EU Company Law Harmonization between Convergence and Varieties of Capitalism

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Martin Gelter
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Abstract

This chapter sketches the history of EU Company Law, from its beginnings in the 1960s until today. Throughout all periods, EU company law harmonization was largely a top-down, technocratic project that was considered imperative to realize the common market. In other words, it was promoted mainly by the European Commission and experts advising it without any particular business or investment interest group pushing for harmonization. Scholars are divided about the success of the project, with opinions ranging from it being a great success story to the claim that EU company law harmonization is largely trivial. This chapter suggests that that the development of EU company law can be understood as reflecting two distinct periods of convergence in corporate law, even if that convergence has often been limited to specific issues and sometimes remained restricted to the formal level. Company law harmonization efforts mirror prevailing fashions about what is considered good corporate law. Each of these periods is roughly linked to the success of a particular model of capitalism that seemed to be on the ascendancy at the respective time. This first period was characterized by a dominance of the German model, and a vision of corporate law that one could characterize as belonging to a "coordinated" variety of capitalism, when shareholder value maximization was not yet the prime directive of corporate law. The second period began in the late 1990s and partly coincides with the "convergence in corporate governance" debate. Harmonization efforts focused on enabling choice for shareholders based on transparency and information. This period was dominated by liberal capitalism oriented toward shareholders and increasingly the stock markets. Germany's position as the model jurisdiction was increasingly taken over by the UK. EU Company law harmonization has always been in the balance between top-down proposals coming from the center and national resistance. In the early period, when company law harmonization was influenced mainly by Continental models, the UK stepped on the brakes after joining the EEC in 1973 whereas since the 2000s Germany and other Continental jurisdictions have been the main source of resistance. Because of Member State options and the ability to avoid company rules, convergence has remained formal and superficial, but not entirely irrelevant. Keywords: Freedom of Establishment, European Company Law, Harmonization, European Court of Justice, Company Law Directives, History of Corporate Law, Varieties of Capitalism, Convergence, Corporate Governance

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Martin Gelter*
Professor of Law
Fordham University, School of Law
150 W. 62nd Street
New York, NY 10023, United States
phone: +1 646 312 8752
e-mail: mgelter@law.fordham.edu

*Corresponding Author

Fordham University School of Law

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By
Martin Gelter
PROFESSOR OF LAW
Fordham University School of Law

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MARTIN GELTER*

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

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* Professor of Law, Fordham University School of Law; Research Associate, European Corporate Governance Institute.

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1. Introduction

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

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

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

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

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

This chapter sketches the history of EU Company Law, from its beginnings in the 1960s until today. While I do not take a strong position on the triviality thesis, I argue that the development of EU company law can be understood as reflecting two distinct periods of convergence in corporate law, even if that convergence has often been limited to specific issues and sometimes remained restricted to the formal level. Company law harmonization efforts mirror prevailing fashions about what is considered good corporate law. Each of these periods is roughly linked to the success of a particular model of capitalism that seemed to be on the ascendancy at the respective time. The first one began with the formation of the European Economic Community, when the goal was minimum harmonization and the prevention of a European Delaware. Harmonization decelerated and was almost brought to a halt by the accession of the UK to the European Union. This first period was characterized by a dominance of the German model, and a vision of corporate law that one could characterize as belonging to a "coordinated" variety of capitalism, when shareholder value maximization was not yet the prime directive of corporate law.

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

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

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

2.1. "Equivalent safeguards"

