Libera Università Internazionale degli
Studi Sociali Guido Carli

LUISS

PREMIO TESI D'ECCELLENZA

Corporate Governance and Regulatory Competition in the Evolution of the EU

Guido Bellenghi

1 2019-2020

LUISS
Academy

LUISS Guido Carli / Premio tesi d'eccellenza
Working paper n. 1/2019-2020
Publication date: november 2021
Corporate Governance and Regulatory Competition in the Evolution of the EU

ISBN 9788861057470

LUISS Academy is an imprint of
LUISS University Press – Pola Srl
Viale Pola 12, 00198 Roma
Tel. 06 85225485
e-mail lup@luiss.it
www.luissuniversitypress.it

Corporate Governance and Regulatory Competition in the Evolution of the EU Internal Market

Guido Bellenghi*

Abstract

This paper is an excerpt from my master's thesis, titled "Corporate mobility and regulatory competition in the evolution of the EU internal market: a critical appraisal". Corporate mobility, based on freedom of establishment and free movement of capital, triggers a mechanism of regulatory arbitrage which, in turn, stimulates regulatory competition amongst Member States. The dissertation tries to analyse the qualitative impact of regulatory competition on EU law, with particular focus on the fields of corporate governance and business taxation. The research seems to show that regulatory competition in the field of corporate governance is likely to result in a "race to the top", whereas regulatory competition in tax law often produces harmful effects. Therefore, the last part of the thesis assesses the Commission's approach to the matter. It is argued that the "Vestager doctrine", based on the application of State aid rules to the s.c. "tax ruling saga", is not the appropriate strategy to tackle harmful tax competition. In conclusion, also with a view on the implications of the current pandemic crisis, some alternative paths are discussed: amongst them, the most convincing solution seems to be the use of art. 116 TFEU. The paper is an excerpt from the second chapter of the thesis, which deals with the relationship between regulatory competition and corporate governance.

* LL.M. candidate at the European Law School of Maastricht University. I am grateful to Daniele Gallo, Enzo Moavero Milanesi and Luigi Eugenio Olita for their supervision during my research. Any errors remain entirely my own.

I. Corporate governance between transnational convergence and national dependence

The term "corporate governance" can be used to describe both the system of management and control of corporations and the rules that are implemented for the regulation of such a system. The first definition was provided by the 1992 "Cadbury Report":[1] accordingly, corporate governance is "the system by which companies are directed and controlled". That definition was later reproduced by the EU, in its two action plans for company law,[2] and by the OECD.[3]

Corporate governance systems are vital in dealing with the crucial agency problems of companies and are heavily influenced by the theory that a country adopts to explain the corporate purpose. Therefore, different approaches to corporate governance codes are the outcome of different theories on corporate purpose.[4] For example, in a certain legal system the main purpose of companies might be regarded as the pursuit of the interest of the State, while elsewhere the supreme goal could be the maximisation of value of shareholders, the welfare of stakeholders, or even the welfare of customers. The two main theories are probably those that identify the corporate purpose as shareholder's primacy and, secondly, stakeholder's primacy,[5] with the former proving to be the most followed of the two during the present century. The natural evolution of company law, however, has also called for new forms of compromise, which have

[1] Committee on the Financial Aspects of Corporate Governance, "Financial Aspects of Corporate Governance", 1992, para. 2.5.

[2] 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" [2003] OJ C 63, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan. "European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies" COM/2012/0740 final, 2012, in the introduction of which it is affirmed that "corporate governance defines relationships between a company's management, its board, its shareholders and its other stakeholders. It determines the way companies are managed and controlled".

[3] OECD, "G20/OECD Principles of Corporate Governance", first issued in 1999.

[4] An overview on the matter is provided by R. J. Gilson, "From Corporate Law to Corporate Governance", in J. N. Gordon, W. Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance*, OUP 2018, p. 15 *et seq.*: the author lists a series of "models in corporate law", such as *(i)* the stakeholder model, *(ii)* the team production model, *(iii)* the director primacy model, and *(iv)* the shareholder primacy model. However, Gilson is aware that the theoretical importance of these models has not been recognized by courts so far: in fact, "some 40 years after economics began making important inroads into corporate law scholarship, a significant amount of academic, but not judicial, attention is still directed at devising the right 'model' of corporate law and governance".

[5] See *ibid.*, p. 16, where the author describes the "stakeholder model" by saying that "a stakeholder model of corporation law or governance recognizes that the corporation is a major social institution that is at the core of a capitalist system".

been found with the theories of the so called "enlightened shareholder value"[6] and "entity-oriented purpose".[7]
Literature[8] has observed that corporate governance rules have a broader scope of corporate law *per se*, meaning that, when considering corporate governance, corporate statutory law is integrated by other complementary[9] sources: corporate governance codes,[10] guidelines, best practices and a series of other soft law tools that fund standards whose respect is often granted through the so called "comply or explain" rule.
Corporate governance codes have been gradually shaped by globalisation, and it is nowadays possible to analyse a common basic structure for corporate law, as forecasted by literature at the end of last century.[11] That prediction rested primarily on the progressive affirmation of the theory of shareholder primacy and at the same time on the "failure of alternative models",[12] such as the manager-oriented model, the labour-oriented model, the State-oriented model, and the stakeholder models.
In particular, convergence is due to a set of factors, amongst which competition is included.[13] In this case, the "race to the standard" in corporate structure is aimed at lowering the cost of equity capital, developing new product markets, incentivising coherent business reorganisation, and allowing rapid abandon of inefficient investments. Even though there might be particular reasons and exceptional circumstances for which the adoption of the standard might also bring some disadvantages—especially in systems that have not adopted the very same theory of corporate purpose adopted by the system to which the standard originally belongs—it will likely

---

[6] The UK has implicitly adhered to this theory through its Companies Act 2006, especially with the provision laid down in Section 172. This approach strikes a balance between the competing interests of different stakeholders in order to benefit the shareholders in the long run. Thus, shareholders remain ultimate beneficiaries of the directors' activity but there is an orientation towards the long-term productivity and a broader set of factors that directors need to consider in complying with their duties. For an overview on the matter, see D. Millon, "Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law", *Washington & Lee Public Legal Studies Research Paper Series*, 2010, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750>.

[7] This is the path followed by the Netherlands, which see the company as an autonomous entity, distinct by its participants and organs. Directors are thus trustees of companies' assets, and their aim is to maximize the value of those assets, with an implicit and indirect benefit for both stakeholders and shareholders.

[8] In particular, see D. Corapi, "Corporate Governance", in A. Nuzzo, A. Palazzolo (eds.), *Disciplina delle Società e Legislazione Bancaria. Studi in Onore di Gustavo Visentini*, LUISS University Press, Rome 2020, pp. 90-92.

