European Company Law 1999-2010: Renaissance and Crisis

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Abstract

European corporate law has enjoyed a renaissance in the past decade. Fifteen years ago, this would have seemed most implausible. In the mid-1990s, the early integration strategy of seeking to harmonise substantive company law seemed to have been stalled by the need to reconcile fundamental differences in approaches to corporate governance. Little was happening, and the grand vision of the early pioneers appeared more dream than ambition. Yet since then, a combination of adventurous decisions by the Court of Justice, innovative approaches to legislation by the Commission, and disastrous crises in capital markets has produced a headlong rush of reform activity. The volume and pace of change has been such that few have had time to digest it: not least policymakers, with the consequence that the developments have not always been well coordinated. The recent 2007/08 financial crisis has yet again thrown many - quite fundamental - issues into question. In this article, we offer an overview that puts the most significant developments of this decade into context, alongside each other and the changing patterns of corporate structure in European countries.

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I. Introduction

European corporate law has enjoyed a renaissance in the past decade. Fifteen years ago, this would have seemed most implausible. In the mid-1990s, the early integration strategy of seeking to harmonise substantive company law seemed stalled by the need to reconcile fundamental differences in approaches to corporate governance. Progress had slowed, to the extent that the vision of the early pioneers seemed more dream than ambition. Yet since then, a combination of adventurous decisions by the Court of Justice, innovative approaches to legislation by the Commission, a series of corporate scandals and latterly a disastrous crisis in capital markets has produced a headlong rush of reform activity. The volume and pace of change has been such that few have had time to digest it: not least policymakers, with the consequence that the developments have not always been as well coordinated as they might. The recent financial crisis has yet again thrown many—quite fundamental—issues into question. In this article, we offer an overview that puts the most significant developments of this decade into context, alongside each other and the changing patterns of corporate structure in European countries.

The motor of European corporate law reform was restarted in 1999. The Court of Justice' decision in *Centros*[1] threw open the door for European entrepreneurs to select a different company law to govern the affairs of their enterprise to that which might otherwise be dictated by the domestic choice of law rules in their jurisdiction. The same year also saw the promulgation of the EU's Financial Services Action Plan ('FSAP'),[2] which contained a significant commitment to substantive harmonisation of the law relating to securities markets. These initiatives were endorsed by the European Council held in Lisbon in 2000, famously declaring its ambition to make Europe 'the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and

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[1] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[2] European Commission, 'Implementing the framework for financial markets: action plan' Communication of 11 May 1999, COM(1999) 232 final.

greater social cohesion' by 2010.[3] Shortly afterwards, in 2001, the collapse of Enron provoked lawmakers around the world to reconsider the appropriateness of their corporate governance frameworks.

These developments seem to have significantly influenced the Commission as regards company law. In responding, the Commission deployed procedural innovations developed in the context of the FSAP. It copied the model of the Lamfalussy 'Committee of Wise Men', which had been successful in producing technocratic reform proposals in relation to securities law, by appointing another High-Level Expert Group ('HLG'). This Committee's report then formed the basis of the Commission's Company Law Action Plan ('CLAP'), which proclaimed a significant change in legislative direction as regards company law.[4] The CLAP focused much more on business' needs than had previous legislative initiatives, seeing the role of harmonisation as purely instrumental for that objective. In so doing, the CLAP viewed the earlier agenda of harmonisation simply to create a 'level playing field', regardless of the impact on business. Rather, it proposed that future harmonisation measures be justified on a case-by-case basis according to their *net* impact on business. That is, such measures are seen as desirable only if the benefits to business outweighed their costs. The CLAP also took more seriously than before the principle of subsidiarity, emphasised the role of disclosure as a means of facilitating choice, and expressly sought to focus reform energies on the cross-border context.

Much of the CLAP's agenda has now made it onto the European statute book. However, it has not done so in isolation from the three forces that triggered its initiation, which have themselves continued to operate. The Court's jurisprudence on corporate freedom of establishment has further confined the ability of Member States to restrict corporate legal mobility, and its decisions on free movement of capital have also begun to cast their shadow over company law. The implementation of the FSAP has seen the emergence of a truly pan-European securities law, the boundary of which with company law is not always clear. And financial markets threw themselves into turmoil yet again with the credit crisis of 2007/08. This, as with earlier crises, has generated intense calls for reform. In this article, we sketch out the impact of these parallel developments.

The rest of the article is structured as follows. In section II, we explain why the original European company law programme of harmonisation was unsuccessful, and the new direction signalled by the CLAP. Section III discusses the impact of the Court's case law on freedom of establishment and free movement of capital. Section IV turns to the effects of the continued harmonisation of capital markets law, and in Section V we consider the extent to which the recent financial crisis has provoked or will bring about change to company law. Section VI concludes.

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[3] Lisbon European Council 23-24 March 2000, Presidency Conclusions.

[4] European Commission, 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, 21 May 2003, COM(2003) 284.

II. Setting the Scene

At a high level of generality, the law governing business enterprise may be understood as seeking to minimise the net costs of such business activity. There are two distinct dimensions to this exercise. On the one hand, the law aims to facilitate the reduction of net costs of production by business participants. This implies a balancing of private costs and benefits associated with the rules in question. On the other hand, additional regulatory measures may be justified in order to restrict such parties' ability to 'externalise' costs onto other parties. This in turn implies a balancing of the costs created for business participants, and averted for others, by such rules. In a world of national autarky, different polities might strike these balances at different points, reflecting differences in regulatory tools, national preferences regarding social costs, and differences in the organisation of interest groups. Although this would probably mean that the rules functioned better in some countries than others, there would be little to provoke change.

The process of European integration has opened up product, capital and other markets across national borders. Concomitantly with this, there is an increased need for 'translation' of enterprise laws across national boundaries. The desire to reduce the costs associated with such cross-border 'translation' was a basic argument for harmonisation of national rules.[5] European integration also generated pressure for law reform at the national level, because it subjects firms to greater competitive pressures. Consequently, firms operating in jurisdictions where enterprise rules impose (relatively) high costs on businesses are likely to call for reform of these rules. The intensity of this process is increased if firms are able to *select* their governing laws from amongst those of different member states. This process has the—undesirable—potential to stimulate the relaxation of national regulatory measures designed to internalise social costs. Concern about a consequent 'race for the bottom' was a second early argument in favour of harmonisation.[6]

The early European integration strategy, in response to these challenges, was an ambitious programme of harmonisation of domestic company laws. Based on what is now Article 50(2)(g) TFEU, the European institutions adopted a number of directives, creating a framework of European company law rules that had to be implemented into national law.[7] The topics ranged from basic disclosure and publicity requirements contained in the First Company Law Directive,[8] through legal capital rules,[9] to rather more recondite topics such as single-member companies.[10]

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[5] V Edwards, *EC Company Law* (OUP, Oxford 1999).

[6] *Ibid.* See the interesting Opinion by AG Trstenjak of 2 June 2010 in case C-81/09 *Idrima Tipou AE v Ipourgos Tipou Kai Meson Mazikis Enimerosis* para [30] (unreported).

[7] For a helpful overview, see J Wouters, 'European Company Law: Quo Vadis?' (2000) 37 CMLR 257, 258 ff.

[8] Originally Council Directive (EEC) 68/151 of 9 March 1968, [1968] OJ L65/8; now replaced by Directive 2009/101/EC of the European Parliament and of the Council on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L258/11.

[9] Second Council Directive (EEC) 77/91 of 13 December 1976 on coordination of safeguards, which for the protection of the interests of members and others, are required by Member States of

The scope of these measures was, however, rather bitty: indeed, some commentators have gone so far as to describe them as 'trivial'.[11] The stumbling-block was that Member States were unable to reach agreement on the more far-reaching proposals, such as the erstwhile Fifth Company Law Directive, which would have harmonised important issues of corporate governance such as the structure of companies and the powers and obligations of the company's organs,[12] and the proposed Ninth Directive promising a common approach on groups of companies.[13] In short, the early integration strategy of seeking to harmonise company law was stalled by the need to reconcile fundamental differences in approaches to corporate governance.

Two complementary explanations can be given for the failure to reach agreement. In one view, the national differences in question—for example, employee participation at board level through co-determination—have political roots:[14] they reflect diverse bargains over the division of spoils from corporate enterprise, and fear on the part of groups who might stand to lose from change. On this account, domestic interest groups lobby to protect their membership, with the result that national differences persist.[15]

The second interpretation suggests that the differences in legal rules complement other differences in national economies—for example, in industrial structure and the financing of corporate activity. That is, company law is merely one element in a wider system of production, the various parts of which complement one another.[16] For example, codetermination may plausibly complement systems of production that require employees to make long-term investments of firm-specific human capital: their ability to participate in the

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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 throughout the Community [1977] OJ L26/1

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

[11] L Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?' (2006) 27 U Pa J Int'l Ec Law 1.

[12] European Commission, Proposal for a Fifth Directive on the structure of public limited companies and the powers and obligations of their organs COM (83) 185 final, [1983] OJ C240/2.

[13] European Commission, Amended draft proposal for a ninth Directive based on Article 54(3)(g) of the EEC Treaty on links between undertakings, and in particular on groups (1983 – not published). For a French version from the mid 1980s, with explanations, see CDVA (ed), *Modes de rapprochement structurel des entreprises. Tendances actuelles en droit des affaires* (Story, Brussels 1986), 223-263. For a German version, see M Lutter, *Europäisches Unternehmensrecht*, 4th ed. (de Gruyter, Berlin 1996) 244. See on this M Andenas and F Wooldridge, *European Comparative Company Law* (CUP, Cambridge 2009) 449 f.

[14] See MJ Roe, *Political Determinants of Corporate Governance* (OUP, Oxford 2003); PA Gourevitch and J Shinn, *Political Power and Corporate Control* (Princeton UP, Princeton 2007).

[15] L Bebchuk and M Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 Stan L Rev 127; RG Rajan and L Zingales, 'The Persistence of Underdevelopment: Institutions, Human Capital, or Constituencies?' NBER Working Paper 12093 (2006).

[16] P Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP, Oxford 2001), 24; W Carlin and C Mayer (2003) 'Finance, Investment and Growth' (2003) 69 J Fin Econ 191.

control of the firm gives them security that their investments will not be expropriated by investors ex post.[17] Moreover, differences in share ownership structure or the structure of credit markets may also complement various provisions of company law.[18]

Whilst both accounts explain obstacles to harmonisation, their normative implications are quite different. Barriers erected simply for the protection of domestic interest groups are hard to justify. On the other hand, where complementarities are in place, then changing the law—as through harmonisation—without changing other components may result in a net decrease in productive capacity.

Regardless of the harmonisation programme, the project of integrating European markets also generates *competitive* pressure to reform national laws. This is likely to manifest itself in relation to those rules that generate higher costs for businesses. Those national rules that impose costs on business simply for distributional reasons may be expected to face pressure to be amended. In contrast, rules that respond to complementarities should not be targets for reform, as these actually assist in lowering costs for business. Consequently, these competitive forces offer a potential exit from the impasse described above: they work to undermine barriers to change generated by political, as opposed to economic, differences. Moreover, if entrepreneurs and investors are permitted to select applicable rules to govern their affairs, their exercise of *choice* will intensify the competitive process and provide lawmakers with useful information about the appropriateness of particular domestic rules.[19] A legal framework which maximises the available choices for parties can make the most of this process.

The idea of facilitating party choice can be seen a central theme of European company law as it entered the twenty-first century. The Court of Justice's case law on freedom of establishment has permitted entrepreneurs a great deal of freedom to select amongst Member States' company laws for the rules to govern their business enterprise. Moreover, the Commission's CLAP agenda has engendered a number of legislative measures that provide choices. First, there are provisions, such as the Takeover Directive, that offer choices for particular types of rule. Second, there are measures such as the SE Regulation and the Cross-Border Mergers Directive that permit firms to choose a different governing law. Third, there is the *acquis* of securities law, which can be understood as

[17] See M Blair and L Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Virginia LR 247; S Vitols, 'Varieties of Corporate Governance: Comparing Germany and the UK' in Hall and Soskice, *supra* note 16, 337.

[18] See RH Schmidt and G Spindler, 'Path Dependence and Complementarity in Corporate Governance' in JN Gordon and MJ Roe (eds), *Convergence and Persistence in Corporate Governance* (OUP, 2004), 114.

[19] Note that it is controversial whether regulators are in a position to interpret the messages conveyed by regulatory arbitrage adequately. See H Tjiong, 'Breaking the Spell of Regulatory Competition. Reframing the Problem of Regulatory Exit', (2002) 66 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 66; Andrew Johnston, *EC Regulation of Corporate Governance* (CUP, Cambridge 2009) 166 ff.

having some characteristics of an optional regime, since it applies only to firms that have chosen to be publicly-traded.[20]

Of course, permitting parties to select laws so as to minimise their costs cannot guarantee results that are desirable from any perspective other than *the party making the choice*. Insofar as rules exist to avoid the externalisation of business costs, permitting choice raises the spectre of the 'race to the bottom' feared by early advocates of harmonisation. The challenge for a regime based on choice is how to discourage undesirable changes yet not hinder those motivated solely by efficiency. In the sections that follow, we consider, respectively, the approaches of the Court and the Commission, and how they have responded to the problem of choice driven by the interests of a single constituency.

There is another way in which roadblocks to legislative integration may be overcome. This is where a political consensus is established that reform is desirable. This is a rare occurrence, but triggered readily following scandals or market crises, such as the bursting of the dotcom bubble and the revelations of accounting fraud at Enron and other firms, or the financial crisis of 2007 onwards.[21] Whilst the strategy of creating choice facilitates the sidestepping of roadblocks, a populist demand for reform simply overwhelms them. However, in this case there should be no presumption in favour of the resulting rules being superior, in terms of net social costs, to those that preceded them.

III. The Role of the Court

The Court of Justice' major contribution to promoting choice in corporate law has been to overcome the divergence in choice of law rules for cross-border companies that formerly prevailed within the EU.[22] Member States have traditionally used one of two connecting factors in determining choice of company law. The 'real seat' theory (or *siège réel*, or *Sitztheorie*) looks to the law of the place of the head office of the business.[23] The 'incorporation' theory looks to the law of the place of the firm's incorporation, which will usually correspond to its registered office.[24] For countries employing the incorporation theory, freedom of choice as regards corporate law is straightforward for entrepreneurs: they simply incorporate their business in the jurisdiction of their choice. The real seat theory, however, restricted such choice by challenging the existence of a company formed abroad but with a local head office: the real seat was domestic, but under domestic law no company

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[20] See on the latter point PG Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems' (1995) 62 U Chic LR 1047, 1090 ff. To be sure, the level of choice is different from our first two points, because the cost of choice may involve abandoning the public markets.

