifications to the triviality thesis. First of all, a few rules or sets of rules (like accounting law) indeed have had or are soon 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. Finally, its production has become an industry itself, employing many EC and national officials and lobbyists, and creating occasions for rent extraction by politicians. See Id. at 34—52 for a more extensive treatment of the qualifications to the triviality thesis.
[5] See e.g. J. Wouters, 'European Company Law: *Quo Vadis*?' (2000) 37 Common Mkt L Rev 257, 269 (reporting that '[h]istorically, [the prevention of a Delaware effect in the EC] … seems … to be the most important motive for including Article 44(3)(g) in the EC Treaty …: a number of delegations … insisted on harmonization at the time the Treaty was being negotiated, as a *quid pro quo* for the liberal grant of a right of establishment to companies') and 289 (arguing that if a charters market is in place within the EU, more harmonisation will be needed in order to protect investors, creditors and employees). See also V. Edwards, *EC Company Law* (Clarendon Press, Oxford, 1999) 3.
[6] See especially T. H. Tröger, 'Choice of Jurisdiction in European Corporate Law – Perspectives of European Corporate Governance' (2005) 6 EBOR 3; M. Gelter, 'The Structure of Regulatory Competition in European Corporate Law', forthcoming in J Corp L Stud.
[7] For an extended and thorough critique of the race to the bottom theory in the EU context see S. Lombardo, *Regulatory Competition in Company Law in the European Community* (Peter Lang, Frankfurt am Main, 2002), especially at Ch 5.
[8] L. Enriques, 'EC Company Law and the Fears of a European Delaware' (2004) 15 Eur Bus L Rev 1259.
[9] Id. at 1260—61.
[10] Any move in this direction by the ECJ would be so bold as to appear unlikely. See W. Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 Common Mkt L Rev 331, 359—60.
[11] L. Enriques, 'EC Company Law and the Fears of a European Delaware', *supra* note 8, at 1265—66.
[12] Id. at 1270—71.
[13] Id. at 1271—72.
[14] Id. at 1273.
[15] See *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.
[16] See R. Daines, 'The Incorporation Choices of IPO Firms' (2002) 77 New York University L Rev 1559, especially at 1575; L. A. Bebchuk and A. Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters' (2002)112 Yale LJ 553, 575.
[17] Compare J. Wouters, *supra* note 5, at 289 and 294.
[18] L. Enriques, 'EC Company Law and the Fears of a European Delaware'*supra* note 8, at 1274; T. H. Tröger, *supra* note 5, at 62.
[19] Nonadjusting creditors are those that do not 'adjust' the terms of their claims to anticipate or anyhow take into account the effects of new developments. See generally L. A. Bebchuk and J. M. Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' (1996) 105 Yale L.J. 857, 864.
[20] M. Gelter, *supra* note 6.
[21] M. Gelter, *supra* note 6.
[22] For data see J. Armour, 'Who Should Make Corporate Law? EC Legislation versus Regulatory Competition', 20 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=757205>.
[23] See J. Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 Modern Law Rev 355; L. Enriques and J. R. Macey, 'Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules' (2001) 86 Cornell Law Rev 1165; P. Mülbert and M. Birke, 'Legal Capital – Is There a Case Against the European Legal Capital Rules?' (2002) 3 EBOR 695; F. Kübler, 'The Rules on Capital Under the Pressure of the Securities Markets' in K. J. Hopt and E. Wymeersch (eds), *Capital Markets and Company Law* (OUP, Oxford, 2003), 95; see also W. Schön, 'The Future of Legal Capital' (2002) 5 EBOR 429 (with respect to minimum capital rules).
[24] See L. Enriques and J. Macey, 'Creditors Versus Capital Formation', *supra* note 23, at 1202—03; L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 37.
[25] Id. at 49—50.