[9] On the concept of "complementarity" of company law, see W. Schön, "Playing Different Games? Regulatory Competition in Tax and Company Law Compared", *Common Market Law Review*, 2005, pp. 353-355.

[10] To name a few: *Codice di Autodisciplina* (Italy), *Deutscher Corporate Governance Codex* (Germany), UK Corporate Governance code (UK), *AFEP-MEDEF Code* (France).

[11] The convergence of corporate laws was for the first time described and analysed by H. Hansmann and R. Kraakman, "The End of History for Corporate Law", *Yale International Centre for Finance*, 2000, where the authors observed that "despite the apparent divergence in institutions of governance, share ownership, capital markets, and business culture across developed economies, the basic law of the corporate form has already achieved a high degree of uniformity, and continued convergence is likely".

[12] *Ibid.*, p. 3; see also page 9, where the authors define the shareholder-oriented model as the "standard model".

[13] *Ibid.*, pp. 13-14, where "the force of competition" is listed together with "the force of logic" and "the force of example".

render firms who adopt it more attractive and innovative, therefore facilitating their access to private equity markets and institutional investors.[14]

While business law has always been influenced by the *lex mercatoria* and corporate governance codes are thus on the path to convergence, no transnational corporate governance system has been recognised so far. There is, in fact, also a "path dependence"[15] from national law: codes, guidelines, best practices—traditional soft law instruments of corporate governance which have a functional and practical rather than formal and theoretical character[16]—and corporate law in general, are still influenced by the society and the economy in which they are created and applied.

The purpose of this Chapter is to assess whether and to what extent these two opposite trends—transnational convergence and national dependence—have interacted with regulatory competition within the internal market, and how corporate governance has been accordingly shaped across the Member States. In order to do so, the first step will be to describe the main attempts of harmonisation at the EU level, mainly focusing on the role of the thirteen company law directives (section II). The second step will instead be to analyse the room left to companies for regulatory arbitrage justified by reasons of corporate governance and to assess how that phenomenon has influenced the choices of both EU and national lawmakers (section III). Lastly, the outcomes of this research might prove useful in reaching some conclusions (section IV).

II. Reflexive harmonisation of corporate governance within the EU

Following the decisions of the Court in the *Centros* trilogy,[17] questions regarding the effects of regulatory competition on company law have arisen at the beginning of this century. However, harmonisation of company law has been deemed an essential need of the internal market since the launch of the integration project. A process of positive, although limited, integration has indeed taken place by means of the Thirteen Company Law Directives, which are worth

---

[14] However, see *infra* paragraph III.1 for a negative assessment on the relationship between the convergence towards the model of the private limited company and the facilitation of access to capital markets.

[15] On the theory of path dependence of corporate structures across the different economies of the world, see L. Bebchuk and M. J. Roe, "A Theory of Path Dependence in Corporate Ownership and Governance", *Stanford Law Review*, 1999, p. 127 *et seq.*, where the authors identify two main sources of path dependence: the economic structure and the corporate legal rules; see also Gilson, "From Corporate Law to Corporate Governance", cit., p. 9, where the author observes that "corporate governance is path dependent—history matters significantly" and that "initial conditions, determined by fortuitous events or non-economic factors such as culture, politics, or geography, can start the system down a specific path".

[16] In I. Ferrero Ferrero and R. Ackrill, "Europeanization and the Soft Law Process of EU Corporate Governance: How Has the 2003 Action Plan Impacted on National Corporate Governance Codes?", *Journal of Common Market Studies*, 2016, p. 892, the authors reach the general conclusion that "with soft law, context matters. In contrast to hard law, where the 'issuer' is de facto the national legislator, our research has shown that, for soft law corporate governance policies, the issuer has a significant impact on the measures laid down".

[17] Cases C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyreslen* [1999] ECLI:EU:C:1999:126, C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECLI:EU:C:2002:632, and C-167/01 *Inspire Art Ltd* [2003] ECLI:EU:C:2003:512.

mentioning. It must be kept in mind, preliminarily, that the Third,[18] the Sixth,[19] the Tenth,[20] and the Eleventh[21] directives deal with corporate mobility rather than corporate structure and that the Fifth and the Ninth directives never entered into force.

The First company law Directive,[22] issued in 1968, concerned some core minimum standards of compulsory disclosure for both public and private companies,[23] the validity regime for obligations assumed by the companies towards third parties, the nullity of companies, and some related safeguard measures. The Second Directive[24] instead regarded some minimum requirements, such as capital requirements, for the formation of public companies. In response to the new issues arising from the evolution of corporate mobility, the first two directives have been repealed and replaced by recent directives, respectively in 2009[25] and 2012.[26] Those directives, in turn, together with those related to corporate mobility, have been codified in Directive 2017/1132.[27]

---

18 Third Council Directive (ECC) 78/855 of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies [1978] OJ L 295, repealed and replaced by Directive (EU) 2011/35 of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies [2011] OJ L 110.

19 Sixth Council Directive (ECC) 82/891 of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies [1982] OJ L 378; that directive was complementary to the first generation.

20 Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L 310.

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

22 First Council Directive (ECC) 68/151 of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L 65.

23 Mainly regarding constitution and statutes.

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

25 Directive (EC) 2009/101 of the European Parliament and of the Council of 16 September 2009 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 L 258.

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

27 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169. Codification is a tool by which, in the "interests of clarity and rationality" (see recital 1) previous legislation is brought together in a single new act. Normally, therefore, there are no deadlines for the implementation of codified directives. Nevertheless, Article 162(4) of the Directive provides that "by 30 June 2016, the Commission shall review the functioning of those provisions which concern the reporting and documentation requirements [...], and in particular their effects on the reduction of administrative burdens on companies, in the light of experience acquired in their application, and shall present a report to the European Parliament and the Council, accompanied if necessary by proposals to amend those provisions".

While the first generation of directives put the stress on harmonisation, it did not take long before Member States regained their room for manoeuvre thanks to a second generation which had a more flexible structure, amongst which were the so called 'accounting directives': Fourth,[28] Seventh,[29] and Eighth[30] directives. Those directives laid down basic accounting standards by means of a series of "opt-in" solutions that basically corresponded to the main habits already used across the Member States.

The third generation of directives was the main turning point. Following the new approach suggested by the Single European Act in 1986, decentralisation was applied in the field of company law, limiting central intervention and thus limiting harmonisation. The "reference to standards" principle introduced a presumption that the compliance with the minimum standards set by directives necessarily implied compatibility with EU law. The main evidence was the Twelfth Directive[31] that left to Member States the competence in providing some key rules regarding disclosure and creditor protection in the case of single-member private limited-liability companies.