[21] See DA Skeel, Jr, 'Icarus and American Corporate Regulation', in J Armour and JA McCahery (eds), *After Enron: Improving Corporate Law and Modernizing Securities Markets* (Hart Publishing, Oxford 2006), 129; EF Gerding, 'The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation' (2006) 38 Conn L Rev 393.

[22] W Ebke, 'The European Conflict-of-Corporate-Laws Revolution: *Überseering*, *Inspire Art* and Beyond', (2005) 16 EBLR 9.

[23] R Drury, 'Migrating Companies' (1999) 24 ELR 354, 356; J Lowry, 'Eliminating Obstacles to Freedom of Establishment: The Competitive Edge of UK Company Law' (2004) 63 CLJ 331, 332.

[24] D Prentice, 'The Incorporation Theory – The United Kingdom' (2003) 14 EBLR 631.

had been formed.[25] However, beginning with its 1999 decision in *Centros*,[26] the Court of Justice has made a great deal of progress in facilitating choice through applying the Treaty freedom of establishment.

1. Freedom of Establishment

(a) Treaty Provisions

Art 49 TFEU (ex 43 EC) provides that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.' The freedom is readily comprehensible as regards a natural person adopting a 'personal' establishment: all that is needed is a definition of what constitutes a protected 'establishment'. This question was addressed by the Court in *Gebhard*,[27] concluding that it involved, 'participat[ion], on a stable and continuous basis, in the economic life of a Member State other than his State of origin ...'[28]

Art 54 TFEU (ex 48 EC) makes clear that freedom of establishment may be relied upon by corporate as well as natural persons: '[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 Union shall ... be treated in the same way as natural persons who are nationals of Member States.' Consequently, any company validly formed under the laws of a Member State, and recognised by any one of the Union connecting factors as being an 'EU' company, is to be treated the same way as a natural person for the purposes of exercise of freedom of establishment and as an establishment of any nationals founding it.[29]

How complete, though, is the assimilation of corporate with natural persons for the purposes of freedom of establishment? A restrictive approach was signalled in the Court's first major case dealing with the issue, *Daily Mail.*[30] Daily Mail plc, a company registered in England, wanted to relocate its management and control (real seat) to the Netherlands, in order to reduce its tax exposure in the UK. Under then-subsisting English law, such relocation required the consent of the UK Treasury.[31] Following unsatisfactory negotiations

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[25] A less restrictive (but equally unacceptable) application of the real seat theory would refuse to accept the existence of a validly formed company, but at least apply partnership law to it – which would recognise the legal personality of the firm, but not its limited liability. This approach was a vain attempt by German courts to rescue the real seat theory just before *Überseering* (n 42) was decided.

[26] *Centros* (n 1).

[27] Case C-55/94 *Gebhard v Colsiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. See also Case C-2/74 Reyners v Belgium [1974] ECR 631 para [21].

[28] *Gebhard* para [25].

[29] Case C-182/83 *Robert Fearon & Co Ltd v Irish Land Commission* [1984] ECR 3677 para [8].

[30] Case C-81/87 *R v HM Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust plc* [1988] ECR 5483.

[31] Income and Corporation Taxes Act (UK) 1970, s 482(1)(a). See now Taxes Management Act 1970, ss 109B-109F (as introduced by Taxation (International and Other Provisions) Act 2010); Taxation of Chargeable Gains Act 1992, s 185.

with the Treasury, Daily Mail argued that the restriction constituted an unlawful interference with its freedom of establishment.

In rejecting Daily Mail's argument, the ECJ made two important points, relating respectively to the *status* of a corporate 'person' that might avail itself of the Treaty freedom of establishment, and the *scope* of such freedom. First, status: the Court reasoned that corporate persons are 'creatures of national law', and consequently they must comply with restrictions imposed by the national law of the country in which they are formed, as part and parcel of the price for having their existence recognised.[32] Daily Mail at all points was a company registered in England, and hence English law could govern what it did. Secondly, scope: the Court focused on the second sentence of Art 49, which states that freedom of establishment, 'shall also apply to restrictions on the setting-up of *agencies, branches and subsidiaries* by nationals of any Member State established in the territory of any Member State' (emphasis added). It noted that this sentence referred to the ways in which companies 'usually' establish themselves in other countries. Had Daily Mail wished to establish itself in the Netherlands by any of these routes, it would have been permitted to do so under English law. Moreover, it could if it wished transfer its activities to a new company incorporated in the Netherlands, although English law would require it to wind up the existing company and transfer the business, which would incur a prohibitive tax charge.[33]

This seemed to imply that the Court thought that the scope of corporate freedom of establishment was limited to what some termed 'secondary' establishment, that is, via an agency, branch or subsidiary.[34] Moreover, in discussing the status of corporate 'persons', the Court observed that the Treaty recognised—and by implication preserved—the existence of a range of connecting factors for corporate law,[35] and expressly provided for inter-state cooperation toward mutual recognition of corporate laws.[36] This implied that further progress in the resolution of the real seat/incorporation theory divide was a matter for the Member States to agree, rather than for the Court to impose. Based on these statements, many commentators concluded that *Daily Mail* showed the real seat theory to be fully compatible with the Treaty freedoms. If a foreign corporation wished to establish itself in a real seat jurisdiction, the real seat theory would not impede its doing so by agency, branch, or subsidiary.

(b) Corporate Mobility at the Point of Formation: Centros

As is well known, the Court revisited these implications ten years later. In *Centros*,[37] two Danish entrepreneurs formed a company (Centros Ltd) in the UK, so as to avoid having to comply with Danish minimum capitalisation requirements. However, the Danish authorities refused to permit Centros Ltd to register a branch in Denmark, on the basis that the company carried on no business in the UK and consequently was seeking to establish not a

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[32] *Daily Mail* (n 30) para [19].

[33] *Ibid*. para [20].

[34] Edwards (n5), 342.

[35] *Daily Mail* para [21].

[36] *Ibid.* referring to then-Art 220.

[37] *Centros* (n 1).

'branch' but its *primary establishment* in Denmark. To the Danish authorities, this was not a question of European law, but a purely domestic matter: the arrangement was set up simply to circumvent domestic Danish rules, and the company had no real existence outside Denmark.[38]

Signalling a retreat from the high water mark of the dicta in *Daily Mail*, the *Centros* Court roundly rejected this argument. The *status* of a 'company', for the purpose of determining whether Art 54 meant it could enjoy the Treaty freedom of establishment, was to be decided according to the law of the Member State in which it had putatively been formed.[39] All the necessary formalities for corporate formation under English law had been complied with. Consequently, Centros Ltd was capable of invoking freedom of establishment in its own right, and the refusal to register its branch in Denmark was a clear interference with its freedom of establishment. In other words, the Danish government's argument sought to deny Centros' status as a legal person, which had been validly conferred by English law for these purposes.

The Court also rejected an argument that reliance on freedom of establishment solely to evade domestic law in this way could be described as an 'abuse' of the Treaty freedom, and that the freedom did not extend to this.[40] The Court opined that the very purpose of freedom of establishment was to permit the formation of companies in other Member States and the carrying on of business elsewhere. Simply to choose to do this in the least restrictive jurisdiction did not constitute an abuse by the company or its founders. Nor was it an abuse simply because the company carried on no business in its home jurisdiction.[41]

Although Denmark in fact applied the incorporation theory so far as recognition of the legal status of the company was concerned, the significance of *Centros* for the real seat theory was made clear shortly afterward in *Überseering.*[42] A company validly formed in the Netherlands, where the incorporation theory was applied, moved its head office to Germany. The German courts, applying the real seat theory, refused to recognise the company's existence: the connecting factor directed them to German law, under which no company had validly been formed. The logic of *Centros*, however, dictated that the company's *status* as such had been established by Dutch law, and consequently it was entitled to rely, via Art 54, on the Treaty freedom of establishment. Denial of its existence by the German court clearly contravened this.

These two decisions became a trio following *Inspire Art*,[43] the facts of which were similar to *Centros*, save that the host state was the Netherlands. According to Dutch legislation, companies registered abroad, but doing business only in the Netherlands had to

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38 *Ibid*. para [16].

39 *Ibid.* para [17].

40 *Ibid*. paras [23]-[28].

41 *Ibid*. para [29].

42 Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

43 Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

add a suffix to their name, indicating their status as a pseudo foreign company.[44] Onerous consequences followed from this status, such the imposition of personal liability on the directors for failure to meet Dutch minimum capital requirements. This time, it was argued that the framing of corporate freedom of establishment in Art 49 in terms of 'agencies [or] branches ...', implied that companies seeking to rely on them must themselves have a primary establishment in another Member State. In other words, the orthodox (from *Daily Mail*) understanding of the limited scope of corporate freedom of establishment also implied an additional *status* condition for companies seeking to rely on that freedom. The Court brushed this interpretation aside by reiterating the point it has made in *Centros* and *Überseering*: once a company's status as such has been recognised under the laws of the Member State of its formation, Art 54 provides that the Art 49 freedom is applicable.

(c) Permissible limitations on corporate freedom of establishment

After *Centros* and *Inspire Art*, European entrepreneurs are in effect free to select the governing law of their choice (amongst EU Member States) for newly-incorporated companies. This raises the question of how to restrict strategic selection of company laws in a way that benefits the entrepreneur at the expense of creditors or others. In principle, this should not be a matter of great concern at the point of formation, because parties who will deal with the company—outside investors, creditors, and employees—are all going to enter into new contracts with it, and so will be able to price in any associated costs. Those constituencies are aware of the jurisdiction in which their contractual partner has been constituted, not least due to the latter's obligation to use an abbreviation of their legal form in the firm's commercial name. The parties most at risk may be groups who are unable to bargain over their claims, for example tort victims or the tax authorities.

The Court's jurisprudence has always permitted Member States a limited power to impose restrictions, based on domestic public policy, on the exercise of Treaty freedoms. This gives Member States room to require foreign companies to comply with domestic norms, which freedom may be used to protect vulnerable constituencies. However in order to avoid undermining the Treaty freedoms, such restrictions are subject to strict review by the Court. In the context of freedom of establishment, permissible restrictions must be (i) applied in a non-discriminatory manner; (ii) justified by imperative requirements of the public interest; (iii) effective to secure their objective; and (iv) not disproportionate in their effect.[45]

It is important to understand that this framework allows the Court to consider putative restrictions individually on a case-by-case basis. These criteria were applied in *Centros* and *Inspire Art* to reject attempted justifications of mandatory rules seeking to impose minimum capital rules, the Court concluding that the public policy objectives of protecting involuntary creditors could be achieved with less invasive measures. In engaging in this 'negative' harmonisation, the Court is not, formally at least, ruling about the propensity of a particular measure to achieve the desired goal. Rather, its conclusion is that there are a set of measures which achieve the same result for less cost to the regulated parties. The line

[44] See on this act R Drury, 'The "Delaware Syndrome": European Fears and Reactions' [2005] JBL 709, 720.

[45] Case C-55/94 *Gebhard v Colsiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

between these two positions is fine, however, and one might question the institutional competence of the Court to make policy decisions of this kind.[46]

It has long been recognised that there is some scope for national legislators to enact anti-abuse rules.[47] Over the years, the Court has progressively elaborated the necessary precondition for the validity of such rules in light of the treaty freedoms. Most importantly, the Court has repeatedly emphasised that any such legislation needs to be designed in a way that it takes account of a 'case-by-case analysis' on the basis of 'objective evidence' of abusive behaviour.[48] Conversely, a general rule that applies irrespective of the specific facts of the situation will almost certainly restrict the company's freedom of establishment.

(d) Home state restrictions revisited

The cases in the *Centros* trilogy all concerned restrictions imposed by a host state. *Daily Mail*, by contrast, had concerned home state regulation.[49] The difficult distinction between these decisions has been revisited in two more recent cases. In *Cadbury Schweppes*,[50] an English company set up a subsidiary in the Republic of Ireland, solely to minimise its tax liability in the UK. The subsidiary was a shell company, carrying on no business in Ireland. Anti-avoidance measures in the UK tax code sought to negate the tax benefits of this type of structure.[51] The parent company argued that this was an unlawful restriction of its freedom to establish itself—by subsidiary—in other Member States. The Court agreed that there was a *prima facie* restriction, but held that this was justified by overriding reasons of public interest. In particular, whilst the exercise of freedom of establishment simply to secure a lower tax liability could not in itself justify any restriction on its exercise, such a restriction could be justified where it applied only to 'wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned.'[52] The purpose of the Treaty freedom of establishment was to grant persons liberty to *establish* themselves in Member States other than their own other jurisdictions—that is, an 'actual pursuit of an economic

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[46] S Deakin, 'Regulatory Competition versus Harmonisation in European Company Law', in DC Esty and D Gerardin, *Regulatory Competition and Economic Integration: Comparative Perspectives* (OUP, Oxford 2001), 190, 203.

[47] See *Centros* para [24].

[48] See eg *Leclerc and others v Au Blé Vert and Others* [1985] ECR 1 para 27; *Centros* (n 1) para 25; Opinion of GA Alber in *Inspire Art* (n 43) paras 102, 106; *Inspire Art* (n 43) paras 105, 143. Cf A Kjellgren, 'On the Border of Abuse – The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law (2000) 11 EBLR 179, 183; K Engsig Sørensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?' (2006) 43 CMLR 423, 453 f.

[49] This distinction was pointed out by the Court in *Überseering* and *Inspire Art*. See on the distinction between home-state and host-state obstacles WG Ringe, 'No freedom of emigration for companies?' (2005) 16 EBLR 621; F Mucciarelli, 'Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited' (2008) 9 EBOR 267.

[50] Case C-196/04 *Cadbury Schweppes plc v Commissioners of Inland Revenue* [2006] ECR I-4585.

[51] Income and Corporation Taxes Act 1988, ss 747-756 and Schs 24-26. See on the EU law conformity of these provisions *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446.

[52] *Cadbuiry Schweppes* para [51].

activity through a fixed establishment in that State for an indefinite period'.[53] A shell company carrying on no economic activity of its own would consequently be a wholly artificial arrangement, and the restrictions adopted by the UK would be justified provided that they extended only to such arrangements, identified by 'objective criteria'.[54] The Treaty, it seems, protects only *genuine*—as opposed to wholly artificial—exercises of the freedom of establishment.