[26] R. Kraakman et al., *The Anatomy of Corporate Law* (OUP, Oxford, 2004), 23.
[27] J. R. Macey, 'Courts and Corporations: A Comment on Coffee' (1989) 89 Colum L Rev 1692, 1697.
[28] A roughly correspondent expression in English is: 'cross that bridge when you come to it'.
[29] See L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 50—51; compare T. H. Tröger, *supra* note 6, at 61.
[30] As argued above (see section 2.A.), Member States should internalise the effects of any company law policy choice they make, thus making it implausible that failure to correct market failures will be due to their ability to externalise the costs of such a failure.
[31] See W. J. Carney, 'The Political Economy of Competition for Corporate Charters' (1997) 26 J Legal Stud 303, 317; L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 36—39.
[32] Compare L. A. Bebchuk and M. J. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 Stan L Rev 127, 165.
[33] See *infra*, section 3.A.1.
[34] See P. Salmon, 'Political Yardstick Competition and Corporate Governance in the European Union' ECGI Working Paper No. 38/2005, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=730385>.
[35] See the statements of L.C.B. Gower ('My own view on this general problem is that harmonization of corporate law is almost totally irrelevant to the completion of the single European market') and R. M. Buxbaum ('traditional company law is not a priority item. … Company law has a very attenuated and indirect relationship to the equal starting point issues concerning the Common Market'), in R. M. Buxbaum, G. Hertig, A. Hirsch and Klaus J. Hopt (eds), *European Business Law* (de Gruyter, Berlin-New York, 1991), 219.
[36] That removal of barriers to freedom of establishment is usually coupled with anticompetitive measures of positive harmonization parallels (and in a way stems from) the fact that harmonization itself was 'a *quid pro quo*, the price asked by some delegations during the EEC Treaty negotiations for their agreement to grant the right of establishment also to companies'. C. Timmermans, 'Methods and Tools for Integration. A. Report' in Buxbaum et al., *supra* note 35, 129, 132.
[37] To be sure, Member States with a stronger tradition in this area of law than others may find ways around the prohibition on goldplating. See E. Ferran, 'Building an EU Securities Market' (Cambridge University Press, Cambridge, 2004) 145 (suggesting that additional requirements for public offers may be introduced as requirements for listing on a stock exchange).
[38] And more generally for offerings of financial instruments other than those listed in Article 2(m)(ii).
[39] See generally F. Tung, 'Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities, and Bankruptcy Law' (2002) 3 Chi J Int'l L 369, 381—82.
[40] It is doubtful, however, whether there are still obstacles to cross-border trading or to cross-border listings: see G. Ferrarini, *The European Regulation of Stock Exchanges: New Perspectives*, (1999) 36 Common Mkt. L. Rev. 569, 577.
[41] See E. Ferran, *supra* note 37, at 36—41.
[42] See K. J. Hopt, 'Company Law in the European Union: Harmonisation and/or Subsidiarity?' (1999) 1 Int'l & Comp Corp L J 41, 52.
[43] See, e.g., L. Enriques, 'Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage' (2004) 4 *Journal of Corporate Law Studies* 77.
[44] See G. Wollf, 'The Commission's Programme for Company Law Harmonization: The Winding Road to a Uniform European Company Law?' in M. Andenas and S. Kenyon-Slade (eds), *E.C. Financial Market Regulation and Company Law* (Sweet & Maxwell, London, 1993), 19.
[45] See *infra*, section 3.B.
[46] See T. H. Tröger, *supra* note 6, at 57.
[47] K. J. Hopt, 'Company Law in the European Union' *supra* note 42, at 51.
[48] If companies, for whatever reasons, prefer to establish subsidiaries in other Member States (as they appear to do despite differences in national company laws), and if they have to choose the host Member State law in order to do so, persistent differences in national company laws also hinder freedom of establishment. However, after *Centros* and its progeny of cases it is no longer the case that the subsidiary has to be set up according to the host Member State company law.
[49] See *infra* section 3.A.2.
[50] B. R. Cheffins, 'Company Law. Theory, Structure and Operation' 448 (Clarendon Press, Oxford, 1997). See also generally R. Van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law' (1999) 5 Maastricht J Eur & Comp L 129, 146—47.
[51] U. Procaccia and U. Segal, 'Thou Shalt Not Sow Thy Vineyard with Divers Seeds? The Case Against the Harmonization of Private Law' in K. J. Hopt and E. Wymeersch (eds), *Capital Markets and Company Law*, *supra* note 23, 639, 650.
[52] See generally R. Van den Bergh, *supra* note 50, at 146—47.
[53] See L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 9—14.
[54] Compare L. A. Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate

Law' (1992) 105 Harv L Rev 1437, 1494.
[55] See generally R. Van den Bergh, *supra* note 50, at 134.
[56] See J. C. Dammann, 'Freedom of Choice in European Corporate Law' (2004) 29 Yale J Int'l L 477, 536—37.
[57] See D. Charny, 'Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities' (1991) 32 Harv Int'l L J 423, 442.
[58] Ibid.
[59] Id. at 443.
[60] Ibid. It is quite another matter of course to judge whether the Accounting Directives, with all the options they allow for Member States and individual companies, have achieved any degree of uniformity in their area. See e.g. L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 20. Of course, greater uniformity would seem to have been achieved for listed companies with Regulation 2002/1606/EC. It is however far from sure that the consolidated accounts of companies from different Member States will indeed become more comparable after the adoption of IFRS. A member of the Portuguese Accounting Board, the national accounting regulator, recently declared: 'When you read a standard in English it means one thing, and when you read the Portuguese translation it means another'. B. Jopson, 'An uncomfortable ride on the standard roadshow' *The Financial Times (Europe)*, July 21, 2005, 16.
[61] D. Charny, *supra* note 57, at 443.
[62] Ibid.
[63] See Ibid.
[64] Ibid.
[65] Id. at 444.
[66] For England see P. Davies, *Gower & Davies' Principles of Modern Company Law* (7th edn, Sweet & Maxwell, London, 2003) 307 (no maximum term required by law); for Italy, see Article 2383, Civil Code (maximum term of three years); for France see Article L225—18, Commercial Code (maximum term of six years); for Germany see § 84 Aktiengesetz (same).
[67] This is the case, for instance, in Germany.
[68] See A. Rojo, 'La sociedad anónima como problema' in P. Abbadessa and A. Rojo (eds), *Il diritto delle società per azioni: problemi, esperienze, progetti* (Giuffrè, Milan, 1993) 1, 4—8 (hihglighting that public limited companies and corresponding legal forms are used mainly by listed companies in the UK and in Germany, while the same are widely used even by smaller businesses in Latin countries).
[69] Daniel C. Esty and D. Geradin, *Regulatory Co-opetition* (2000) J Int'l Econ L 235, 243.
[70] Ibid.
[71] Ibid.
[72] R. Van den Bergh, *supra* note 50, at 135.
[73] See J. C. Dammann, *supra* note 56, at 535.
[74] Ibid. Compare R. J. Daniels, 'Should Provinces Compete? The Case for a Competitive Corporate Law Market' (1991) 36 McGill L J 131, 136.
[75] J. C. Dammann, *supra* note 56, at 536 (also noting that Member States are also involved in the EC lawmaking process, so that their 'legislative costs' will be little reduced anyway).
[76] See, e.g., 'Convergence comes into conflict with global realities', *The Financial Times (Europe)*, October 17, 2005, 15 (according to Martin Walker, a professor of finance and accounting at Manchester University, '[a]ccounting has to reflect the economic, legal and political systems in which it is operating. Until those systems are the same, you can't standardise accounting').
[77] See *infra* section 3.B.
[78] See generally S. Woolcock, 'Competition among rules in the single European market' in W. Bratton, J. McCahery, S. Picciotto and Colin Scott (eds), *International Regulatory Competition and Coordination. Perspectives on Economic Regulation in Europe and the United States* (Clarendon Press, Oxford, 1996), 289, 301; J. Sun and J. Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 J Common Market Stud 67, 85—86.
[79] *Cf.* I. Ayres, 'Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks' (1995) 43 Kan. L. Rev. 541, 558—59 (suggesting that Delaware may engage in excessive innovation of its corporate law thanks to its market power).
[80] See U. Noack and D. A. Zetzsche, 'Corporate Governance Reform in Germany: The Second Decade' (2005) 6—7 (<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=646761>).
[81] See section 3.B.
[82] More precisely, only the problems described in section 3.D also apply to this kind of rules.
[83] See e.g. L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 41.
[84] See W. J. Carney, *supra* note 31, at 310—11.
[85] This argument is made with respect to taxation by B. S. Frey and R. Eichenberger, 'To Harmonize or to Compete? That's not the Question' (1996) 60 J Publ Econ 335, 338.
[86] Directives and regulations (other than 'level 2' ones) are adopted by the Council, whose meetings (like those of the