Ultimately, the fourth generation of directives, amongst which is the Thirteenth Directive[32] (also known as "Takeover Bids Directive"), followed the path laid down by its predecessor, going even further by encouraging self-regulatory bodies and local-level action.

The sliding door for the harmonisation of corporate governance across the EU is the Proposal for a Fifth company law directive,[33] drafted by the Commission in 1972, thus belonging to the period of first-generation directives. Hence the Proposal had ambitious goals of harmonisation, namely the creation of a uniform legal environment for German, Belgian, French, Luxembourgish, Dutch, and Italian public limited companies[34]. The original Proposal, however, failed in finding the consensus of Member States. The influence of German corporate law appeared excessive for the other Member States, with special regard to the adoption of a mandatory two-tier board structure[35] and the provisions concerning the participation of employees in the governance of the company. In addition, the UK would have joined the Community in 1973, but the UK traditional

---

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

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

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

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

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

[33] Commission of the European Communities, "Proposal for a Fifth directive on the coordination of safeguards which for the protection of the interests of members and outsiders, are required by Member States of companies within the meaning of Article 59, second paragraph, with respect to company structure and to the power and responsibilities of company boards" [1972] OJ C 131.

[34] Called respectively *Aktiengesellschaft* in Germany, *société anonyme* in Belgium, France, and Luxembourg, *naamloze vennootschap* in the Netherlands, and *società per azioni* in Italy.

[35] Proposal for a Fifth Directive, pp. 6-7.

corporate governance structure was highly incompatible with the principles laid down by the Proposal. As a matter of fact, while German and French corporations were collocated in the framework of "insider systems", where "share ownership tends to be concentrated in the hands of family groups or held in large blocks by other corporations",[36] in the UK "outsider system" the predominant mode of ownership was through the holdings of institutional investors. While the UK model has traditionally been oriented towards shareholder value (even in its "enlightened" version), the two-tier board and employee involvement are mainly guarantees for stakeholders. This is true also because in insider systems, such as the German one, the risk of hostile takeovers, and thus the risk for shareholders of losing control of the firm, is lower.

The influence of the new approach of the second and third generations of directives was crucial for the amendments to the Proposal which were introduced by the Commission in 1983,[37] 1990,[38] and 1991.[39] In fact, the Amended Proposal was less intrusive for the legislations of Member States and was aimed at setting some minimum standards and principles, which were a compromise between the need for convergence within the internal market and the will of preservation of Member States' national corporate governance traditions. The one-tier board was reintroduced, though as merely optional for founding partners, and a higher threshold[40] for the mandatory involvement of employees was set, even allowing Member States to opt for any available co-determination mechanism other than the participation of employees in the board. However, the Amended Proposal was not successful because of a certain degree of reluctance of Member States to accept those innovations, especially in the context of the consistently increasing supremacy of the theory of shareholders primacy and the subsequent development of flexible, UK-inspired, corporate governance structures.

Even though the Fifth Directive has never been adopted, it is possible to notice that the provisions regarding the double-tier board have later been autonomously implemented by some Member States, such as Italy in its 2003 reform of company law, and that some of its provisions regarding shareholders have later inspired the Shareholder Rights Directives.[41]

---

[36] S. Deakin, "Regulatory Competition Versus Harmonisation in European Company Law", *ESRC Centre for Business Research*, 2000, p. 9; the same considerations also apply to Italy.

[37] Commission of the European Communities, "Amended proposal for a Fifth directive founded on Article 54 (3) (g) of the Treaty concerning the structure of public limited companies and the powers and obligations of their organs" [1983] OJ C 240.

[38] Commission of the European Communities, "Second amendment to the proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs" [1991] OJ C 7.

[39] Commission of the European Communities, "Third amendment to the proposal for a fifth Council directive based on article 54 of the ESC treaty concerning the structure of public limited companies and the powers and obligations of their organs" [1991] OJ C 158.

[40] Shifting from the number of 500 workers required by the Proposal to the number of 1000 workers required by the Amended Proposal.

[41] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132 ("Shareholder Rights Directive II"), and Directive (EC) 2007/36 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 L 184 ("Shareholder Rights Directive I").

Finally, the one or two-tier board options and employees' participation are also key elements of the SE Regulation,[42] which provides that a *Societas Europaea* shall comprise "either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes"[43] and that "employee involvement in an SE shall be governed by the provisions of Directive 2001/86/EC",[44][45] which in its preamble mentions in the first place the Amended Proposal for a Fifth Directive.
At the beginning of the new millennium, after a period during which integration was exclusively top-down and after the failure of the Commission's attempts to force the adoption of the German model across the EU, the new challenges brought by the steadily increasing cross-border mobility and the major bankruptcy cases of Enron (2001), Worldcom (2002), and Parmalat (2003) reshaped the approach to the matter. The aforementioned Commission's Action Plan 2003[46] opened to the setting of new minimum standards, through the individuation of 26 corporate governance priorities, which were characterised by the predominance of the UK model,[47] which in turn had already heavily influenced other corporate law systems, such as the Dutch one. The available data[48] show that the index of convergence with the 26 Commission's priorities was 53.85% for the UK and for the Netherlands in 2003, i.e. the year in which the Action Plan was published. Interestingly, at the time of the "Cadbury Report", in 1992, the index of convergence of the UK was already 34.62%, even though the Action Plan had not even been drafted yet, while the Dutch index only showed a 11.54% convergence in 1997. In addition, in 2000 the index was still only at 3.85% for Germany.[49] These empirical findings seem to confirm the shift from a "German model" to a "UK model".

---

[42] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company [2001] OJ L 294 ("SE Regulation"). It has been argued that the *Societas Europaea*, albeit its harmonising aim, has been exploited for the purpose of regulatory arbitrage by some companies. On that critic see H. Eidenmüller, A. Engert and L. Hornuf, "Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage", *European Business Organization Law Review*, 2009, p. 1: according to the authors, in particular, regulatory arbitrage would be encouraged by the fact that under the SE Regulation a *SE* can be constituted with a one-tier board structure "in jurisdictions that impose a two-tier structure on their national public companies"; moreover, the enhancement of corporate mobility through the SE Regulation would have the effect of incentivising legal arbitrage "with a view to corporate tax savings". However, more recently, in M. Mannan and I. Wuisman, *Freedom of Establishment for Companies in Europe (EU/EEA)*, Ars Aequi Libri, Nijmegen 2019, p. 113, it is observed that "given the high number of SEs that have remained in the Czech Republic and Germany after formation, it would appear that the formation of SEs has been inspired less by a desire for corporate mobility rather than for other reasons, such as 'freezing' employee participation at a certain threshold in Germany".

[43] SE Regulation, Article 38(b).