We should pause here and reconsider *Centros* and *Inspire Art*. If Art 49 only protects genuine exercises of the freedom of establishment, why were both Centros Ltd and Inspire Art Ltd able to invoke its protection, when they admittedly carried on no economic activity in the UK?[55] The answer reveals much about the Court's conception of corporate freedom of establishment. The Treaty protects EU nationals' freedom to establish themselves in *other* Member States.[56] However, the purpose of the freedom is to foster genuine establishments: Member State restrictions on wholly artificial exercises will not undermine the purpose of the freedom, as Cadbury Schweppes discovered. Centros and Inspire Art, on the other hand, unquestionably had *genuine* establishments in Denmark and the Netherlands respectively. The extent of their establishment in the UK was irrelevant, because this was their jurisdiction of origin, and the freedom relates to establishment *in another Member State*. The only question with respect to the jurisdiction of origin, as we have seen, is whether a corporate person is recognised to exist *under that law*. Whilst *Cadbury Schweppes* indicates that the Court is willing to permit restrictions conditioning on the (lack of) genuineness of the *establishment abroad* that is protected under Art 49, there is no tolerance of such restrictions where they relate to the *status* of a corporate person that may use Art 54 to claim this protection. The latter question is one that by Art 54 is expressly reserved to national law. All that is required is that the company be validly formed under the laws of a Member State. In other words, whilst 'establishment' has an autonomous meaning in European law, 'company' does not for this purpose.

The boundary between the (national law) questions of corporate status and the (European law) questions of establishment was further explored by the ECJ in *Cartesio*.[57] Cartesio, a limited partnership formed under Hungarian law, wished to relocate its head office to Italy whilst still retaining its status as a Hungarian company. At the time, Hungarian company law required that companies be registered in the jurisdiction in which their real seat was located.[58] The Hungarian authorities therefore did not authorise the relocation of the

[53] *Ibid.* paras [53]-[54]. See also Case C-221/89 *Factortame* [1991] ECR I-3905 para 20 and Case C-246/89 *Commission v United Kingdom* [1991] ECR I-4585 para 21.

[54] *Cadbury Schweppes* paras [67]-[74].

[55] J Vella, 'Sparking Regulatory Competition in European Company Law: A Response' in R de la Feria and S Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law* (Hart Publishing, Oxford 2011), 127.

[56] *Cadbury Schweppes* para [53]. See also *Gebhard* para [25].

[57] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

[58] Law No CXLV of 1997 (Hungary), Arts 11(2), 16(1). See V Korom and P Metzinger, 'Freedom of Establishment for Companies: The European Court of Justice confirms and refines it *Daily Mail* Decision in the *Cartesio* Case C-210/06' (2009) 5 ECFR 125, 141-44. The requirement was removed on 1 September 2007 (*ibid*).

company's head office to Italy. The Court, affirming *Daily Mail*, held that this was not an interference with the company's freedom of establishment.

It appears that Cartesio sought to create a genuine establishment in Italy.[59] Clearly, if Hungarian law had permitted the firm to do this whilst retaining its status as a Hungarian company, but *Italian* law had refused to recognise its existence, an Italian refusal would have infringed the firm's freedom of establishment.[60] Why, then, was its ability to do so not protected by Art 49 against the Hungarian registry's rejection? The Court treated the issue as a question of corporate status, concluding that it was a matter for the law of the Member State under which the company was said to be formed—the law of its 'nationality', to use the analogy drawn in Art 54.[61] On this view, just as questions of *initial* existence—by formation—are to be assessed by the law of the home Member State, so too are questions of *continued* existence.[62] If moving the corporate head office to another jurisdiction results in dissolution, this consequently does not trigger Art 49 because there is no longer any corporate person who seeks to invoke the rights.[63] Not only was the *ratio* of *Daily Mail* still good law, but it was extended.[64]

The foregoing conclusion is consistent with the formal structure of the Treaty provisions regarding corporate freedom of establishment, which make the determination of status a precondition to the exercise of the freedom. Yet from a policy point of view, a distinction between restrictions imposed by the home state on exit and those imposed by the host state at entry seems hard to rationalise. [65] Home state restrictions on exit are surely just as much of an impediment to the goals of freedom of establishment—that is, the carrying on of business in other Member States—as are host state restrictions. The gap between the Court's reasoning and a desirable result in policy terms was narrowed considerably, however, by an important *dictum*. The Court went out of its way to explain that things would have been different had the firm sought to change its governing law to *Italian* law:

[59] As Cartesio sought to register a change of seat in accordance with provisions of Hungarian law defining the seat as the place of the company's central administration (n 58), the clear inference is that it wished to relocate its central administration to Italy.

[60] *Überseering* (n 42).

[61] *Cartesio* (n 57) paras [104]-[109].

[62] *Überseering* (n 42) para [70]; *Cartesio* (n 57) para [110].

[63] Nor would this impinge upon the freedom of establishment of the natural persons managing and owning shares in the company. Art 49 would protect their ability to set up and manage companies in other Member States 'under the conditions laid down for [that Member State's] own nationals'. The Hungarian authorities' refusal to recognise the company's continued existence did nothing to interfere with this. Cartesio's managers and shareholders remained free to set up an *Italian* company if they wished.

[64] For other comments on Cartesio, see J Borg-Barthet, 'European Private International Law of Companies after Cartesio' (2009) 58 ICLQ 1020; T Biermeyer, 'Bringing darkness into the dark: European corporate cross-border mobility in Re Cartesio' (2009) 16 Maastricht Journal of European and Comparative Law 251; Andrew Johnston and P Syrpis, 'Regulatory competition in European company law after Cartesio' (2009) 34 European Law Review 378; S Lombardo, 'Regulatory Competition in Company Law in the European Union after *Cartesio'* (2009) 10 EBOR 627.

[65] WG Ringe, 'No freedom of emigration for companies?' (2005) 16 EBLR 621.

> [T]he situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.[66]

The Court opined that any restrictions imposed by Hungarian law on such a transfer—for example, 'requiring winding up or liquidation of the company'—*would* contravene the company's freedom of establishment.[67] This marks a potentially critical departure from the Court's earlier comment in *Daily Mail* that requiring a winding-up and dissolution was a permissible part of Member States' freedom to define the terms of corporate status.[68] It also begs the question as to why, if questions of continued existence under the law of incorporation are to be treated as matters of corporate status, this should not also be the case where the company wishes to leave that jurisdiction legally, as opposed to physically? The answer, it would appear, is that if the law of another Member State would recognise such a 'reincorporation' as occurring without a dissolution and re-formation, then the company would putatively exist under the laws of that Member State, and the (former) home state restriction on exit would not mark the cessation of its existence, but rather simply a barrier to its establishment in the laws of the Member State to which the company wished to migrate.

A key question that emerges is how widespread are the circumstances under which such a seamless 'reincorporation' may occur. What appears to be necessitated is recognition by the laws of the Member State of immigration of the *continued* existence of the same entity: otherwise it is hard to see how 'the company' can claim that restrictions on such a move by the Member State of emigration are impeding its freedom of establishment. Yet few, if any, Member States currently provide specifically for 'immigration' of a foreign legal entity—that is, transfer of its registered office without dissolution.[69] *Vale*, a case currently before the Court, raises the question whether such lack of provision can constitute an invalid restriction on corporate freedom of establishment.[70] The case concerns – in a scenario almost reverse to *Cartesio* – an Italian company wishing to migrate to Hungary, thereby changing its legal form to a Hungarian limited liability company. Italy is one of the few Member States that currently allows companies to emigrate.[71] The Italian formalities having been undertaken, the Hungarian authorities were asked to register the company as

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[66] *Cartesio* para [111].

[67] *Cartesio* para [112].

[68] *Daily Mail* para [20], discussed *supra* at text to n 33.

[69] Johnson and Syrpis (n 64).

[70] Case C-378/10, *Vale Építési Kft*, reference for a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary).

[71] Codice Civile, Article 2437. The provision is subject to safeguards for minority shareholder protection, which presumably would fall to be justified under *Gebhard.* See on this F Mucciarelli, 'The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: an Important Decision from Italy' (2005) 2 ECFR 512, 521.

successor to the Italian company. The Hungarian registrar refused, on the basis that they could only recognise a wholly new entity. This refusal has been challenged as impeding the company's freedom of establishment. In particular, it is argued that as Hungarian law permits a change of corporate status for domestic firms, whereby an entity of the new type is recognised as the successor to the entity of the old type, the refusal to permit this for foreign companies amounts to a discriminatory impediment to the exercise of their freedom of establishment.

This argument draws an analogy with the ECJ's decision in *SEVIC,*[72] where it was held that if mergers are permitted for domestic entities, then it is a discriminatory impediment to freedom of establishment not to permit a foreign entity to merge with a domestic firm. Consideration of *SEVIC,* of course, reveals that 'reincorporation' may already be achieved quite readily by means of a cross-border merger. This must be permissible—either on the basis *SEVIC* coupled with of the general permissibility of domestic mergers under the Third Company Law Directive,[73] or more recently based on the Cross-Border Mergers Directive.[74] Another route would be through the formation of a *Societas Europaea*,[75] to which possibility the Court in *Cartesio* expressly referred as supporting its views about transfer of governing law.[76] Consequently, we shall revisit *Cartesio* in our consideration of these provisions.[77] Together, these developments open the way to midstream corporate mobility.

(e) The impact of choice at the point of formation

Despite the struggle over mid-stream mobility, the judicial development of corporate freedom of establishment triggered large-scale use of foreign company laws by entrepreneurs incorporating new businesses. As on the facts of *Centros* and *Inspire Art*, these were motivated primarily by a desire to avoid minimum capital requirements in the entrepreneurs' home states. The jurisdiction of choice for these entrepreneurs was mostly the UK, where no minimum capital is required for a private company.[78] Studies of the UK register of companies reported a dramatic increase in the number of 'foreign' limited companies from 2003 onwards.[79] The trading offices of these companies are unevenly distributed across other Member States—although Germany has by far the largest share—probably reflecting the

[72] Case C-411/03 *Sevic Systems AG* [2005] ECR I-10805.

[73] Directive 78/855/EEC.

[74] Directive 2005/56/EC [2005] OJ L 310/1.

[75] Council Regulation (EC) no 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] OJ L294/1 ('SE Regulation').

[76] *Cartesio* paras [115]-[118].

[77] *Infra* section IV.2.c.

[78] See J Armour and DC Cumming, 'Bankruptcy Law and Entrepreneurship' (2008) 10 Am L & Econ Rev 303, 312-4. The start-up costs—both in terms of time and money—associated with forming a private company in the UK are also significantly lower than in most other Member States.

[79] J Armour, 'Who Should Make Corporate Law? EC Legislation versus Regulatory Competition' (2005) 58 CLP 369, 386; M Becht, C Mayer and H Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry' (2008) 14 J Corp Fin 241, 249-252. 'Foreign' status is determined in these studies either by a non-English language name, or the company's directors all residing in a country that is not the UK.

significant differences in the cost of registering branches in the jurisdictions where they carry on business.[80]

The massive migration of entrepreneurs from continental European countries in the years 2003-6 put lawmakers in these countries under pressure. Virtually all major jurisdictions responded to the market pressure in an attempt to make their company law system more appealing to businesses and to retain incorporations.[81] Most of these countries have abandoned the requirement of minimum capital for setting up a company, and have tried to reduce the costs and time involved in setting up a new company. However, the rate of entrepreneurial selection of 'foreign' (UK) company law at the formation stage appears to have fallen back from its 2006 peak.[82] In part, this may be because entrepreneurs found that compliance costs under English company law were higher than expected.[83] More plausibly, it reflects Member States' reduction of the costs to domestic incorporation, as described.[84] Together, these factors reduce the net benefit of incorporating under English law. We may infer that the ultimate consequence of *Centros* is unlikely to be indefinite continent-wide legal migration of new firms. Rather, it will have been to trigger the reduction or abandonment of minimum capital requirements across Member States.

2. Free movement of capital

Alongside the work done by freedom of establishment, a second treaty freedom plays an increasingly important role in European company law. The free movement of capital, enshrined in what is now Articles 63-66 TFEU, prohibits 'all restrictions on the movement of capital between Member States and between Member States and third countries'.[85] While the Treaty does not define the concept of 'movement of capital', the Court's caselaw treats the terminology used in Council Directive 88/361/EEC[86] as an indicative list of capital movements.[87] According to this instrument, movements of capital for the purposes of Article 63(1) TFEU include in particular investments in the form of a shareholding which confers the possibility of effectively participating in the management and control of an undertaking ('direct investments') and the acquisition of shares on the capital market solely with the

[80] M Becht, L Enriques and V Korom, '*Centros* and the Cost of Branching' (2009) 9 JCLS 171.

[81] WW Bratton, JA McCahery and EPM Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis' (2009) 52 Am J Comp L 347.

[82] *Ibid.*

[83] *Ibid*, 376-377.

[84] See WG Ringe, 'Sparking Regulatory Competition in European Company Law – The Impact of the Centros Line of Case-Law and its Concept of 'Abuse of Law'' forthcoming in R de la Feria and S Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law* (Hart Publishing, 2011), 107.

[85] Article 63(1) TFEU.

[86] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1998] OJ L178/ 5.

[87] See, in particular, case C-367/98 *Commission v Portugal* [2002] ECR I-4731 para [37], and case C-112/05 *Commission v Germany* [2007] ECR I-8995 para 18.

intention of making a financial investment without any intention of influencing its management and control ('portfolio investments').[88]

Obviously, there is a certain overlap between the freedoms of capital and establishment. Whereas the freedom of capital might catch all 'direct' and 'portfolio' investments, only national rules which apply to shareholdings allowing a 'definite influence or control of the company's decisions and to determine its activities' fall within the scope of establishment.[89] If a national measure at stake is unspecified enough to apply to either a situation where control or a direct/portfolio investment is at stake, the Court will accordingly apply both freedoms separately and cumulatively.[90] By contrast, if a measure exclusively concerns direct or portfolio investments, only the free movement of capital (and not establishment) is applicable. It follows that the Court considers a control transaction as a specific form of a direct investment and consequently a sub-category of the latter. In any case, the free movement seems to have a potentially much larger scope than the freedom of establishment.

This broad interpretation makes the free movement of capital a powerful weapon in the hands of the European Commission. The movement of capital can in principle be restricted by any national rule that makes it less attractive to invest in securities in another Member State. The applicability of the capital freedom to company law is therefore not dependent upon an entity seeking an 'establishment' abroad, but comes into play when a potential investor wishes to invest in shares of a company in another Member State. In terms of the 'choice' framework articulated in this paper, the free movement of capital is concerned to ensure that *investors* enjoy an unfettered choice over jurisdictions in which they may make direct or portfolio investments. A violation is possible if the national measure in question would deter putative investors from acquiring shares in a company.[91] Consequently, the scope of application of the free movement of capital to company is potentially even wider than that of freedom of establishment.