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

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

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

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

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

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

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

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

2.2. Preventing regulatory arbitrage

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

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

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

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

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

In practice, the Member States attempted to use the fact that harmonization proceeded slowly as a justification to retain restrictions. While early on many assumed that harmonization would cover "all provisions concerning structure and organs of companies, formation and maintenance of its capital, the composition of the profit and loss account, the issue of securities, mergers, conversions, liquidations, guarantees required in cases of company concentrations, etc." (Wouters 2000, p. 268), some expected company law to be comprehensively harmonized by the end of the transition period of the EC Treaty in 1969 (Houin 1965, p. 13-14). Following a two-year standoff between the Commission and the German government about the government's authorization for foreign firms to do business (Stein 1971, p. 37-41; Johnston 2009, p. 117) and only one directive having been passed in 1968, the EEC fell far short of this goal. Several early writers argued that Member States could maintain restrictions until a comprehensive harmonization had been accomplished (Everling 1964, ¶ 312; Großfeld 1967, p. 20-21; see also Stein 1971, 162-163). The Member States signed a "Convention on the Mutual Recognition of Companies and Bodies Corporate" in 1968,[10] but it did not come into force because the Netherlands did not ratify it (Timmermans 1991, p. 149; Conard 1991, p. 2161; Ebke 2000, p. 636 n. 83). Those defending restrictions thus felt that Member States were justified in retaining the protectionist conflict of law rules (see Behrens 1988, p. 512; Ebke 2000, p. 649).

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

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

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

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

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

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

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

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

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

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

2.3. Fostering economic integration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1. Convergence and EU Company Law

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

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

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

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

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

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

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

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

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

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

While at least some of the earlier steps of EU harmonization proved to be relatively innocuous, widely accepted changes in some jurisdictions, in other areas the process got caught up in a "clash of capitalisms" (on the different models in the context of EU harmonization, see Dean 2012). On one level, if we look beyond company law harmonization, the EEC/EC/EU as a whole has helped to foster free trade, open markets and competition. Openness to trade often has the consequence of upsetting national socio-economic arrangements and bargains between interest groups because of the introduction of foreign competition. Openness to competition tends to erode corporate rents, which, among other things, reduces the portion captured by employees (Roe 2001). European integration generally is often seen as a market-oriented project, and a good case can be made that the EU, as a whole, has helped convergence in corporate governance by fostering open markets, trade and competition. This is evident from the case law rooted in primary EU law, namely the freedom of establishment cases discussed above (section 2.2 above) as well as the cases on Golden Shares (discussed below in section 3.3), which made it harder for national governments to influence the economy through corporate ownership. While primary law sought to eliminate national barriers, secondary law in the form of the directives often was intended to mitigate the effects of market forces. In the "clash of capitalisms", while primary law tended to promote aspects of liberal capitalism, the initial harmonization program sought to preserve elements of coordinated capitalism, in some cases by raising them to the European level. The following sections will thus explore the two main periods of convergence and harmonization. In the first period, harmonization efforts largely had this effect, but increasingly faced resistance from liberal Britain. In the second period, the situation reversed. Liberal capitalism and financial markets were on the ascendancy, and harmonization increasingly served that purpose, while pockets of resistance by capitalism's coordinated variety remained.

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

As we have seen, the early EU company law harmonization project was partly driven by practical considerations, such as firms interacting with third parties. The more regulatory aspects on the agenda were at the time characterized by a typically Continental vision of the law, for which the Second Directive (discussed above in section 2.2) provides a good example. Conceptually, law could attempt to protect creditors from shareholder opportunism in a number of ways. It could set up ex ante safeguards, of which legal capital would be an example (even if many argue that it is not particularly effective in this capacity) (e.g. Armour 2000; Enriques & Macey 2001). Specifically, minimum capital could be called a form of merit regulation, i.e. only firms that are able to surmount that barrier are permitted to enter the market. This contrasts with disclosure-oriented creditor protection (see below section 3.3) or ex post liability for directors or shareholders (e.g. veil piercing).

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

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

[30] Art. 13.

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

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

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

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

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

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

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

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

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

[37] SE Regulation, art. 9.

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

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

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

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

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

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

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

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

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

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

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

3.3.1. The ECJ and capital markets reinvigorate European Company Law

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

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

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

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

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

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

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

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

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

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

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

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

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

[48] Directive 2004/109/EC of the European Parliament and of the Council of 15 Dec. 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, O.J. 2004 (L 390) 38.

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

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

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

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

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

3.3.2. Shareholder rights and new legal forms

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

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

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

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

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

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

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

[55] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final.

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

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

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

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

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

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

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

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

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

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

4. Conclusion

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

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

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

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

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

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

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