[44] Council Directive (EC) 2001/86 of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294 ("SE Directive").

[45] SE Regulation, Article 1(4).

[46] See *supra* note 2.

[47] The influence of the advent of the UK on EU corporate governance is described in M. Gelter, "EU Company Law Harmonisation between Convergence and Varieties of Capitalism", *European Corporate Governance Institute*, 2017, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977500>, p. 34, where the author describes continental jurisdictions as the "main force of resistance" against the "formal and superficial, but not entirely irrelevant" convergence towards the UK model.

[48] Ferrero Ferrero, and Ackrill, "Europeanization and the Soft Law Process of EU Corporate Governance", cit., pp. 888.

[49] The German index was brought to 30.77% by the *Geman Code of Corporate Governance* published on 6 June 2000.

In this respect, it has been noticed by some scholars that insider systems are normally implemented in real seat jurisdictions, while outsider systems are usually typical of jurisdictions which adhere to the seat of incorporation theory.[50] Hence, the overlap between the latter countries and the preferred countries of destination for cross-border movements of corporations during the first fifteen years of the millennium—thus after *Centros*[51]—cannot be surprising.[52]

However, Brexit has already impacted on those data, given the steadily increasing number of cross-border mergers where the acquiring company is German and the merger company is British, and the more general tendency of outbound movements from the UK.[53] It is still to be determined whether this shift will be capable of reversing the trend of EU corporate governance integration. At the time of writing, it is nonetheless possible to notice that Brexit deprives the EU of a key-actor in the development of corporate models. Indeed, the UK has so far played a crucial role in both spontaneous convergence, by providing rules and solutions which have stimulated regulatory competition, and central harmonisation, by leading the institutional and academic debate on the enhancement of European company law.[54]

In conclusion, corporate governance—especially in its soft law dimension—appears to be a field in which reflexive harmonisation is more likely to occur than it is in other sectors of law. This phenomenon has also been referred to as "reflexive governance" or "open method of

---

50 According to M. Viénot, quoted by Deakin, "Regulatory Competition Versus Harmonisation in European Company Law", cit., p. 12, "in Anglo-Saxon countries the emphasis is for the most part placed on the objective of maximising share values, whilst on the European continent and France in particular the emphasis is placed more on the human assets and resources of the company".

51 S. Deakin argues that "diversity of practice at Member State level is [...] undermined by the increased possibilities for corporate migration following the Centros case" in "Reflexive Governance and European Company Law", *European Law Journal*, 2009, p. 244.

52 According to T. Biermeyer and M. Meyer, "Cross-border Corporate Mobility in the EU: Empirical Findings (Vol. 2)", ETUI, 2019, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477495>: the UK, the Netherlands, and Luxembourg. See also C. Gerner-Beuerle, F. M. Mucciarelli, E. Schuster and M. Siems, "Why Do Businesses Incorporate in Other EU Member States? An Empirical Analysis of the Role of Conflict of Laws Rules", *International Review of Law and Economics*, 2018, p. 26, where the authors observe that "conflict of laws rules plays a key role: countries that have a clear-cut version of the 'incorporation theory' attract more incorporations than countries which have retained elements of the 'real seat theory'".

53 See T. Biermeyer and M. Meyer, "The Use of Corporate Mobility Instruments and Brexit: An Empirical Analysis", *European Company Law*, 2020, p. 20, where the authors report that "UK companies make use of cross-border mergers and cross-border seat transfers of Societates Europaeae (SEs) in order to move from the UK to other EU Member States. For 2018, seventy-six entry transactions could be identified compared to 116 exit transactions. As regards 2019, the picture is even more drastic thus far. Only twenty-eight entry transaction could be identified, as opposed to 222 exit transactions".

54 The topic is analysed in H. Eidenmüller, "Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law", *European Corporate Governance Institute*, 2018. The author begins his reasoning from two premises: that *(i)* "regulatory competition between the EU Member States is, in principle, beneficial because it initiates a 'discovery process' for new and, hopefully, more efficient legal products"; and that *(ii)* "Brexit will reduce the level of regulatory competition in the EU' as 'choosing UK legal products will likely be more difficult in the future". Eventually, the author then concludes that Brexit will reduce the incentive to innovate that comes from competitive pressure at a national level, and that on the European level "the loss of expertise in the 'real' law-making process within the European institutions" will cause the impoverishment of debates and the suffering of the quality of outcomes, as the EU will "no longer benefit from UK influence and contributions". See also R. Ghetti, "Unification, Harmonisation and Competition in European Company Forms", *European Business Law Review*, 2018, p. 842, where the author observes that "the success of corporate governance unification or harmonisation in Europe would appear to depend heavily on the unification of political governance, but today, especially after Brexit, the road to Political Union is longer and steeper than ever".

coordination".[55] According to this view, a limited intervention from Brussels integrated by the convergence of corporate purpose theories has allowed Member State to retain their traditional systems while simultaneously enhancing new efficiencies. Consequently, corporate governance might be described as an appropriate environment for the development of a "race to the top".

This consideration, however, does not imply that there is no room for regulatory competition. It means, instead, that regulatory competition occurs but it is characterised differently than in other fields.

For example, if corporate law is compared to tax law (described in Chapter III), some key differences might be noticed.

First of all, unlike some tax preferential regimes, corporate legal forms are never offered only to foreign investors, as they are also always available for domestic businesses. In this way, the room for harmful practices aimed exclusively at attracting foreign investors is reduced.

Secondly, administrative secrecy and tax preferential regimes bring an advantage that is objective and directly measurable in monetary terms.[56] Corporate governance rules, on the contrary, show a degree of subjectivity, meaning that the effects that they cause are strictly related to the economic and social context in which they are implemented (path dependence), a hunch that is witnessed by their frequent nature of soft law.

Thirdly, even though some governance rules can potentially undermine the interests of stakeholders[57]—workers, creditors, and tort victims—negative externalities are less likely to occur. In fact, shareholders, who are ultimately entitled to choose and control the corporate structure, are the immediate beneficiaries of the company's success, but it is also true that, aside from specific situations, stakeholders generally benefit from the same company's well-being from which shareholders benefit. Instead, in the field of taxation, companies find their counterpart in welfare and public expenditure, which is normally harmed and reduced by tax competition.

III. Limited regulatory arbitrage and matters of regulatory competition in the field of corporate governance

The consequence of the "defensive harmonisation"[58] described in the previous section is that regulatory arbitrage in the field of corporate law has proved to be limited, at least when considering the great expectations that followed the Court's decision in *Centros*. Indeed, as a

---

[55] Those terms are used in, amongst others, Deakin, "Reflexive Governance and European Company Law", cit.