(a) Early efforts and 'golden shares'

The significance of the free movement of capital for company law has only been 'discovered' by the Commission relatively recently.[92] It was not until the Maastricht Treaty that this freedom's full effectiveness was developed; the (former) EC Treaty only mandated the

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[88] See case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661 para [21]; case C-483/99 *Commission v France* [2002] ECR I-4781 paras [36] and [37]; case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641 paras [39] and [40]; joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141 para [19].

[89] See on the relationship between establishment and capital Case C-326/07 *Commission v Italy* [2009] ECR I-2291, para [34]-[35]; case C-81/09 *Idrima Tipou AE v Ipourgos Tipou Kai Meson Mazikis Enimerosis* paras 47 ff (not yet reported) and the opinion by AG Trstenjak of 2 June 2010 paras 62 ff.

[90] *ibid* para [36].

[91] *Commission v Netherlands* (above note 88) para [20].

[92] Wouters (n 7) ten years ago only very briefly discusses free capital flows within the European Union: see *ibid* 269.

complete abolition of all obstacles to capital movement from 1994 onwards.[93] In subsequent years, the Commission accepted this new task and published a communication 'on Certain Legal Aspects Concerning Intra-EU Investment' in 1997.[94] This explained the conditions for application of the free movement of capital and clarified necessary definitions. In it, the Commission identified various obstacles to free movement of capital, among them 'rights given to national authorities, in derogation of company law, to veto certain major decisions to be taken by the company, as well as the imposition of a requirement for the nomination of some directors as a means of exercising the right of veto, etc.' This category was at the time a less obvious violation of the free movement of capital. Its theoretical basis is that these special rights constitute 'national measures' under the *Gebhard* formula '[which are] liable to hinder or make less attractive the exercise of fundamental freedoms.'[95]

In the years that followed, the Commission gradually challenged such special rights before the Court of Justice. In these proceedings, the Court mandated the abolition of several so-called 'Golden Shares': special rights retained by states to intervene in the share structure and management in formerly publicly-owned undertakings.[96] Although the business of the company has been privatised, the articles of association often provide states with such rights on a precautionary basis, most notably in the case of public utilities. These include special provisions designed to enable the government to prevent takeovers or other changes of control.

The particular rights attached to such 'shares' varied from case to case. Some conferred supermajority voting rights, nomination rights for board members, or veto rights for certain corporate actions. Others included provisions limiting the maximum proportion of the shares which may be beneficially owned by other investors. In some jurisdictions, golden shares could be created using the framework of general company law, while elsewhere, special legislation was needed to introduce State privileges in privatised companies. In company law, 'golden shares' are generally conceived as a separate class of shares. Consequently, any attempt to alter the State's privileges requires the consent of the special preference class. The Court of Justice found, in the almost all such cases before it, that these special rights violated the fundamental freedoms. The cases concerned special rights

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[93] JA Usher, *The Law of Money and Financial Services in the EC* (2nd ed, OUP, Oxford 2000) 22 ff; D Chalmers and others, *European Union Law* (CUP, Cambridge 2006), 509; L Flynn, 'Coming of Age: The Free Movement of Capital Case Law 1993-2002' (2002) 39 CMLR 773. This fundamental freedom is considered as directly effective, see joined cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera and others* [1995] ECR I-4821 paras [41]-[47].

[94] [1997] OJ 220/15.

[95] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.

[96] See on this E Szyszczak, 'Golden Shares and Market Governance' (2002) 29 *Legal Issues of Economic Integration* 255; H Fleischer, 'Case Note on the Golden Shares Cases' (2003) 20 CMLR 493; CO Putek, 'Limited but not Lost – A Comment on the ECJ's Golden Share Decisions' (2004) 72 Fordham L Rev 2219; A Looijestijn-Clearie, 'All that glitters is not gold: European Court of Justice strikes down golden shares in two Dutch companies' (2007) 8 EBOR 429. Most recently, F Benyon, *Direct Investment, National Champions and EU Treaty Freedoms* (Oxford, Hart Publishing 2010), ch 2.

in privatised companies in France,[97] Portugal,[98] the United Kingdom,[99] Spain,[100] the Netherlands[101] and Italy.[102] In fact, the Belgian privatised utilities *Distrigaz* and *Société Nationale de Transport par Canalisations* were the only situations in which a Member State was authorised to maintain its 'golden share'.[103]

Further discussion of these proceedings is unnecessary here.[104] Suffice to say that the gist of this caselaw is that the Court does not allow decisive state influence in companies if this influence unjustifiably and disproportionately favours the state over other shareholders. In other words, the European Court has always found a violation of fundamental freedoms when the State has used the guise of market participation to exercise regulatory power.[105] In so doing, the Court does not distinguish between statutory law and provisions written into corporate constitutions.[106] Moreover, according to the Court's case-law, infringement of Article 63 TFEU is no longer triggered solely by *discriminatory* national provisions, but now extends to all norms that might hinder the free movement of capital, even if their effect is not discriminatory.[107] The decisive factor – in accordance with the above-mentioned Commission Communication – has always been whether the special right in question conferred a benefit on the State as market coordinator.

(b) Expansion into general company law?

In each of the Golden Shares cases, the atypical shares conferred special rights on the State. The most recent developments suggest that the Court might move beyond this ground as a doctrinal starting point and bring other company law rules, not necessarily favouring the State over other market participants, within the scope of the free movement of capital rules.

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[97] Case C-483/99 *Commission v France* [2002] ECR I-4781.

[98] Case C-367/98 *Commission v Portugal* [2002] ECR I-4731. Very recently, Case C-171/08 *Commission v Portugal* judgment of 8 July 2010, and case C-543/08 *Commission v Portugal*, both not yet reported.

[99] Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641.

[100] Case C-463/00 *Commission v Spain* [2003] ECR I-4581. More recently, see cases C-274/06 *Commission v Spain* [2008] ECR I-26 (summary publication) and C-207/07 *Commission v Spain* [2008] ECR I-111 (summary publication).

[101] Joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141.

[102] Case C-174/04 *Commission v Italy* [2005] ECR I-4933; joined cases C-463/04 and C-464/04 *Federconsumatori and others v Comune di Milano* [2007] ECR I-10419; C-326/07 *Commission v Italy* [2009] ECR I-2291.

[103] Case C-503/99 *Commission v Belgium* [2002] ECR I-4809. The Court considered that the relevant special powers were justified by their limitation to certain decisions on strategic assets of the companies in question, and the direct link with public service obligations incumbent on both companies.

[104] For more details, see the literature cited in n 96 above.

[105] A Arnull and others, *Wyatt & Dashwood's European Union Law*, 5th ed (Sweet & Maxwell, London 2006) para 20-021.

[106] See especially *Commission v United Kingdom* (above note 99).

[107] Case C-367/98 *Commission v Portugal* (above n 98), at paras [44]-[45]; *Commission v United Kingdom* (above n 99) para 43; see P Craig and G de Búrca, *EU Law – Text, Cases, and Materials* (4th ed, OUP Oxford 2007) 725.

The best example to illustrate this process is the *Volkswagen* case from 2007, in which the Court delivered a judgment of particular relevance for the potential further development of the free movement of capital.

This case dealt with the validity of the Volkswagen law ('VW law'), [108] a piece of German legislation providing for special company law rules for a particular undertaking, *Volkswagen AG* ('VW'). This statute, enacted in 1959, sought to resolve a long-running dispute over VW's ownership, and to shield its employees from the influence of any future large shareholder. To this end, the VW law created a specific company law for Volkswagen, from which both the Federal Republic of Germany (the 'FRG') and the Land of Lower Saxony (the 'Land') benefited. Among the special rules for Volkswagen were three of particular relevance: (1) a provision capping the voting rights of any shareholder at 20 per cent,[109] (2) a provision implementing an 80 per cent majority requirement for important company decisions,[110] and (3) rights for the FRG and the Land each to appoint one member to the company's supervisory board,[111] so long as the FRG and the Land were shareholders of VW.[112] Of course, these rights make sense only in combination with the fact that the Land held 20 per cent of the shares: the 80 per cent majority requirement thus conferred an indirect veto right for important decisions on the Land.

Volkswagen's situation attracted the ire of the Commission, who took the view that the VW law was in violation of the free movement of capital (now Articles 63 ff. TFEU) and the freedom of establishment (now Articles 49, 54 TFEU) insofar as it made it substantially less attractive for other EU investors to acquire shares in VW with a view to participating in management decisions or of controlling the company.[113] According to the Commission, these derogations from general German company law resulted in a special blocking minority right for the Land at shareholders' meetings, plus a special right to appoint representatives onto the supervisory board. These restrictions arose from the Land of Lower Saxony acting in its capacity as a public authority rather than being the result of the normal operation of company law. Moreover, they reduce incentives for investors to acquire a bigger block of shares in VW. The Court agreed with the Commission and the Advocate General and declared all three contested provisions to be incompatible with the free movement of capital.[114] It characterised them as tools for the State to secure an enduring influence, in the sense of the traditional golden shares cases.[115]

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[108] Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk GmbH in private Hand ('Volkswagengesetz','VW law') of 21 July 1960, [1960] Bundesgesetzblatt I, 585.

[109] VW Law, s 2(1).

[110] VW Law, s 4(3).

[111] German company law employs a two-tier board structure which includes a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*). The board's role of running the company and supervising the management is thus split into two separate bodies.

[112] VW Law, s 4(1).

[113] European Commission, Press Release of 30 March 2004 – IP/04/400.

[114] Case C-112/05 *Commission v Germany* [2007] ECR I-8995. For comments on the case, see M Schmauch, 'Economic Patriotism made in Germany – The Court of Justice overturns parts of the 'VW-Gesetz'' [2007] ELR 438; F Sander, 'Case C-112/05, European Commission v. Federal Republic of Germany: The Volkswagen Case and Art. 56 EC – A Proper Result, Yet Also a Missed

However, the result in *Volkswagen* went beyond the golden shares cases because the provisions challenged were simply modifications to general rules of company law, which did not specify the state as their beneficiary: the voting cap and special majority requirement applied to all shareholders. Other private shareholders—irrespective of their Member State of origin—could in principle have benefitted from the provisions, just as the German authorities did.[116] Only when viewed alongside VW's ownership structure does the sense of these two provisions become clear: self-evidently, the Land of Lower Saxony, holding 20 per cent of the shares, profited from both the voting cap and from the 80 per cent special majority requirement. These two provisions meant that the Land enjoyed a *de facto* veto and considerable influence within the company.[117]

The particular ownership structure allowed the Court to declare the 'situation' created by the VW law as incompatible with the free movement of capital.[118] It thereby built a bridge to this case from the earlier golden shares cases, where State benefit had undoubtedly been at stake. Nevertheless, the VW case might also be seen as a first step towards a broader understanding of the free movement of capital. If measures that do not necessarily favour the state can come under its scope of application, this might open a Pandora's Box whereby any rule of company law may be put to a proportionality test. Indeed, it is possible that the application of the principles guiding the Court of Justice may lead to this result in the future.[119] In a recent German case, for example, it was argued that provisions granting board appointment rights for large shareholders impeded the free movement of capital by allegedly making minority shareholders less willing to invest.[120] The case was dismissed, but it shows the potential future direction of travel in this area.

Should the Court continue along the path described, it may be necessary to reflect on possible interactions between free movement of capital and the effects of freedom of establishment. As we have seen, corporate freedom of establishment restricts host Member States from imposing measures that make it less attractive for entrepreneurs and controlling shareholders to establish businesses there. The exercise of choice over company law by such parties has engendered much speculation about a possible 'race to the bottom' whereby Member States remove protections for other constituencies—*inter alia* for

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Opportunity?' (2008) 14 Colum J Eur L 359; PE Partsch and G Dennis, 'The Court of Justice rules on 'golden shares' held in private companies' (2008) 3 JIBFL 157; G Parleani, 'Après l'arrêt *Volkswagen* du 23 octobre 2007, quelle liberté pour les Etats actionnaires?' [2007] *Revue des sociétés* 874; WG Ringe, 'Case C-112/05, *Commission* v. *Germany* ('VW law'), Judgment of the Grand Chamber of 23 October 2007' (2008) 45 CMLR 537.

[115] On this see Ringe (above n 114).

[116] This of course was not the case as regards the right of the Federal State and of the Land of Lower Saxony to appoint two members of the company's supervisory board for so long as they were shareholders of VW, which was a classical 'golden share' provision.

[117] This is the way the Court saw it, see paras 50 ff of the judgment.

[118] See para 52: 'this situation is liable to deter direct investors from other Member States'.

[119] See on the various options WG Ringe, 'Company law and free movement of capital' (2010) 69 CLJ 378. Cf J Rickford, 'Protectionism, Capital Freedom, and the Internal Market' in U Bernitz and WG Ringe (eds), *Company Law and Economic Protectionism* (OUP, Oxford 2010), 54.

[120] AktG § 101(2); Bundesgerichtshof, decision of 8 June 2009, II ZR 111/08, ZIP 2009, 1566 – ThyssenKrupp.

investors—in a bid to attract entrepreneurs and controlling shareholders to use their laws. For example, the debate about legal capital rules,[121] which are often viewed as protecting creditors, can be understood in these terms. Of course, host Member States remain free under the establishment caselaw to impose *proportionate* restrictions on formally foreign corporations. Yet an expansion of the free movement of capital caselaw might imply a further constraint on Member States' ability to 'race to the bottom' in order to attract incorporations. To see this, imagine a Member State introduces measures designed to appeal specifically to controlling shareholders, which are in fact detrimental to minority shareholders.[122] Such a step might lead to questions about proportionality as regards free movement of capital. Consequently the protection of free movement of capital by the Court can be understood as an additional restraint on the possibility of a 'race to the bottom'—as regards investor protection—ushered in as a consequence of the freedom of establishment caselaw.

IV. Legislative Measures

Over the course of the last decade, European lawmakers changed the focus of their company law reform efforts. This began with the Commission's 1999 Financial Services Action Plan ('FSAP') which proposed sweeping reforms to securities laws. To take the FSAP forward, the Commission asked a 'Committee of Wise Men' chaired by Baron Lamfalussy to prepare a report detailing suggestions for its implementation.[123] Many of the prescriptions of the Lamfalussy Report were subsequently implemented in a relatively successful programme of harmonisation of capital markets laws.

Whilst the Commission must have felt buoyed by its progress with the FSAP, it probably also felt challenged by the Court's boldness in *Centros*. It seems likely that as a consequence, the Commission was concerned to make more progress with core company law. Their first major project was the Thirteenth Company Law Directive—on Takeover Bids—which had been stalled for several years. Using the Lamfalussy Report as a precedent, the Commission invited Professor Jaap Winter to chair a committee of experts to report on appropriate next steps for the Takeovers Directive. No sooner had the resulting Winter Report been written,[124] than the fallout from Enron and related scandals pushed the Commission to take further steps. It asked the High Level Expert Group ('HLG') who had reported under Winter to prepare another report on future priorities for European company law more generally.[125] The HLG report then formed the basis of the Commission's Company

[121] Text to nn 78-84.