Commission, which adopts level 2 measures) are not open to the public (see Article 207, para. 3, EC Treaty).

[87] See R. Van den Bergh, *supra* note 50, at 148—50. In general, '[i]nternational lawmakers largely face weaker constraints on their behaviour.' P. B. Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy' (1996-1997) 17 Nw J Int'l L & Bus 681, 681. EC lawmakers are no exception.

[88] See J. R. Macey, 'Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism' (1990) 76 Va L Rev 265, 271.

[89] Compare B. S. Frey and R. Eichenberger, *supra* note 85, at 338.

[90] In a similar vein see generally P. B. Stephan, 'The Political Economy of Choice of Law' (2002) 90 Geo LJ 957, 961 ('the people who negotiate international agreements, as well as the people who serve the institutions that promote those negotiations, have powerful incentives to achieve some kind of agreement regardless of substantive outcome. Association with a concluded agreement brings prestige, opportunities to offer interpretation, and invitations to participate in subsequent negotiations'). See also R. Van den Bergh, *supra* note 50, at 149—50.

[91] Unsurprisingly, they usually select policy advisers sharing for whatever reasons the same inclination. See generally B. S. Frey and R. Eichenberger, *supra* note 85, at 339—40; R. Van den Bergh, *supra* note 50, at 149.

[92] Implicit in the previous analysis is of course the assumption that EC and national officials and politicians deciding on EU matters do not behave differently from bureaucrats and politicians in general, i.e. that the EC dimension does not alter the human nature of those working in it. In turn, the assumption that bureaucrats and politicians tend to maximize their private utility as opposed to social welfare, again, simply derives from the intuition that politicians and bureaucrats are human beings like anyone else. Of course, this is not to say that altruism is alien to human nature. The point is only that politicians and bureaucrats cannot be assumed to be systematically more altruistic than other human beings. See generally J. R. Macey, 'Regulation and Disaster: Some Observations in the Context of Systemic Risk' in R. E. Litan and A. M. Santomero (eds), *Brookings-Wharton Papers on Financial Services* (Washington D.C., 1998), 405, 407 ('the public interest theory of regulation assumes that public servants take action to cure defects in the distributional or efficiency outcomes generated by market processes simply because they are benevolent. By contrast, the public choice theory of legislation […] makes the same basic assumption about self-interest for politicians and bureaucrats that standard economic analysis makes for private sector actors').

[93] See L. Enriques, 'EC Company Law Directives and Regulations', *supra* note 3, at 36—39.

[94] *See* Editorial, 'When in Doubt Just Do Nowt' *The Financial Times (Europe)*, January 24, 2005, at 10.

[95] See, e.g., R. Romano, *The Genius of American Corporate Law* (AEI Press, Washington D.C., 1993), 132; Lombardo, *supra* note 7, at 77.

[96] Woolcock, *supra* note 78, at 299.

[97] R. Sacco, 'Diversity and Uniformity in Law' (2001) 49 Am J Comp L 171, 180.

[98] A. Tunc, 'Corporate Law. A. Report' in R. M. Buxbaum et al., *supra* note 35, 166, 208.

[99] See J. N. Gordon, 'An American Perspective on Anti-Takeover Laws in the EU: The German Example' in G. Ferrarini et al. (eds), *Reforming Company and Takeover Law in Europe* (2004) 542, 551 n.23.