[56] In W. Schön, "Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence", in I. Richelle, W. Schön and E. Traversa (eds.), *State Aid Law and Business Taxation*, Springer, Berlin Heidelberg 2016, p. 4, it is observed that "the main difference between fiscal aid and (most) other means of subsidization stems from the fact, that any tax as such is just the opposite of a financial benefit".

[57] Many concerns arose after more scandals breaking at the beginning of the century, especially with the collapse of Enron (2001), Worldcom (2002), and Parmalat (2003). For an overview on the impact of Enron case on corporate governance, also on a transnational level, see S. L. Gillan and J. D. Martin, "Corporate Governance post-Enron: Effective Reforms, or Closing the Stable Door?" *Journal of Corporate Finance*, 2007, p. 929 *et seq*.

[58] This expression is used by C. GernerBeuerle F. Mucciarelli, E. Schuster, M. Siems, "The Illusion of Motion: Corporate (Im)Mobility and the Failed Promise of *Centros*", *European Business Organization Law Review*, 2019, p. 452, when describing the reaction of Member States to the threat of regulatory arbitrage in the field of board-level employee participation.

recent study shows,[59] the *lex societatis* determines only a part of the many rules that govern the activities of a company. Hence, there are rules, such as those related to the protection of third parties, that might fall outside the scope of the *lex societatis* and thus rely on different connecting factors under private international law.[60]

A clear example is provided by the Insolvency Regulation,[61] as it introduces the concept of "centre of main interests", that can be seen as an equivalent of the real seat theory. The landmark case in that field was *Kornhaas*,[62] in which the European Court of Justice allowed the application of German insolvency law to a UK incorporated company.

Another overlap may occur between national company law, where the connecting factor is the *lex societatis*, and Rome II Regulation,[63] particularly in the field of non-contractual obligation. Indeed, Rome II Regulation provides different connecting factors that might sometimes be incompatible with the *lex societatis*, especially vis-à-vis the theory of incorporation. The two main examples are tort law, which refers to the *lex damni*,[64] and the *culpa in contrahendo*—"the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract"—which refers to the "law that applies to the contract".[65] Similar uncertainties arise when considering the law applicable to directors' liability, and, to a certain extent, to the liability of shareholders for obligations of the company, when it is hard to determine whether company

[59] *Ibid.*, p. 425 *et seq*.

[60] See *ibid.*, p. 428, where the authors observe that "in this pure form, the incorporation theory cannot be found in any jurisdiction" and that, therefore, even the uniform adoption of the incorporation theory could not bring complete harmonisation of company law.

[61] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141; on the impact of regulatory competition on insolvency law; see H. Eidenmüller, "Comparative Corporate Insolvency Law", in Gordon and Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance*, cit., p. 1036: the author believes that regulatory competition in the field of insolvency law can be regarded as both a race to the top, as "it creates an 'international laboratory' for better solutions, spurring regulatory competition between states for the best 'insolvency product'", and a race to the bottom, considering that "last-minute forum shopping by firms—possibly initiated by dominant lenders—can create problems, especially for outside creditors whose interests might be compromised by the move". In particular, interestingly, Eidenmüller argues that there is a sort of inequality in regulatory arbitrage, as "not all firms have the knowledge and money to engage in sophisticated regulatory arbitrage and, as a consequence, might not have access to an efficient domestic insolvency or restructuring regime".

[62] Case C-594/14 *Simona Kornhaas v Thomas Dithmar as liquidator of the assets of Kornhaas Montage und Dienstleistung Ltd* [2015] ECLI:EU:C:2015:806.

[63] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199.

[64] Rome II Regulation, Article 4(1): "[...] the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

[65] *Ibid.*, Article 12(1).

law or the law applicable to non-contractual obligations—and thus Rome II Regulation—should apply.[66]

In conclusion, when a company exercises its freedom of establishment for mere purposes of regulatory arbitrage for corporate governance rules, it faces the risks that many of the aspects of a business strictly related to corporate matters are not necessarily governed by corporate law. Chances of overlaps and uncertainty become more relevant when the company has its real seat in Member States that "rely extensively on insolvency and tort law to regulate corporate behaviour, as is the case for most of the largest EU economies".[67] When those risks, together with the administrative costs of mobility, outweigh the benefits deriving from reincorporation, regulatory arbitrage in the field of corporate law becomes disadvantageous.[68]

Having clarified that regulatory arbitrage for corporate law has features, trends, and effects that are deeply different from those that will be observed for tax law in Chapter III, the next step is nonetheless to focus—both from a comparative and from an EU law point of view—on some specific matters related to corporate governance that have been somehow shaped and influenced by regulatory competition: the legal form of the company (III.1); minimum capital requirements (III.2); and control-enhancing mechanisms (III.3).

III.1. Competing for the best legal form: the UK private limited company and its equivalent counterparts across the Member States

Small businesses have traditionally been at the heart of European economy. They normally present similar features which, should the business be carried out in the legal form of a company, are likely to benefit from specific characteristics of corporate governance. In particular, in addition to the need of retaining limited liability, an adequate legal form should grant a high degree of flexibility and a certain enhancement of shareholder rights.

The first successful legal form capable of meeting those requirements has been the UK Private Limited Liability Company (Ltd). This type of company was created in 1907 thanks to the Companies Act, later amended and replaced by the other Companies Acts of 1985, 1989, 2004, and 2006. The main features of the Ltd are flexibility in governance, low capital requirements, and autonomy of shareholders. Since its introduction, the importance of the Ltd grew exponentially until it became, in 2006, the default model for UK companies, swapping its former residual role with the public company. In particular, since 2006 the minimum capital requirement has been set

---

[66] Three approaches pursued by Member State to distinguish which is the applicable law in cases of directors' liability are described in GernerBeuerle, Mucciarelli, Schuster and Siems, "The Illusion of Motion", cit. The first *(i)* is based on substantive law: accordingly, company law should apply to breaches of directors' duties, the articles of association, or company law itself, while Rome II Regulation should apply to obligations arising from wrongful acts not grounded in company law. The second *(ii)* approach considers the type of harmful act: only if it involves the exercise of corporate powers, corporate law is applicable. Lastly, the third *(iii)* approach focuses on the injured party: the so called "reflective loss to the shareholders" is governed by company law, while the *lex loci commissi delicti* applies to damage caused to stakeholders.

[67] *Ibid.*, p. 462.

[68] In Gerner-Beuerle, Mucciarelli, Schuster and Siems, "Why Do Businesses Incorporate in Other EU Member States?", cit., p. 24, the authors argue that "businesses may not choose a legal system by way of incorporation that is too unfamiliar to them".

at GBP 1,[69] by omitting the related provisions, in order to allow the UK Ltd to even increase its attractivity for small and medium-sized enterprises (SMEs).