[122] This example is analogous to what some scholars argue has been the strategy of Delaware in the United States—to design rules that appeal to managers, such as takeover defences and board entrenchment mechanisms—that are harmful to shareholders. See, eg, LA Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1992) 105 Harvard LR 1435; LA Bebchuk and A Cohen, 'Firms' Decisions Where to Incorporate' (2003) 46 J L & Econ 383.

[123] Lamfalussy Committee, Final Report of the Committee of Wise Men on the Regulation of European Securities Market, February 2001.

[124] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids (January 2002).

[125] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe (4 November 2002).

Law Action Plan ('CLAP'), which proclaimed a significant change in legislative direction as regards company law.[126]

The CLAP proposed a more minimalist approach to European company law: it should focus on meeting the needs of business, as opposed to treating harmonisation as an end in itself. In future, harmonisation was only to be viewed as an instrumental good, whose value in advancing the efficiency of business functioning would need to be demonstrated in a particular context.[127] In other words, this was a reassertion of the principle of subsidiarity: the burden of proof should rest on the proponents of European legislation to show that national law measures cannot bring about the desired result.

This new approach has manifested itself in a number of distinctive features of post-CLAP European company law-making. First, the scope of new legislative measures has been more closely targeted on cross-border issues, where national law measures are least effective. Second, the Commission has since employed an evidence-based approach to the formation of legislative policy, assessing the scope of market failures and the likely impact of possible legislative measures. Third, the Commission has also made greater use of non-binding 'soft law' measures,[128] such as Recommendations, which are intended to serve simply as guidelines for best practice as regards national law measures.

Finally, following the expiration of the SLIM programme in 2002,[129] the Commission adopted a new long-term programme to simplify and update EU legislation.[130] Over the next few years, this generated a number of specific simplification measures relating to existing legislation.[131] In 2007, it appeared to take a more radical turn, when the Commission floated

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[126] See generally K Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron' (2003) 3 JCLS 221. For a recent reassessment of the CLAP, see K Geens and KJ Hopt (eds), *The European Company Law Action Plan Revisited – Reassessment of the 2003 priorities of the European Commission* (Leuven University Press, Leuven 2010).

[127] Report of the High Level Group of Company Law Experts, n 125, 29-31.

[128] For example, based on what is now Article 17(1) TEU (formerly Article 211 EC), the Commission adopted recommendations to regulate matters like remuneration and independence of directors: see eg, Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies [2004] OJ L385/55; Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board [2005] OJ L52/51.

[129] SLIM stands for Simpler Legislation in the Internal Market. See European Commission, *Communication on Simpler Legislation for the Internal Market* (SLIM) COM(1996) 204. Cf E Wymeersch, 'European Company Law: The "Simpler Legislation for the Internal Market" (SLIM) Initiative of the EU Commission', Working Paper Financial Law Institute, University of Gent, No. 9/2000.

[130] European Commission, Communication of 11 February 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Updating and simplifying the Community acquis COM (2003) 71 final.

[131] Most notably, reforms to the First and Second Company Law Directives: Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies [2003] OJ L221/13; Directive 2006/68/EC of the European Parliament and of the Council of 6

the possibility of reconsidering the existing company law *acquis* through the lens of the evolving framework for justifying new legislation.[132] The idea of a root-and-branch reassessment, which bore the imprint of then-Commissioner McCreevy,[133] proved too much for the European Parliament, which rejected it in favour of a second, less far-reaching, proposal.[134] The adopted framework envisages a more 'principles-based' regulatory style in European corporate law.[135] Under its aegis, further simplification measures followed in relation to several other Directives,[136] with a corresponding reduction of administrative burdens. However, the European institutions stopped short of revolutionising EU corporate law by repealing entire Directives.

We now consider in more detail key aspects of recent legislation in company law, dividing the discussion into three parts: listed companies, cross-border restructuring, and takeovers.

1. Substantive harmonisation: listed companies

One area in which sustained progress has been made in the harmonisation of Member States' company laws concerns the rules governing listed companies. These developments are in large part the result of the FSAP's programme of reform to securities laws, the content of which impinges upon company law because of the ill-defined boundaries between the two fields. However, the CLAP also proposed measures related to listed companies, reasoning that deeper integration of European capital markets would mean that listed firms would typically have investors from more than one Member State, consequently raising cross-border regulatory issues.

(a) The FSAP and company law

September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital [2006] OJ L264/32.

[132] European Commission, Communication on a simplified business environment for companies in the areas of company law, accounting and auditing, COM(2007) 394 final.

[133] See his speech 07/527 on 'Simplification of the business environment for companies' at a public event on Better Regulation/Simplification of Company Law with the Portuguese Ministry of Justice, Lisbon, 13 September 2007.

[134] European Parliament resolution of 21 May 2008 on a simplified business environment for companies in the areas of company law, accounting and auditing (2007/2254(INI)), [2009] OJ C279E/36.

[135] *Ibid*, 5-6.

[136] Two instruments reformed the directives on mergers and divisions: Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies [2007] OJ L300/47; and Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions [2009] OJ L259/14. Furthermore, the Commission adopted a proposal to amend the First and Eleventh Company law Directives, see Proposal for a Directive of the European Parliament and of the Council amending Council Directives 68/151/EEC and 89/666/EEC as regards publication and translation obligations of certain types of companies, COM(2008) 194 final.

Issuer-related securities laws in the EU had been undergoing gradual harmonisation since the 1970s.[137] It was, however, not until the implementation of the FSAP from 1999 that we could speak for the first time of a systematically created European 'capital markets law'.[138] The FSAP was an ambitious programme with four key strategic 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.[139]

In the securities area, the FSAP led to a new generation of directives, significantly furthering European integration in this field. The key measures were the Market Abuse Directive,[140] the Prospectus Directive,[141] the Directive on Markets in Financial Instruments ('MiFID'),[142] the Takeover Directive,[143] and the Transparency Directive.[144] The adoption of these directives dominated the first half of the past decade. In 2005, the Commission's Green Paper on financial services policy called a halt on new financial services legislation for the 2005-10 period, in favour of further implementation and consolidation of the FSAP measures.[145] A 2009 impact analysis of the FSAP (whilst noting a mixed success overall) concluded that – in the securities law field – 'there are clear market impacts and there is an expectation that these will grow over time'.[146]

Of the FSAP directives, the Market Abuse, Transparency and Takeover Directives have the most significant impact upon company law, albeit only for publicly-traded

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[137] See generally, Edwards (n 5) 228 ff.; N Moloney, *EC Securities Law*, 2nd ed (OUP, Oxford 2008), 11-16.

[138] See E Ferran, *Building an EU Securities Market* (CUP, Cambridge 2004), Ch 2.

[139] See generally, FSA, HM Treasury, and Bank of England, *The EU Financial Services Action Plan: A Guide* (2003); N Moloney, 'Time to Take Stock on the Markets: The Financial Services Action Plan Concludes as the Company Law Action Plan Rolls Out' (2004) 53 ICLQ 999.

[140] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.

[141] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, [2003] OJ L345/64.

[142] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 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, [2004] OJ L145/1.

[143] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, [2004] OJ L142/12.

[144] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, [2004] OJ L390/38.

[145] European Commission, Green Paper of 3 May 2005 on Financial Services Policy (2005-2010), COM(2005) 177 final.

[146] CRA International, 'Evaluation of the economic impacts of the Financial Services Action Plan – prepared for the European Commission' (March 2009), available at

<http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_economic_impact_en.pdf>.

companies.[147] Respectively, they prescribe limits on insider trading, establish a mandatory framework for periodic and ad hoc disclosure, and regulate the conduct of both bidders and targets during the process of a takeover. The Takeover Directive imposes a lesser degree of harmonisation than these measures, and so we discuss it separately below.[148]

(b) CLAP: minimum standards for listed companies

One of the themes of the CLAP, closely related to these FSAP measures, was the need to achieve uniform minimum standards of investor protection for European listed companies. The flagship CLAP measure for this theme was the Shareholder Rights Directive,[149] intended to facilitate cross-border engagement by shareholders.[150] This introduced minimum standards regarding shareholders' access to information prior to a general meeting, mechanisms for shareholder voting at a distance, and encouraged the use of electronic communication with investors.[151] The Directive also abolishes 'share blocking'—the practice of denying shareholders who have registered to vote in a general meeting the power to trade their shares between the record date and the date of the meeting,[152] and introduces minimum standards for the rights to ask questions, put items on the agenda and table resolutions.[153] The EU hopes, through this instrument, to facilitate more cross-border 'shareholder engagement'. The CLAP also suggested measures to prohibit disproportionate voting mechanisms through which blockholders entrench their control,[154] but the Commission decided not to take these forward following an impact assessment that was inconclusive as regards the costs to outside investors of control-enhancing mechanisms.[155]

(c) Why were there no roadblocks to securities law reforms?

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[147] The FSAP capital markets law measures predominantly apply to companies that are listed on a regulated market. The term 'regulated market' is defined in Article 4(1) of Directive 2004/39/EC on Financial Markets ('MiFID'). The Market Abuse Directive, however, also partly applies to firms that are not listed on a regulated market: see Article 9(2).

[148] *Infra,* section IV.3.

[149] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L187/17.

[150] D Zetzsche, 'Shareholder passivity, cross-border voting and the shareholder rights directive' (2008) 8 JCLS 289.

[151] Shareholder Rights Directive (n 149), Articles 5, 7, and 10-12.

[152] This was used in some Member States as a precaution against an incongruence between ownership and economic risk exposure of shareholders at the general meeting—specifically, where members register to vote and then sell their shares before the meeting. However, this significantly reduced the liquidity of the shares in question, and the precaution was therefore judged disproportionate in its impact by the Commission.

[153] Shareholder Rights Directive (n 149), Arts 6, 7, and 9.

[154] The Commission was cautious about a clear statement with regard to the one-share-one-vote principle. Whereas they considered that there was a strong medium to long term case for establishing a 'shareholder democracy' in the EU, the Commission nevertheless observed that any initiative in this direction required prior research. See CLAP (n 4) 14.

[155] See Commission Staff Working Document, Impact Assessment on the Proportionality between Capital and Control in Listed Companies, SEC (2007) 1705.

The success of these legislative harmonisation measures against the background of earlier failure calls for explanation. How was it that the roadblocks to harmonisation described in Section II could be overcome? Moreover, to what extent is the existence of these measures consistent with our claim that twenty-first century European company law has thus far been concerned with promoting choice on the part of business users of the law?

Consider first the 'political' explanation for the failure of the company law harmonisation programme. Plausibly, negotiations on securities law harmonisation in the EU were easier than for 'mainstream' company law, because the bargaining positions were very different. For many EU Member States, there was less at stake as regards securities law. At the time of the FSAP's adoption, market-based finance was used very unevenly throughout Europe, with the UK relying upon it to a much greater degree than continental European countries.[156] Because the adoption of new capital markets laws affects only those firms that are participants in such markets, there would have been relatively little opposition—as compared to company law reforms—from interest groups that would suffer as a result.[157]

The same asymmetry of starting point can, secondly, help to explain why there was no opposition to reforms seeking functional equivalence between Member States' rules: for most countries there was no national doctrine or tradition (or significant interest groups benefiting from them) that would be in contradiction to the centralised EU plans. Many Member States may have felt that they can only profit from harmonised rules in that their capital markets might develop better with fresh legislative input. Indeed, as one German commentator put it, the highly developed German company law in the early years of the EEC meant that the country longed to play a decisive role in harmonising company law standards, whereas it accepted its role as an 'importer' of capital market regulation later, because it was felt that German securities law was underdeveloped.[158] By contrast, the UK, long a sceptic of harmonisation, supported the measures proposed under the FSAP because its financial services sector expected to benefit disproportionately from the further development of integrated capital markets across the EU.[159]

In addition to these explanations based in differences in Member States' starting points, there was probably also a difference in the Commission's approach. Progress with capital market laws may be closer to the core goals of the internal market than is company law: the functioning of an intended internal market plausibly depends on the ability to

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[156] See RG Rajan and L Zingales, 'What Do We Know About Capital Structure? Some Evidence from International Data' (1995) 50 J Fin 1421, 1448; R La Porta, F Lopes-de-Silanes, A Shleifer and R Vishny, 'Legal Determinants of External Finance' (1997) 52 J Fin 1131, 1138; J Franks, C Mayer, P Volpin and HF Wagner, 'The Life Cycle of Family Ownership: International Evidence' , London Business School / Oxford University working paper 2010, available at <http://ssrn.com/abstract=1102475> (last accessed 22 July 2010).

[157] See J Armour, S Deakin, V Mollica and M Siems, 'Law and Financial Development: What are we Learning from Time-Series Evidence?' (2010) BYU L Rev 1435, 1488-90; R Gilson, H Hansmann and M Pargendler, 'Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the US, and the EU', ECGI Law Working Paper No 149/2010.

[158] F Kübler and HD Assmann, *Gesellschaftsrecht*, 6th ed. (CF Müller, Heidelberg 2006), 570.

[159] HM Treasury and FSA, Strengthening the EU Regulatory and Supervisory Framework: A Practical Approach (November 2007) 9.

integrate various national markets into one European capital market.[160] Consequently, it may well be more important to harmonise market-facing rules such as prospectus requirements and insider dealing prohibitions than organisational structures or internal aspects of corporations, which only indirectly impact on the investment markets across the EU.[161] Welfare conditions like market confidence and legitimacy presuppose first and foremost the development of uniform rules of investor protection.[162] From this perspective, it also makes sense for the Commission to insist on harmonisation of securities regulation rather than corporate law.

Fourth, innovations in legislature procedure recommended by the Lamfalussy Committee adopted for the passage of the capital markets directives may also have facilitated their progress.[163] The so-called 'Lamfalussy' procedure, which is based on older 'comitology' procedures within the EU,[164] starts from the premise that directives will contain only framework rules, whereas technical details will be adopted by the Commission with the help of two expert committees. Arguably, this procedure allowed lawmakers to reach consensus more easily on basic issues, whereas details are left to technocrats, less subject to populist pressure. To their supporters, the Lamfalussy procedure allows for more efficient and better-quality lawmaking, bringing in expert knowledge and saving time; to their critics, the procedure suffers from a democratic deficit.[165]

Finally, we can understand EU capital market regulation being subject to international competition with the USA for investment.[166] Following the Enron and Parmalat scandals at the beginning of the decade, European institutions had to signal to the markets that the EU was quickly acting to restore market confidence and trust.[167] This would explain the high productivity of EU legislation in the past years. Indeed, it is well-known that corporate frauds and scandals are often a main driver of securities law reform.[168] Moreover, American securities regulation was and has been highly sophisticated, offering a high standard of investor protection. For the EU to remain attractive to investors, it felt compelled to offer

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[160] See Ferran (n 138), 15-24.