[100] See R. Van den Bergh, *supra* note 50, at 130—34; A. Ogus, 'Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 Int'l & Comp L Q 405, 416. D. W. Leebron, 'Lying down with Procrustes: An Analysis of Harmonization Claims' in J. Bhagwati and R. E. Hudec (eds), Fair Trade and Harmonization (MIT Press, Cambridge (MA), 1996), 41, 88.

[101] Compare L. Enriques, 'Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms' (2003) 38 Wake Forest L Rev (2003) 911, 915.

[102] See L. Guiso, M. Haliassos and T. Jappelli, 'Household Stockholding in Europe: Where Do We Stand and Where Do We Go?' (2003) Econ Pol'y 123, especially at 157.

[103] See *supra*, section 2.C.2.b.

[104] For a more detailed description of the Lamfalussy approach *see* E. Ferran, *Building an EU Securities Market*, *supra* note 37, 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.

[105] H. Halbhuber, 'National Doctrinal Structures and European Company Law' (2001) 38 Common Mkt L Rev 1385, 1412.

[106] Id. at 1408, n 119.

[107] Id. at 1408.

[108] See e.g. R. J. Daniels, *supra* note 74, at 144. D. W. Leebron, *supra* note 100, at 66.

[109] See R. M. Buxbaum and K. J. Hopt, *Legal Harmonization and the Business Enterprise* (de Gruyter, Berlin-New York, 1988), 243. M. Baudisch, 'From Status to Contract? An American Perspective on Recent Developments in European Company Law' in F. Snyder (ed), *L'union Européenne et la gouvernance* (Bruylant, Bruxelles, 2003), 23, 27.

[110] A study by a group of experts appointed by the EC Commission, containing proposals aimed to simplify the Second Directive dates back to 1999. See E. Wymeersch, 'European Company Law: The "Simpler Legislation for the Internal Market" (SLIM) Initiative of the EU Commission' *Financial Law Institute* WP 2000-9, 1 (<http://www.law.ugent.be/fli/WP/WP2000-pdf/wp2000-09.pdf>).

[111] See L. Enriques, 'EC Company Law Directives and Regulations, *supra* note 3, at 41.
[112] Id. at 44—46.
[113] Compare M. E. Kostel, 'A Public Choice Perspective on the Debate over Federal Versus State Corporate Law' (1993) 79 Va L Rev 2129, 2153—54.
[114] In Italy, this was the case with the First Investment Services Directive. First implemented in 1996, its implementing rules were then consolidated into the 1998 Consolidated Act on Financial Intermediation, which included matters not covered at all in the relevant Directive, such as mutual funds, tied agents, and listed companies. The domino effect of the Investment Directive further led to an overall reform of Italian company law that was said to be needed following the 1998 changes in the law of listed companies. See L. Enriques, 'Scelte pubbliche e interessi particolari nella riforma delle società di capitali' (2005) *Mercato concorrenza regole* 145, 152—55.
[115] See G. Hertig and J. McCahery, 'Revamping the EU Corporate and Takeover Law Agenda – and Making it a Model for the U.S.,' <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1104&context=berkeley_law_econ>, February 23, 2004.
[116] Compare S. J. Choi and A. T. Guzman, 'Choice and Federal Intervention in Corporate Law' (2001) 87 Va L Rev 961, 976—79 (criticizing a proposal for an optional federal regime on takeovers on the grounds that the federal regulator may have the strong temptation of making the optional regime mandatory after introducing it, the regime would likely prove unattractive, and it may interact better with some states' corporate laws (those of the states dominating the market for incorporations for obvious reasons) than others, so as to distort regulatory competition in favour of the stronger competitors).
[117] G. Hertig, Presentation at the Conference 'Regulatory Competition and Subsidiarity in Corporate Governance in a Transatlantic Perspective,' 12th July 2004, Bibliotheque Solvay, Brussels, <http://ecgi.org/tcgd/launch/hertig_speech.php>.
[118] Ideally, it should consider repealing many of the existing company law harmonization measures. But this programme deserves nothing more than a footnote, as it is unimaginable that EC institutions can even consider a proposal like this.

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