After the *Centros* trilogy—and in particular after *Inspire Art*—more than 50,000Ltds incorporated in the UK started operating their businesses in Germany.[70] German reaction was to issue the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbrauchen 2008* (*MoMiG*), that introduced the *Unternehmergesellschaft* (*UG*), a particular type of *Gesellschaft mit beschrankter Haftung* (*GmbH*)[71] that simplifies the formalities for constitution but at the same time provides a series of rules for the protection of creditors. The minimum capital was set at EUR 1, clearly influenced by the UK Ltd experience.

The same process of lowering the minimum capital to EUR 1 has been observed in many other Member States: in France, the *loi 2003-721*[72] lowered the minimum capital requirement for the *societè à responsabilitè limitèe* (*SARL*) from EUR 7,500 to EUR 1; in Italy, the *Decreto-Legge 1/2012*[73] introduced the new *società a responsabilità limitata semplificata* (*SRLS*), with the same minimum capital;[74] in the Netherlands, the *Flex BV Act 2012* deleted any reference to the minimum capital for the *Besloten vennootschap* (*BV*); in Portugal, with a similar provision, in 2009 the minimum capital *de facto* requirement for the *sociedade por quotas* (*Lda*) has been lowered to EUR 1;[75] lastly, also the Irish Private Company Limited by Shares and the Cypriot Private Limited Company have lowered their minimum capital requirements to EUR 1 and EUR 2 respectively.

The lowering of minimum capital requirements has been balanced by lawmakers through the introduction of measures such as the mandatory indication of the legal form adopted in the name and in the acts and correspondence of the company—three examples are the *UG*,[76] the Italian

---

[69] Or better, any value above zero.

[70] G. B. Portale, "Il Diritto Societario tra Diritto Comparato e Diritto Straniero", *Rivista di Diritto Societario*, 2013, p. 335.

[71] *UG*s are often informally referred to as *"mini-GmbHs"*.

[72] *Loi n° 2003-721 du 1 août 2003 pour l'initiative économique*.

[73] *Decreto-Legge 24 gennaio 2012, n. 1 (Raccolta 2012), Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività (12G0009) (GU Serie Generale n.19 del 24-01-2012 - Suppl. Ordinario n. 18).*

[74] The minimum capital requirement was lowered to EUR 1 also for the *società a responsabilità limitata* (*SRL a capitale ridotto*) one year later, by the *Decreto-Legge 28 giugno 2013, n. 76, Primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonché in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti. (13G00123) (GU Serie Generale n.150 del 28-06-2013)*, Article 9, paragraph 15-ter, amending *Codice Civile*, Article 2463.

[75] *Código das Sociedades Comerciais*, Decree law no. 262/86, dated September 2, as amended by Decree law no. 64/2009.

[76] Pursuant to paragraph 5a(1) of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (*GmbHG*) the name of the company shall include "*Unternehmergesellschaft*".

SRLS[77] and the Spanish *sociedad limitada de formaciòn sucesiva* (*SLFS*)[78]—and the provisions regarding specific legal reserves. As regards the latter, the *UG* shall constitute a revenue reserve amounting to 25% of the profits referable to the reporting period,[79] while the Spanish *SLFS* shall constitute a revenue reserve amounting to 20% of the profits.[80] Moreover, the *SLFS* can pay dividends only if the statement of financial position shows a net assets/capital share ratio amounting to at least 60%.[81]

That is not all: the abovementioned forms of companies share many other similarities. As regards to the rights of shareholders, under the UK Companies Act 2006 the annual general meeting of a Ltd is not anymore mandatory, and the same applies for the German *UG*, apart from when it is called by 10% of the shareholders, which is the same threshold set for the French *SARL*. In addition, in the UK Ltd, the German *UG*, the Italian *SRLS*, and the French *SARL*, it is possible that the function of the general meeting is replaced by written resolutions of the shareholders, with *quorum* requirements identical to those of the general meeting.[82]

Furthermore, strong similarities can also be found in the provisions allowing one natural person to be the only shareholder of this type of company and at the same time to benefit from the limitation of liability. In this case, however, general minimum standards had already been provided by the Twelfth Company law Directive and were later codified in Directive 2009/102.[83] Examples of single member companies are the Italian *SRL unipersonale* and the Spanish *Sociedad Unipersonal*.

Lastly, all the aforementioned forms of companies benefit from a series of accounting and fiscal benefits—not closely related to corporate governance matters—that are aimed at incentivising the competitiveness of small businesses. Indeed, those legal forms are often[84] the default model for the creation of start-ups and innovative enterprises, which, for the very reason of being

---

[77] *Codice civile*, Article 2463-bis(4).

[78] This legal form was introduced in Spain by the *Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización*, which amended Articles 4, 5, and 23 and introduced Article 4.bis of the the *Ley de sociedades de Capital*, approved through the *Real Decreto Legislativo 1/2010 de 2 de julio 2010*. Pursuant to new Article 4 the *SLFS* does not have to comply with the minimum capital requirement of EUR 3,000 normally requested for the *Sociedad de responsabilidad limitada*, in fact *"[...] podrán constituirse sociedades de responsabilidad limitada con una cifra de capital social inferior al mínimo legal [...]"*.

[79] *GmbHG*, paragraph 5a(3).

[80] *Ley 14/2013*, Article 4.bis(1)(a); the same reserve shall be constituted by the Italian *SRL a capitale ridotto* under Article 2463(5) of the *Codice civile*, adding 1/5 of the profits for the year until the reserve, together with the legal capital, reaches the sum of EUR 10,000 (which is the ordinary minimum capital requirement for the *SRL*). On the same line of reasoning, when the legal capital of a UG reaches the threshold of EUR 25,000, that company automatically becomes a GmbH.

[81] *Ibid.*, Article 4.bis(1)(b); a general overview on reserves and financial ratios is provided by P. Atrill and E. McLaney, *Accounting and Finance for Non-Specialists*, Pearson, 10th edn., London 2017, pp. 130-132, 195-246.

[82] This rule is contained in provisions which are almost identical to each other: Companies Act 2006, Part 13 Chapter 2; *GmbHG*, paragraph 48(2); *Codice civile*, Article 2479(3); *Code de Commerce*, Article L223-27(1).

[83] Directive (EC) 2009/102 of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies [2009] OJ L 258. Annex I of the directive lists the type of companies to which the Directive applies: they are UK ltd and its counterparts named in the paragraph.

[84] For example, in Germany and in Italy.

constituted in such forms and meeting certain other requirements, gain access to preferential regimes.