[161] See RM Buxbaum and KJ Hopt, *Legal Harmonisation and the Business Enterprise – Corporate and Capital Market Law Harmonisation Policy in Europe and the USA* (de Gruyter, Berlin/New York, 1988), 280.

[162] *Ibid*, 281.

[163] On the Lamfalussy procedure, see Ferran, (n 138), 61 ff.; Moloney (n 137), 1020 ff.

[164] See generally, K Lenaerts and A Verhoeven, 'Towards a Legal Framework for Executive Rule-making in the EU? The Contribution of the New Comitology Decision' (2000) 37 CMLR 645; A Ballman, D Epstein and S O'Halloran, 'Delegation, Comitology, and the Separation of Powers in the European Union' (2003) 56 *International Organization* 551.

[165] Ferran (n 138) 84 ff.

[166] See E Kamar, 'Beyond Competition for Incorporations' (2005) 94 Geo LJ 1725; D Huemer, 'European Law on Capital Markets – Quo Vadis?' Cornell Law School Inter-University Graduate Student Conference Papers 5/2005, 45 f.

[167] See L Enriques and M Gatti, 'EC Reforms of Corporate Governance and Capital Markets Law: Do They Tackle Insiders' Opportunism?' (2007) 28 Nw J Int'l L & Bus 1, 3.

[168] See generally S Banner, 'What Causes New Securities Regulation? 300 Years of Evidence' (1997) 75 Wash ULQ 849; F Partnoy, 'Why Markets Crash and What Law Can Do About It' (2000) 61 U Pitt L Rev 741.

equivalent investor protection. Policymakers in other countries consequently felt compelled to react in a similar way, often even in the absence of local scandals.[169] The two aspects together – scandal-driven lawmaking and international competition – may contribute to our understanding of why capital market legislation has been so profuse in recent years.

(d) Choice and capital markets law

The Transparency and Market Abuse Directives impose disclosure obligations in relation to secondary capital markets.[170] The Transparency Directive essentially governs two different concepts: first, it establishes disclosure duties for investors acquiring or selling a large block of shares, and secondly, it requires the issuer to provide continuous investor information through periodic disclosure. The third element of disclosure obligation is the so-called *ad hoc* disclosure, detailed in the Market Abuse Directive. Both directives harmonize national laws in a way that leaves domestic lawmakers little freedom. However, this is not inconsistent with the exercise of choice by firms and investors, for the same basic reason as it faced little political opposition: in most EU Member States, the starting point was that few firms tapped into capital markets. Facilitating the growth of capital markets gives firms an option they did not previously enjoy as regards financing.

Secondly, the securities law framework applies the laws of the home state of a European issuer—namely, the law of the place of its registered office.[171] Whilst the substantive rules are largely harmonized, questions of supervision, liability and enforcement were left to the discretion of Member States. Consequently, firms wishing to avail themselves of the rules, or more importantly, liability enforcement standards, of a particular Member State are able to exercise choice through the location of their registered office.[172] A (limited) regulatory competition might be possible, in particular if the liability regime corresponds to the relevant capital market duties.[173]

2. Cross-Border Restructuring and Jurisdictional Mobility for Established Companies

A second major theme of the EU's post-CLAP legislation has been the facilitation of cross-border restructuring. EU legislation now provides two distinct routes by which existing companies may restructure across borders. The first is by forming a *Societas Europaea*, or European public company; the second is through a cross-border merger. These have an important side-effect of facilitating choice in corporate law, because both routes permit the constituent entities to effect a change in their governing law.

(a) Conversion to Societas Europaea

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[169] See G Hertig, 'On-Going Board Reforms: One Size Fits All and Regulatory Capture' (2005) 21 Ox Rev Econ Pol 269.

[170] This has to be distinguished from primary market duties, e.g. in the Prospectus Directive.

[171] L Enriques and T Tröger, 'Issuer Choice in Europe' (2008) 67 CLJ 521.

[172] Enriques and Tröger (n 171); WG Ringe and A Hellgardt, 'The international dimension of issuer liability' forthcoming (2011) 31 OJLS, available at <http://ssrn.com/abstract=1588112>. On the mechanisms by which an existing company might relocate its registered office, see *infra* section IV.2.

[173] See Ringe and Hellgardt (n 172).

The adoption of the SE statute in 2001 marked a watershed for the further development of European Corporate Law. The new legislation, which consists of two documents, the Council Regulation on the Statute for a European Company[174] and the Council Directive supplementing the Regulation with regard to the involvement of employees[175] is a significant extension of the legal framework for the EU's internal market. Institutional and scholarly debate concerning the creation of a Europe-wide corporate form has been on-going since at least 1967. The debate mirrored those over substantive harmonisation, and concerned what 'model' should be adopted for the governance of the European public company; specifically, over the participation rights of employees. As with substantive harmonisation, these debates proved fruitless.[176] The impasse was finally broken by crafting a compromise that on the one hand, built in a 'menu' of options over key dimensions, such as board structure (SEs have the choice of one or two tier boards), and on the other hand, applied the law of the state of the SE's registered office to many key aspects of the organization.[177] This lowered the stakes by producing a multiplicity of possible SE configurations.

As was pointed out by Enriques,[178] it did create the possibility for some degree of inter-jurisdictional mobility, either at the point of formation of an SE by merger or subsequently for any SE through exercise of a statutory power to relocate the registered office.[179] Such a shift would bring with it a change in the governing law on the many issues where the SE legislation relies on a reference to the law of the registered office. More subtly, the range of options built into aspects of the SE directly determined by the European legislation also provided the opportunity for firms to decouple themselves from aspects of domestic corporate law without changing their state of incorporation.[180]

Inter-jurisdictional mobility for SEs may however be very costly, because the SE statute requires that both the registered office and the head office must be in the same jurisdiction:[181] to change the governing law, the company must physically move its head office. Nevertheless, the prospect of such mobility focused policymakers' minds on mechanisms to protect constituencies against opportunistic moves to jurisdictions that would lower their entitlements. In the terms of the discussion above, the resulting measures seek to ensure that a change of governing law is an event that involves bargaining with potentially affected constituencies. For employees, the solution involves an ingenious structured bargaining arrangement on formation of an SE. Management of pre-SE entities must engage in negotiations with employee representatives with a view to agreeing employee participation

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[174] Council Regulation (EC) no 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] OJ L294/1 ('SE Regulation').

[175] Council Directive 2001/86/EC of 8 October 2001, supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22 ('SE Directive').

[176] See *supra*, section II.

[177] Regulation 2157/2001 [2001] OJ L 294/1.

[178] L Enriques, 'Silence is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage' (2004) 4 JCLS 77.

[179] Regulation 2157/2001, Art 8.

[180] See generally, G Hertig and JA McCahery, 'Optional Rather than Mandatory EU Company Law: Framework and Specific Proposals' (2006) 4 ECFR 341.

[181] Regulation 2157/2001, Art 7.

rights in relation to the new entity.[182] If no agreement is reached after six months,[183] then key aspects of employee information/consultation and/or participation rights are set by default according to the level of the most employee-favourable of the regime(s) applying to the pre-SE entities.[184] This encourages an agreement no less favourable to the employees than their entitlements in the pre-SE entities.[185] Of course, if the employees can be persuaded to agree, then it is possible to abandon, or at least modify, the existing participation rights.[186] Thus the negotiation structure permits the parties to abandon participation rights if it is efficient to do so—that is, the benefits of such change exceed the costs to the employees, who will need to be compensated in order to induce them to agree.[187] Similarly, shareholders must approve either the formation of an SE by merger,[188] or a transfer of registered office, by a supermajority vote of at least two-thirds.[189]

Use of the SE form has been modest in aggregate terms. According to data collected by the European Trade Union Institute, around 680 SEs had been established by December 2010.[190] The rate of SE formation accelerated rapidly from 2006 onward.[191] SE formations occur overwhelmingly in countries with worker participation laws, the vast majority being in just two jurisdictions: the Czech Republic and Germany.[192] Whilst this implies that parties are

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[182] Directive 2001/86/EC [2001] OJ L 294/22, Arts 3-5.

[183] The parties may consensually extend the negotiating period to one year: *ibid*, Art 5(2).

[184] *Ibid*, Art 7 and Annex.

[185] S Deakin, 'Regulatory Competition Versus Harmonisation in European Company Law' in DC Esty and D Géradin (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford, OUP, 2001), 190, 212-3; PL Davies, 'Workers on the Board of the European Company?' (2003) 32 Ind LJ 75, 84-90.

[186] See C Teichmann, 'The European Company—A Challenge to Academics, Legislatures and Practitioners' (2003) 4 German L J 309, 319-21. An exception is where the SE is created by transformation of an existing public company, in which case the new entity must provide at least as much participation for employees as they enjoyed beforehand (Directive 2001/86/EC, Art 4(4)).

[187] On the use of bargaining levers to protect employee interests, see generally J Armour and S Deakin, 'Insolvency and Employment Protection: The Mixed Effects of the Acquired Rights Directive' (2003) 22 Int Rev L & Econ 443, 448-62, 458-60.

[188] Regulation 2157/2001, Art 17(2) (incorporating by reference the approval procedure prescribed by Directive 78/885/EEC [1978] OJ L 295/36).

[189] *Ibid*, Arts 8(6), 59(1). The threshold may be raised by the relevant national law.

[190] See <http://ecdb.worker-participation.eu/show_overview.php?letter=A&orderField=se_name&status_id=3&title=Established%20SEs> (last accessed 11 December 2010).

[191] See WW Bratton, JA McCahery and EPM Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis' 57 Am J Comp L 347, 362 ff.

[192] H Eidenmüller, A Engert and L Hornuf, 'Incorporating under European Law: The *Societas Europaea* as a Vehicle for Legal Arbitrage' (2009) 10 EBOR 1, 29; European Trade Union Institute, Overview of the Current State of SE Founding in Europe, 1 November 2010, 4 (available at <http://www.worker-participation.eu/content/download/3581/55559/file/SE_Currentstate-updated%20figures%20Nov%202010.pdf>, last accessed 11 December 2010).

concerned to arbitrage around such rules, it cannot be the only explanation, as four-fifths of the SEs formed are simply holding companies without any employees.[193]

Moreover, few SEs take the opportunity to change their governing law.[194] This may be taken as evidence that, beyond issues of board structure and employee participation, widespread demand for mobility in corporate law does not exist.[195] Alternatively, it may simply indicate that the SE statute's requirement that head office be relocated to the new jurisdiction makes such mobility too costly to be practically worthwhile, or that other costs and uncertainties involved with the relocation procedure outweigh the potential benefits.

In any case, the European Commission launched a consultation on the practical application of the SE in 2010 with a view to determine whether improvements to the existing rules are necessary.[196] The consultation yielded much support for some of the proposed measures, most importantly the possible ways of creating an SE, the prerequisite for cross-border activity, the minimum capital requirement and the prospects for separating the registered office from the real seat.[197] The Commission's 2011 Work Programme correspondingly includes an intention to propose in 2012 a simplification of the rules for setting up an SE and transferring its seat.[198]

(b) Cross-border mergers

Potentially far more significant for inter-jurisdictional mobility is the Cross-Border Merger ('CBM') Directive, which required Member States to facilitate cross-border mergers within the EU.[199] Transposition, mandated by December 2007,[200] was completed by Member States by October 2009.[201] The overall motivation for the Directive is concerned with facilitating cross-border restructuring. Nevertheless, it has a by-product of permitting companies to change

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[193] ETUI (n 192), 3. This observation prompts various conjectures. It is possible that the use of 'shelf companies' is particularly common in Germany and the Czech Republic owing to complicated domestic incorporation procedures. Another possibility is that shelf SEs allow the creation of an SE without having to fulfil a burdensome cross-border element or go through the negotiations on employee involvement. See Report from the Commission to the European Parliament and the Council – the application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), COM(2010) 676 final, 6.

[194] Eidenmüller *et al*. (n 192), 27; ETUI (n 192), 8-9. The Commission (n 193) reports 49 cases as of June 2010.

[195] Bratton *et al* (n 191), 366.

[196] European Commission, Consultation on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE) of 23 March 2010.

[197] European Commission, Synthesis of the Comments on the Consultation Document of the Internal Market and Services Directorate-General on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE) of July 2010. See also the report to Parliament and Council (n 193).

[198] Commission Work Programme 2011, COM(2010) 623 final, Annex, p 36.

[199] Directive 2005/56/EC [2005] OJ L 310/1.

[200] *Ibid*, Art 19.

[201] Compare European Commission Transposition Status for Company Law and Anti-Money Laundering Directives 22.09.2009 and 22.10.2009: <http://ec.europa.eu/internal_market/company/official/index_en.htm> (last accessed 27 June 2010).

their governing laws by the expedient of merging into a newly-formed company in another jurisdiction.[202] This is the technique typically used for 'reincorporation' in the US. Unlike the US, however, the process in Europe is federally prescribed so as to facilitate bargaining with stakeholders potentially affected by a midstream change. The structured bargaining procedure with employees developed for the SE is incorporated into the CBM Directive with some important modifications.[203] For shareholders, the CBM Directive simply requires that the merger shall be subject to 'approval' by the general meeting, but in the case of a public company, Member States' merger provisions would already be subject to the Third Company Law Directive, which will usually imply a supermajority requirement.[204]

Unlike the SE, however, there is no requirement that a CBM resulting in a change of governing law also involves the physical relocation of any personnel or assets. The cross-border merger is therefore a mechanism with the potential to be much more conducive to corporate legal mobility. Most obviously, this could occur through a merger of a company in Member State A into a newly incorporated firm in Member State B, whereby the new firm is the survivor. The remaining entity will now be governed by the law of Member State B. A second version would be to use a 'reverse triangular' merger structure, under which Company B (incorporated in Member State B) is merged into an acquisition subsidiary of Company A (in Member State A), with the old B shareholders receiving shares in A as a result. The outcome is that B becomes a wholly-owned subsidiary of A, in which the old B shareholders now hold shares. Because B remains subject to the laws of Member State B, its creditors and employees continue to enjoy the same protections as before. However, the former B shareholders, as new shareholders in A, are now subject to the shareholder protection rules applicable in Member State A.