At the EU level, the need for a "European Private Company" (EPC) was for the first time acknowledged by the Commission's Action Plan 2003, as the High Level Group of Company Law Experts (so called "Winter Group") had noted in its report[85] that the *Societas Europaea* could not respond to the need of SMEs, which have traditionally constituted the majority of businesses across the EU.[86] In particular, in the Action Plan the Commission observed that this "new legal form at EU level [...] would primarily serve the needs of SMEs which are active in more than one Member State".[87] However, as "the Group nevertheless observed that the first priority should be to adopt the Tenth Directive on cross-border mergers", the Commission postponed the adoption of any measure and limited itself to launching a feasibility study including "an in-depth analysis of the legal, tax and social policy regimes relevant to SMEs".

Consequently, it was only in 2008 that the Commission presented its "Proposal for a Council Regulation on the statute for a European private company",[88] or *Societas Privata Europaea* (SPE), in the context of a wider package named "Small Business Act for Europe". The objective of the proposal was the enhancement of the competitiveness of SMEs, through the facilitation of their establishment and the reduction of compliance costs, aside from aspects of labour law, tax law,[89] accounting, or insolvency.

The most discussed elements of the proposal were four: *(i)* the cross-border element; *(ii)* the minimum capital requirement; *(iii)* the possibility of splitting the registered office and the headquarters in different jurisdictions; and *(iv)* the rules governing employee participation at board level.

First, *(i)* the proposal did not require any mandatory cross-border element.[90] Second, *(ii)* the minimum capital threshold was set at EUR 1,[91] consistently with the recent development of the private limited companies across the Member States. Third, *(iii)* the SPE would not have been

---

[85] The Winter Group was a committee of experts nominated by the Commission. On 4 November 2002 the Group issued its "Report of the High Level Group of Company Law Experts a Modern Regulatory Framework for Company Law in Europe".

[86] According to the European Commission's website, available at <https://ec.europa.eu/growth/smes_en>, "small and medium-sized enterprises are the backbone of Europe's economy. They represent 99% of all businesses in the EU. They employ around 100 million people, account for more than half of Europe's GDP and play a key role in adding value in every sector of the economy".

[87] Action Plan 2003, para. 3.5.

[88] COM/2008/0396 final, 2008.

[89] It was highlighted, however, that "the choice of SPE as a legal form to conduct business activities in the EU should [have] be[en] neutral from a tax perspective".

[90] According to paragraph 4 of the Explanatory Memorandum, "the proposal aims to make the Single Market more accessible to SMEs by providing them with an instrument that facilitates the expansion of their activities in other Member States. However, the proposal does not make the creation of an SPE subject to a cross-border requirement (e.g. shareholders from different Member States or evidence of cross-border activity). In practice, entrepreneurs usually set up businesses in their own Member State before expanding to other countries. An initial cross-border requirement would, therefore, significantly reduce the potential of the instrument. In addition, a cross-border requirement could easily be circumvented and monitoring and enforcing it would put an unreasonable burden on Member States".

[91] Proposal for a EPC, Article 19(4).

"under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office".[92] Fourth, *(iv)* the participation of employees would have been governed by national rules of Member States of the place of incorporation, combined with specific rules in the case of cross-border mergers and seat transfers. Those specific rules were inspired by the SE Directive, in turn inspired by German company law, and would have applied "where the employees of the SPE in the home Member State account[ed] for at least one third of the total number of employees of the SPE including subsidiaries or branches of the SPE in any Member State".[93]

The first Member State showing concerns about the content of the proposal was France, a country traditionally adhering to the *siège reel* (real seat) doctrine. In particular, the French presidency of the Council proposed[94] a new article 7 which would have not allowed the split between the registered office and the real seat. Instead, the amended proposal opted for a seat "governed by national law in accordance with Community law".

Moreover, in March 2009 the European Parliament adopted a resolution[95] by which it called on the Commission "to initiate a consultation with the social partners, with a view to evaluating and where necessary streamlining, creating or reinforcing the provisions for employees' participation in the internal market". The subsequent resolution[96] of the Parliament on the Proposal contained a series of changes as regards the four abovementioned crucial elements. First off, *(i)* it required a cross-border element, demonstrated by either a cross-border business intention or corporate object, an objective to be significantly active in more than one Member State, establishments in different Member States, or a parent company registered in another Member State.[97] Additionally, *(ii)* the amended proposal allowed the minimum capital threshold to be lowered to EUR 1 only where "the articles of association require that the executive management body sign a solvency certificate", otherwise providing that the threshold should have been set at EUR 8,000.[98] Furthermore, *(iii)* the Parliament disagreed with the Council's French presidency's proposal and thus endorsed the possibility of splitting the real seat and the registered office under article 7(2).

---

[92] *Ibid.*, Article 7(2).

[93] Proposal for a EPC, Article 38(2).

[94] Council of the European Union, Interinstitutional File, 2008/0130 (CNS), 11 December 2008.

[95] European Parliament, Resolution of 12 March 2009 on employees' participation in companies with a European statute and other accompanying measures, 2009.

[96] European Parliament, Legislative resolution of 10 March 2009 on the proposal for a Council regulation on the Statute for a European private company, 2009.

[97] *Ibid.*, amended Article 10(2); indeed, the amended recital 2(a) observed that "existing Community forms of company have a cross-border component. That cross-border component should not be an obstacle for the founding of a European private company (SPE). The Commission and Member States should, however, without prejudice to the requirements of registration and within two years of registration, conduct ex-post monitoring in order to examine whether the SPE has the required cross-border component".

[98] *Ibid.*, amended Article 19(4).

Lastly, *(iv)* the Parliament changed the condition under which the SE Directive should have been applicable to govern the employee participation, introducing new quantitative thresholds.[99]
Between April 2009 and May 2011 seven compromise proposals were issued by Czech, Swedish, and Hungarian presidencies, but no agreement was reached on the four main matters. Therefore, the Commission decided to focus on a fourteenth company law directive and eventually withdrew the proposal in 2014.[100]
Therefore, private limited companies and their equivalent counterparts across the Member States remain formally non-harmonised on a path of national dependence, although the needs they try to satisfy are almost identical and thus their main features are very similar (providing for limited liability but at the same time governance structures and shareholder rights close to those of partnerships) thanks to a simultaneous process of transnational convergence.
In particular, Member States' lawmakers have traditionally set a precise limit: those companies shall not have access to public capital markets. This limit was first overcome by the Italian legislator, who allowed the *SRL* to issue *titoli di debito*[101] in 2003, and then in 2012[102] and 2014[103] provided some *SRL*s, especially innovative SMEs and start-ups, with new means to access capital markets: minibonds, financial bills, convertible bonds, work for equity, stock options, equity-based crowdfunding, participative financial instruments.[104]
The need to combat the historical problem of insufficient liquidity and undercapitalisation[105] of SMEs and to emancipate those businesses from dependence on bank lending has been recently addressed by the EU. In particular, in 2015 the Juncker Commission launched the Capital Markets

---

99 *Ibid*., amended Article 34(1a).