This facility raises the prospect of generally available jurisdictional mobility for established companies, which might in turn spark regulatory competition between Member States regarding public company laws,[205] as opposed to the entrepreneurial company rules that have so far been subject to competition.[206] For this to happen, there must be real

[202] J Rickford, 'The Proposed Tenth Company Law Directive on Cross Border Mergers and its Impact in the UK' (2005) 16 EBLR 1393, 1413; Directive 2005/56/EC, Arts 12, 14. The Directive applies to any company permitted to effect a merger under national law (Arts 1, 4(1)(a)), which will, by virtue of the Third Company Law Directive (78/855/EEC [1978] OJ L 295/36), necessarily include all public companies.

[203] *Ibid*, Art 16. The CBM Directive permits Member States to limit the employee representatives in a one-tier board to one-third of the total board members, regardless of the respective proportions in the merging companies. This may make jurisdictions that avail themselves of this limitation—such as the UK (SI 2007/2974, reg 39)—particularly attractive destinations for companies seeking to limit codetermination obligations.

[204] *Ibid*, Art 4(2); Directive 78/855/EEC, Art 7. Ordinarily a two-thirds vote of the shares represented at the meeting would be required. This falls to a simple majority where >50% of the subscribed capital is represented at the meeting, and for *acquirors*, the vote may be waived altogether, subject to shareholders with >5% of the subscribed capital having the right to request it if desired (Art 8). On the other hand, where the surviving entity's articles will differ from those of a constituent entity, the voting requirements will be those applicable to alteration of articles (Art 7): usually a supermajority. For a cross-border merger, this is likely to be the applicable minimum.

[205] See Armour (n 79); Ringe (n 84).

[206] *Supra*, section III.1(e).

benefits to firms from changing their governing laws and real benefits to Member States from attracting incorporations (or deterring their loss). Detailed discussion of the financial, as opposed to legal, considerations for firms and Member States of such activity is beyond the scope of this paper,[207] although two recent studies report that cross-border acquisitions yield higher merger premia for target stockholders where the acquiror is located in a country with better investor protection laws, controlling for other factors that might affect merger premia.[208] These findings are consistent with improvements in firm performance associated with being controlled by a firm itself subject to a better company law regime. However, for jurisdictional mobility to be attractive, we must be sure that any such benefits are not eaten up by the cost of completing the CBM transaction, or by restrictions imposed on such transactions by Member States. To answer this, we must revisit briefly the caselaw on freedom of establishment.

(c) Cross-border restructuring and freedom of establishment

In addition to the provisions just described, the High Level Group and the Commission had put onto the CLAP agenda a statutory mechanism to permit established companies to change their registered office, and thereby their governing laws.[209] This would have been a mechanism of 'pure' legal mobility, facilitating a change of law without the need for physical relocation of agents or assets.[210] Although the proposal received support from the Parliament,[211] and from respondents to the Commission's 2005 consultation on the issue,[212] the Commission concluded in 2007 that midstream legal mobility (i.e. mobility of existing companies) was already facilitated to such an extent that it would be unnecessary to introduce a Directive covering the same ground.[213] This conclusion, a striking example of the new evidence-based approach to policymaking,[214] was influenced by the new possibilities for cross-border mobility generated by the SE and the CBM Directive, and the Commission's

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[207] One of us has argued elsewhere that such benefits are likely to be significant: Armour (n 79), 382-396.

[208] A Bris and C Cabolis, 'The Value of Investor Protection: Firm Evidence from Cross-Border Mergers' (2008) 21 Rev Fin Stud 605; M Martynova and L Renneboog, 'Spillover of Corporate Governance Standards in Cross-Border Mergers and Acquisitions' (2008) 14 J Corp Fin 200.

[209] CLAP para 3.4. This was based upon a similar recommendation made by the HLG: see *HLG Report* (n 125) 102.

[210] See the original proposal for a Fourteenth Directive on the transfer of the seat from one Member State to another (proposal from 1997: Doc No XV/D2/6002/97-EN REV.2).

[211] Resolution of the European Parliament of 25 October 2007 on the European Private Company and the Fourteenth Directive on the transfer of the registered office (PE: B6-0399/07).

[212] Commissioner McCreevy announced in October 2007 that he would not proceed with the Directive (Speech at the European Parliament's Legal Affairs Committee, 3 October 2007, Speech/07/592). Cf European Commission, Impact Assessment on the Directive on the Cross-Border Transfer of Registered Office, SEC(2007) 1707, 12 December 2007, 7.

[213] *Ibid*, 52. However, the European Parliament has subsequently pressed to re-open the negotiations on the proposed Directive: see Committee of Legal Affairs, 'Draft Report with recommendations to the Commission on cross-borders transfers of company seats' 2008/2196 (INI) of 17 October 2008.

[214] See above, text to nn 127-128.

expectation of further extension of the freedom of establishment case law by the Court in *Cartesio*. But was the Commission right to take this view?

First consider SEs. These face a potentially significant restriction on the exercise of jurisdictional mobility, in the form of the legislative requirement that an SE must always have its head office in the same jurisdiction as its registered office.[215] However, *Cartesio* makes clear that where a Member State provides a mechanism to integrate an immigrating company into its legal system by converting to a domestic legal form, the Member State of emigration is not allowed to apply disproportionate restrictions on the emigrating company.[216] The same should therefore be true for the Member State of emigration of an SE, and it is arguable that Article 7 of the SE Regulation is consequently itself an unlawful restriction on SEs' freedom of establishment.[217]

The CBM Directive imposes no such restriction. But recall that the import of *Cadbury Schweppes* appears to be that if a company wishes to be sure of protection under the Treaty freedom of establishment, it must create a *genuine* establishment in the jurisdiction to which it wishes to move its governing law. A 'bare' reincorporation with a 'wholly artificial' establishment would not, it seems, be protected against suitably targeted restrictions imposed by the host state, at least on the current case-law.[218] Whilst setting up a genuine establishment is likely to be far less costly than relocating the head office function, it may still be thought to make a change of jurisdiction via CBM more costly and therefore less attractive to firms.

However, in the case of mergers, *both* parties will be exercising their freedom of establishment. For example, assume Company A, a well-established business incorporated and physically located in Member State A (a real seat jurisdiction), wishes to effect a cross-border merger with Company B, a shell company formed in Member State B (an incorporation jurisdiction) solely for this purpose. Company B is to be the surviving entity, to take advantage of its incorporation status in Member State B. The logic of *Cadbury Schweppes* might appear to suggest that, where there is no genuine establishment in Member State B, it might be lawful to impose targeted restrictions that would impede Company A's plan. However, as Company *B* is the surviving entity, such a restriction would nevertheless be an impediment to *its* freedom of establishment in Member State A.[219] After

[215] Regulation 2157/2001, Art 7.

[216] *Cartesio* para [111].

[217] WG Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 JCLS 185. See also E Wymeersch, 'The Transfer of the Company's Seat in European Company Law' (2003) 40 CML Rev 661, 693. Cf European Commission (n 193) 7. This argument depends on characterising the SE as a creature of domestic, rather than EU, law. If the latter characterisation is followed, then the matters discussed in the text could be said to be part of the determination of the status of an SE, governed by the EU law framework provided.

[218] See above __

[219] Cf Case C-411/03 *Sevic Systems AG* [2005] ECR I-10805, in which, following the characterisation in the text, Company A survived. The Court held that it was a discriminatory restriction of A's freedom of establishment for Germany (where it was located) to refuse to recognise its merger with a Luxembourg entity, because mergers between domestic entities were recognised.

all, Company B will genuinely establish *itself* in Member State A—by succeeding to the former enterprise of Company A—through the merger.[220]

The SE and CBM legislation may also have implications for further challenges before the Court of domestic rules that seek to protect the interests of employees, creditors and minority shareholders associated with such change.[221] Their reliance on procedural protections for constituencies—creating rights to participate in the reincorporation decision—may it harder to argue that substantive protections in the interests of such constituencies are proportionate, save for instances where parties are unable to participate in such bargaining. Furthermore, at least as regards employees, the structured bargaining mechanism developed in the European legislation is sufficiently detailed and prescriptive that it may plausibly be regarded as a comprehensive code for employee protection. In contrast, the European legislation leaves more of the procedural protections for shareholders and especially creditors to domestic law.[222]

(d) 'Exit taxes'

A serious obstacle to inter-jurisdictional mobility has traditionally been the threat of 'exit taxes': levies payable when a company ceases to be subject to taxation in one jurisdiction and becomes so in another. The specifics of what counts as 'residence' for tax purposes varies from Member State to Member State, and does not track the connecting factors used for company law.[223] Thus, for example, UK tax law would essentially consider a company as resident in the UK if its 'central management and control' is in the UK (which is a similar test to the company law concept of 'head office').[224] If a company ceases to be resident in the UK, domestic tax legislation imposes an immediate charge to tax.[225]

Exit taxes are imposed to mitigate tax arbitrage:[226] they typically require a company to pay corporation tax on reserves made (profits realised but not yet taken into account for tax purposes), or treated as having effected a deemed realisation of assets at the point of exit, to levy CGT unrealised gains. This intends to ensure that profits and gains accrued before the move do not escape from the jurisdiction of exit.

Obviously, such taxes have the potential to create a significant hurdle to 'midstream' corporate mobility. In particular, they have the potential to impede movements across

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[220] To the extent that this argument will not be tenable where

[221] Such litigation has not yet occurred because, in contrast to potential involuntary creditors, there is usually little scope for protecting employees and minority shareholders of entrepreneurial companies at the point of start-up.

[222] Directive 2005/56/EC, Art 4(1)(b), (2); Regulation 2157/2001, Art 8(5), (7).

[223] See CHJI Panayi, 'Corporate Mobility in the European Union and Exit Taxes' (2009) *Bulletin for International Taxation* 459, 471-2.

[224] *De Beers Consolidated Mines Ltd v Howe* [1905-06] 5 TC 198.

[225] TCGA 1992 s 185, imposes a deemed disposal on a company ceasing to be resident in the UK; FA 1988 s 130, requires a company to secure its liability to tax.

[226] MA Kane, 'Strategy and Cooperation in National Responses to International Tax Arbitrage' (2004) 53 Emory LJ 89; MA Kane and EB Rock, 'Corporate Taxation and International Charter Competition' (2008) 106 Michigan L Rev 1229.

borders using SEs or cross-border mergers. However, as applied to *individuals* relocating across national borders, exit taxes were held by the Court to be an unlawful impediment to freedom of establishment in *de Lastreyie du Saillant*[227] and the subsequent case *N*.[228] In the Commission's view, the Court's language and reasoning generalises to the case of corporate taxpayers.[229] The Commission has consequently brought proceedings against a number of Member States regarding their corporate exit taxes.[230] The *dictum* in *Cartesio* supports this, as regards jurisdictional mobility.[231] Consequently, the UK exit tax system for companies also appears hard to square with European rules.[232]

The EU's Tax Merger Directive offers a second line of attack, prohibiting to some extent the application of exit taxes in relation to certain cross-border restructuring transactions.[233] It applies *inter alia* to cross-border mergers, which as we have seen are the most likely channel through which midstream corporate mobility would be exercised. In 2005 it was extended to apply to the transfer of an SE's registered office as well.[234] However, even as of 2009, several Member States were still not in compliance with the Directive.[235] Moreover, the Directive specifically permits Member States to continue to impose exit taxes in transactions which will reduce the resulting organization's employee participation obligations.[236] However, it is unclear whether, in the light of the Court's case law, this

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[227] Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409.

[228] Case C-470/04 *N* [2006] ECR I-7409.

[229] European Commission, 'Exit Taxation and the Need for Co-ordination of Member States' Tax Policies', COM(2006) 825 final 19.12.2006, 5-6.

[230] See Commission Press Release, 'Direct Taxation: The European Commission requests Belgium, Denmark and the Netherlands to change restrictive exit tax provisions for companies and closes a similar case against Sweden', IP/10/299 of 18 March 2010.

[231] If a company simply wishes to move its head office whilst still remaining subject to the company law of its state of formation, it is clear from *Cartesio* that this does not trigger the protection of freedom of establishment, because—as in *Daily Mail*—this is a question of corporate status reserved to the law under which it is formed. However, this has no implications for jurisdictional mobility.

[232] D Goldberg, 'The Ordinary and Extraordinary Power of the European Court of Justice' (2007) VI *GITC Review* 17, 25.

[233] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L310/34. The Directive prohibits exit taxes at least with regard to assets that remain connected to a permanent establishment of the company in the Member State of the transferring company, Article 4(1)(b) of the Directive. See R Russo and R Offermanns, 'The 2005 Amendments to the EC Merger Directive' [2006] *European Taxation* 250, 251.

[234] Directive 2005/19/EC (now Directive 2009/133/EC), Arts 12-14.

[235] See Ernst & Young, *Survey of the Implementation of Council Directive 90/434/EC*, (Brussels: European Commission, 2009), available at <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/mergers_directive/study_impl_direct.pdf> (last accessed 6 July 2010), 13-15.

[236] Directive 2009/133/EC, Art 15(1)(b). This has been implemented in Germany: see §§ 1, 2 Mitbestimmungsbeibehaltungsgesetz. On this, A Engert, 'Steuerrecht' in H Eidenmüller (ed), *Ausländische Kapitalgesellschaften im Deutschen Recht* (Beck, Munich 2004) § 8 paras 131-5.

provision would survive a challenge arguing it was an impediment to corporate freedom of establishment.

3. The Takeover Directive

The Takeover Directive, finally adopted in 2004,[237] lays out rules governing corporate control transactions and tender offers for EU listed companies. In the minds of EU policymakers, the harmonisation efforts were supposed to achieve the two-fold goal of providing market players with a common regulatory platform for takeover bids and of creating a playing field in pan-European corporate control contests, so that no Member State regulation would have granted companies any particular benefit or penalisation *vis-à-vis* other EU peers.[238] Nevertheless, the Takeover Directive has been described as an enactment 'full of loop-holes and opt-out clauses'.[239] Owing to a lack of political consensus in the highly sensitive topic of (hostile) takeovers, no consensus position could be reached regarding some of the key features of the Directive—such as the board neutrality rule, preventing the board of the target company from frustrating the takeover, or the breakthrough rule, setting aside certain capital structures in the target company.[240] To avert a total failure, the Directive was ultimately saved by making these features *optional*—Member States may choose whether they wish to implement these rules, provided that they permit their companies to opt in to rules not implemented in national law.[241] The resulting 'Thirteenth Directive' was a compromise with many options, choices and discretions for the Member States. In other words, the Directive provides a 'menu' of federal rules for takeovers.[242]

The Takeover Directive's 'optionality' approach has been seen as positive by some, who point out that an optional instrument will allow Member States to implement the Directive in a more functional way, corresponding to their established corporate environment and complementing earlier local policy decisions.[243] To others, the Directive is simply the

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237 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, [2004] OJ L142/12.

238 L Enriques and M Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' (2008) 14 Stan J L Bus & Fin 43, 64.

239 P Zumbansen, ''New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism' (2009) 15 ELJ 246, 249.

240 For the history of the Takeover Directive, see R Gilson, 'The Political Ecology of Takeovers: Thoughts on Harmonising the European Corporate Governance Environment' (1992) 61 Fordham L Rev 161; E Wymeersch, 'Problems of the Regulation of Takeover Bids in Western Europe: A Comparative Survey', in KJ Hopt and E Wymeersch (eds), *European Takeovers. Law and Practice* (Butterworths, London 1992), 122; C Kirchner and RW Painter, 'Takeover Defenses under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform' (2002) 50 Am J Comp L 451; B Clarke, 'Takeover Regulation—Through the Regulatory Looking Glass' (2007) 8 German LJ 381; for a US-UK comparative perspective, see J Armour and DA Skeel Jr, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95 Geo LJ 1727.

241 Directive 2004/25/EC, Art 12.

242 Armour (n 79) 374.

243 G Hertig and JA McCahery, 'Optional rather than Mandatory EU Company Law: Framework and Specific Proposals' (2006) 3 ECFR 341. See also Andrew Johnston, *EC Regulation of Corporate Governance* (CUP, Cambridge 2009) 280 ff.

messy result of a political deadlock.[244] Surprisingly, a recent study found that the implementation process of the Directive across the different Member States yielded results that are even less takeover-friendly than before.[245] This finding appears to lend support to the Takeover Directive's critics.

V. The Financial Crisis

1. The Financial Crisis as an impetus for reform

The worldwide economic crisis that erupted in 2007 and deepened in 2008 is challenging a number of conceptions and theories of effective corporate governance. Unfortunately, however, there is little agreement as to what went wrong and what changes need to be made.[246] To start with, it is disputed whether corporate governance played a contributing role in precipitating and/or exacerbating the financial crisis. Even if this question is answered in the affirmative, responses diverge as to the corporate-governance reforms that would be required in light of what we have learned from the crisis. More fundamentally, there is no consensus as to whether the existing corporate governance regime is deficient or has simply been poorly implemented.

The European Commission has in the first instance identified governance shortcomings in the financial industry, but is also pondering more general corporate governance reforms for companies generally. Following the de Larosière report,[247] the Commission announced that it would examine corporate governance rules and practices within financial institutions, particularly banks, in the light of the financial crisis, and where appropriate make recommendations, or even propose regulatory measures, in order to remedy weaknesses in the corporate governance system in this sector.[248] This has been followed up by a Green Paper, outlining the proposed changes the (new) Commission is considering.[249] Some of these proposals follow common best practice, but in other respects they go much further. For example, the Green Paper invites views on remuneration for directors of listed companies, including whether stock options and golden parachutes should be prohibited, asks if the civil and criminal liabilities of directors need to be reinforced, and

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[244] E Wymeersch, The Takeover Bid Directive, Light and Darkness, Financial Law Institute Working Paper No 2008-01 (January 2008), at 2, available at <http://ssrn.com/abstract=1086987>; A Nilsen, The EU Takeover Directive and the Competitiveness of European Industry (The Oxford Council on Good Governance, 2004), available at <http://www.oxfordgovernance.org/fileadmin/Publications/EY001.pdf>.

[245] PL Davies, EP Schuster and E van de Whalle de Ghelcke, 'The Takeover Directive as Protectionist Tool?' in U Bernitz and WG Ringe (eds) *Company Law and Economic Protectionism* (OUP, Oxford forthcoming 2011), ch 6.

[246] J Winter, 'Governance and the Crisis' (2010) 7 *European Company Law* 140.

[247] The High-Level Group of Financial Supervision in the EU (chaired by Jacques de Larosière), *Report of 25 February 2009*, available at <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf>.

[248] European Commission, Communication of 4 March 2009 for the Spring European Council – Driving European Recovery, COM(2009) 114 final.

[249] European Commission, Green Paper of 2 June 2010 – Corporate Governance in financial institutions and remuneration policies, COM(2010) 284 final.

questions whether shareholder control of financial institutions is still realistic. It also considers imposing a new duty of care on directors of financial institutions to take account of depositors' and other stakeholders' interests.

Most of the issues discussed in this context specifically target financial institutions as a 'special case': due to the systemic role of the banking industry, the reasoning implies, financial institutions are different from normal companies and thus require different governance arrangements.[250] Hence, corporate governance in the financial services sector should arguably take into account the interests of other stakeholders (depositors, savers, life insurance policy holders, etc), as well as the stability of the financial system, due to the systemic nature of the business.[251] However, the Commission's Green Paper also makes more general points: for instance, on the role of shareholders in corporate governance, the paper confirms that this aspect is not limited to financial institutions and announces that the Commission will soon launch a review covering listed companies in general.[252]

The new Internal Market Commissioner Michel Barnier has said that, '[t]he crisis has demonstrated clearly that an excessively deregulatory environment contains serious risks, and these need to be addressed. The deregulatory race to the bottom has to stop. That's why we need to move forward and close the regulatory gaps so that no market, no territory and no institution escapes intelligent regulation and effective supervision.'[253]He consequently announced a general 'reflection on corporate governance in listed companies', as a follow-up to the work on corporate governance in financial institutions.[254] More concretely, he recently identified a number of issues the Commission plans to address over the coming months and years: board composition, diversity and remuneration; internal risk assessment of companies; conflicts of interest on various levels; and active shareholder engagement in companies, to name but a few.[255] Most importantly, however, Barnier made clear that the Commission is still thinking about the practical framework for envisaged activities, but 'will not be able to rely on voluntary codes'.[256] This seemingly more interventionist attitude corresponds to what Guenther Verheugen, former EU Commissioner

[250] See JC Coates IV, Testimony before the Subcommittee on Securities, Insurance, and Investment of the US Senate Committee on Banking, Housing and Urban Affairs, July 29, 2009, available at <http://ssrn.com/abstract=1475355>; BR Cheffins, 'Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500' (2009) 65 Bus Law 1; P Mülbert, 'Corporate Governance of Banks' (2009) 10 EBOR 411.

[251] L Bebchuk and H Spamann, 'Regulating Bankers Pay' (2010) 98 Geo LJ 247; L Bebchuk, A Cohen and H Spamann, 'The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000-2008' (2010) 27 Yale J Reg 257.

[252] European Commission (n 249) 8, 16.

[253] W Hutchings, 'FN profile: Michel Barnier sets out his new agenda for Europe', 29 March 2010, <http://www.efinancialnews.com/story/2010-03-29/barnier-sets-out-his-new-agenda-for-europe>.

[254] European Corporate Governance Forum, Minutes of the meeting of 2 June 2010, point 2.2.

[255] M Barnier, 'Re-establishing responsibility and accountability at the heart of the financial system', Speech in Brussels on 25 October 2010, <http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20101025/speech_en.pdf>.

[256] *Ibid.*

for Enterprise and Industry, reported at his recent speech at the Berlin conference on Corporate Governance where he described a 'dramatic deterioration of the climate' (*Klimasturz*) in European corporate law and explained that the EU would be determined to deeply intervene into corporate freedom over the next years.[257] A Green Paper on this issue is planned for spring 2011.

An initial foray of the new approach might be the (draft) Regulation on short selling.[258] Proposed in September 2010, it responds to the perceived aggravation by short-sellers of downward movements in the price of shares, especially those in financial institutions, and consequent increase in financial instability. If adopted, the Regulation would introduce sweeping duties of disclosure on holders of net short equity positions, and would ban naked short selling. The rationale of the proposal is however open to question: studies from both before and after the financial crisis suggest that many of the concerns associated with short selling were exaggerated or unwarranted and that short selling bans and disclosure requirements recently introduced by many regulators globally have in fact had a negative impact on liquidity, volatility and spreads.[259] Moreover, research suggests that short sellers in fact may discover and anticipate financial misconduct in firms and thereby convey beneficial information to the market.[260]

From this perspective, it seems likely that moves to enhance regulation of corporate governance for the financial sector will spill over into more general rules for all firms. Moreover, it may be that this marks the end of the ascendency of 'choice' in the agenda for EU corporate lawmaking.

2. Protectionism

A quite different consequence of the 2008 crisis seems to be that (some) Member States have rediscovered a protectionist attitude, contrary to the Internal Market idea, which encompasses a wide range of issues such as trade policy and bail-outs for national industries and state aid issues, but also intrudes into the scope of European corporate law.[261] Within the field of company law, such newly-reinvigorated protectionism can be seen across a number of legislative and regulatory measures. Old-style protectionism related

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[257] J Jahn, 'Verheugen warnt vor EU-Regulierung' *Frankfurter Allgemeine Zeitung* (Frankfurt 18 June 2010) 12. The speech is available at <http://www.tvonweb.de/kunden/dcgk/170610/index.html>.

[258] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps*, COM(2010) 482 final.

[259] Y Bai and others, 'Asset prices under short-sale constraints', Working Paper, 2006; DM Autore and others, 'Short sale constraints, dispersion of opinion, and market quality: Evidence from the Short Sale Ban on U.S. Financial Stocks', Working Paper, 2009; A Lioui, 'The undesirable effects of banning short sales', Working Paper, 2009.

[260] JM Karpoff and X Lou, 'Short Sellers and Financial Misconduct' (2010) 65 J Fin 1879. Similarly, scholars argue that insider trading may have positive effects where insiders trade on negative information and thereby disclose information that was concealed: see K Grechenig, 'Positive and Negative Information – Insider Trading Rethought' in P Ali and G Gregoriou (eds), *Insider Trading: Global Developments and Analysis* (CRC Press, 2008); J Macey, 'Getting the Word Out About Fraud: A Theoretical Analysis of Whistle-blowing and Insider Trading' (2007) 105 Mich L Rev 1901.

[261] U Bernitz and WG Ringe (eds), *Company Law and Economic Protectionism* (OUP 2010).

primarily to the retention of state influence over ‘national champion’ firms—seen as being of strategic economic significance—which had largely been privatised during the 1990s. Relevant state measures included grants of state aid to and special rights in privatised companies—often referred to as ‘golden shares’—which, as we have seen, were successfully challenged as inhibiting the free movement of capital.[262] A lightning rod for renewed protectionism has been the enormous increase in the size and influence of sovereign wealth funds, mainly from Russia, East Asia or the Gulf States. Many Member States perceive the acquisition of control over strategically important domestic firms by sovereign wealth funds as a direct threat to their economic sovereignty,[263] and are tempted to subvert company law rules to become deterrents to foreign investment. Recent examples are the implementation of the Takeover Directive in EU Member States,[264] and Member States’ attitude towards foreign direct investment.[265]

It is important to note that protectionism is not only a problem at the national level. Even trade blocks like the European Union, which were set up to *overcome* trade barriers, are also tempted to use the opportunity to regulate particular issues in a protectionist way. An example is the EU Directive on Alternative Investment Fund Managers:[266] The ‘European passport’ for EU hedge and private equity funds entails conditions for marketing of non-EU alternative investment funds (AIFs) and for the marketing of non-EU AIFs by third country managers in the EU. The conditions imposed will make it harder for non-EU funds and managers to obtain the passport to operate in the EU. This has been criticised as disguised protectionism and the creation of a ‘fortress Europe’, which will ultimately not benefit European investors.[267] Commentators pointed out that third countries such as the US or Australia could even retaliate and prevent European funds from being sold to investors in their jurisdictions.

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[262] See above section III.2.

[263] See R Gilson and CJ Milhaupt, ‘Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism’ (2008) 60 Stanf L Rev 1345; K Pistor, ‘Sovereign Wealth Funds, Banks and Governments in the Global Crisis: Towards a New Governance of Global Finance?’ (2009) 10 EBOR 333; H Schweitzer, ‘Sovereign Wealth Funds – Market investors or ‘imperialistic capitalists’? The European response to direct investments by non-EU state-controlled entities’ in Bernitz and Ringe (n 261), ch 12; S Butt, A Shivdasani, C Stendevad and A Wyman, ‘Sovereign Wealth Funds: A Growing Global Force in Corporate Finance’ (2007) 19 J App Corp Fin 73; F Benyon, *Direct Investment, National Champions and EU Treaty Freedoms* (Hart Publishing, Oxford 2010), ch 9.

[264] On this see PL Davies and others, ‘The Takeover Directive as a Protectionist Tool?’ in Bernitz and Ringe (n 261), ch 6. On the Takeover Directive, see above section IV.3.

[265] eg Schweitzer (n 263).

[266] European Commission, Proposal of 30 April 2009 for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2004/39/EC and 2009/…/EC, COM(2009) 207 final. Agreement on the final text was reached in October 2010 (Council Document 15053/1/10 of 27 October), and the Directive was adopted on [insert final date].

[267] House of Lords, European Union Committee, Directive on Alternative Investment Fund Managers, 3rd report of session 2009-10, February 2010.

VI. Conclusion

The motor may have been restarted, but the direction of travel is now more uncertain than ever. This is, in short, how we may summarise the results of the last ten years' developments in European corporate law. After coming close to stasis towards the end of the 1990s, a combination of factors gave European corporate law a renaissance. We see the principal drivers for this development as the seminal *Centros* decision in 1999, flanked by more prudent and nuanced legislation following the respective Financial Services and Company Law Action Plans. Furthermore, a series of corporate scandals such as Enron and Parmalat further contributed to a breakthrough in European company lawmaking.

We identify a move towards 'choice' as a general theme that guided the development of European corporate law in the first decade of the twenty-first century. Choice has been enabled on various levels: entrepreneurs' choice for an appropriate corporate law to govern their affairs when setting up their company; a now-realistic possibility for midstream jurisdictional choice by established companies through cross-border mergers; an increasing number of optional legislative instruments that leave leeway for individual arrangements, including soft law instruments like recommendations; the emergence of European legal forms as which companies may choose to reincorporate; and the creation of a strong and comprehensive framework for securities regulation, to which companies that choose to list their securities will be subject. All of this fits with an overall picture of company law that views it as enabling law, providing efficient rules for conducting business, lowering transaction costs, and bringing about intervention only insofar as it is absolutely necessary.[268]

How may all of this be affected by the financial crisis? It is probably still too early to give a final answer, but the first signs point towards a significant change of direction. History teaches us that politicians and regulators tend to react vigorously following a major crisis. This appears to be the case today—both on the national and the EU level. Moreover, protectionism has reappeared on both levels as well. It is undeniable that a first wave of legislative activities responding to the crisis has begun, targeting mainly financial institutions and alternative investment funds. What remains to be seen is how widely the new regulatory seeds will be sown.[269]

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[268] See R Kraakman and others, *The Anatomy of Corporate Law*, 2nd ed. (OUP Oxford 2009), 2.

[269] See the Commission's Green Paper (n 249).

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