100 European Commission, "Withdrawal of obsolete Commission proposals" [2014] OJ C 153. See also Ghetti, "Unification, Harmonisation and Competition in European Company Forms", cit., pp. 828-829, there the author points out that "the failure of the SPE project was not due to lack of demand for a unified legal form for small companies" and thus "the Commission put forward a new proposal for a Societas Unius Personae" through two public consultations and an impact assessment. However, the Commission announced that the proposal would be withdrawn, which it formally did on 3 July 2018.

101 *Titoli di debito* are debt securities. They can be issued pursuant to Article 2483 of the *Codice civile*. However, they have been largely unsuccessful, because they could only be traded by institutional investors, who are liable for the insolvency of the SRL should they decide to trade those securities with non-institutional investors. Moreover, these securities shall have a minimum nominal value of EUR 50,000. See G. F. Campobasso, *Diritto Commerciale. Diritto delle Società (vol. 2)*, UTET, 2nd edn, Turin 2015, pp. 562-564.

102 *Decreto-Legge 22 giugno 2012, n. 83.*

103 *Decreto-Legge 24 giugno 2014, n. 91, Disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea* (so called *Decreto Competitività*).

104 In particular, Article 26(5) of the *Decreto-Legge 179/2012* as amended by Article 57 of the *Decreto-Legge 50/2017* allows all SMEs (defined as those companies constituted as *SRL*s which remain below the threshold set by Article 2(1)(f) of Regulation (EU) 2017/1129) to offer their shares to the public on online platforms, openly derogating to Article 2468(1) of the *Codice civile*, which instead states that *"le partecipazioni dei soci non possono essere rappresentate da azioni né costituire oggetto di offerta al pubblico di prodotti finanziari"*.

105 On this topic, see also the "Allowance for Growth and Investment" proposed by the Commission and analysed below in paragraph III.3.

Union (CMU) policy.[106] Significantly, amongst the priorities there was the enhancement of financing for innovation, start-ups and non-listed companies. The Commission and the Parliament pointed out that SME Growth Markets, a new category of trading venue introduced by MiFiD II,[107] were still relatively unexplored, especially when considering that "data suggest that newly listed SMEs in such venues tend to outperform other private companies as regards both overall growth and job generation".[108] Thus, in order to facilitate the access of SMEs to capital markets, the administrative requirements and the quantitative thresholds provided for the access to SME Growth Markets have been lowered by Regulation 2019/2115.[109] However, the access to those markets necessarily entails going public, i.e. issuing shares through an IPO, something that is not compatible with the form of private limited companies allowed across the Member States.

In conclusion, regulatory competition in the context of legal forms seems to shed the light on the concrete intertwinement between market features and corporate governance rules. Regulatory arbitrage in this field has triggered a mechanism which, in turn, has provided companies with governance structures that are more suitable for their purposes. As observed by literature, competition amongst Member States "appears to be producing more successful company forms in spontaneous fashion".[110]

III.2. Minimum capital requirement and protection of creditors after *Centros*: a new perspective on the phenomenon of undercapitalisation

The essential facts of *Centros* have been described above in Chapter I, where it has been said that Danish authorities held that Centros Ltd was trying to evade Danish law on minimum capital. The question referred to the Court was related to the compatibility with freedom of establishment of the registration of a branch of a "company which has its registered office in another Member State and has been lawfully funded with company capital of GBP 100 (approximately DKK 1,000) [...] where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200,000 (at present DKR 125 000)".[111]

---

[106] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. "Action Plan on Building a Capital Markets Union", COM/2015/468 final, 2015.

[107] Directive (EU) 2014/65 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L 173; Article 33(3)(a) of the directive describe Growth Markets as "Multilateral Trading Facilities" where "at least 50% of the issuers whose financial instruments are admitted to trading [...] are SMEs".

[108] European Parliamentary Research Service, "Enabling SMEs' access to capital markets", 2019.

[109] Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets [2019] OJ L 320.

[110] Ghetti, "Unification, Harmonisation and Competition in European Company Forms", cit., p. 841.

[111] *Centros*, para. 13.

First of all, the Court took advantage of the opportunity to clarify the functions of minimum capital requirement: the protection of public creditors, as they "they cannot secure those debts by means of guarantees", and the protection of creditors in general (thus public and private ones), especially "by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate".[112]

The problem of the inadequate capitalisation of private companies, especially family-owned businesses, is a direct consequence of the gradual process of lowering the minimum capital requirement observed in the previous paragraph. An example worth mentioning is provided by Italy, where the legislator—in the context of the 2003 reform of company law[113]—amended article 2467 of the *Codice civile* to combat undercapitalisation of companies registered as *SRL*. The new mechanism provided by Italian law is called *postergazione*[114] and it entails that the refund of loans received by shareholders shall happen only after the other creditors are satisfied.[115] The rules apply when the gearing ratio[116] shows a high level of debt and more in general when a capital injection in the form of equity appears more "reasonable"[117] than one in the form of debt.

Going back to *Centros* ruling, however, the measure adopted by Danish authorities in that case was deemed to be unsuitable to protect creditors. The Court believed that the Danish refusal to registrar the branch was "not such as to attain the objective of protecting creditors [...] since if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk".[118] Moreover, the Court believed that less restrictive means, "which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees",[119] could be used to pursue the same aim.

---

[112] *Ibid.*, para. 32.

[113] *Decreto Legislativo 17 gennaio 2003, n.6, Riforma organica della disciplina delle società di capitali e società cooperative, in attuazione della legge 3 ottobre 2001, n. 366 (G.U. n. 17 del 22-1-2003- Suppl. Ordinario n.8).*

[114] The provision is analysed by Campobasso, *Diritto Commerciale*, cit., pp. 560-561, where the author observes that this rule cannot be regarded as a coercive conversion of those sums from equity to debt, but it is instead a degradation of the position of those creditors who are also shareholders of the company which benefits from the loan.

[115] However, in order to face the emergency situation caused by the coronavirus pandemic, this rule has been temporarily frozen by the *Decreto-Legge 8 aprile 2020, n. 23, Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali (20G00043) (GU Serie Generale n.94 del 08-04-2020)*, Article 8.

[116] This financial ratio, also known as "debt-to-equity (D/E)", "risk", or "leverage" ratio, is explained in Atrill and McLaney, *Accounting and Finance for Non-Specialists*, cit., p. 224. It considers the relationship between debt and equity.

[117] *Codice civile*, Article 2467(2), which uses the word *"ragionevole"*.

[118] *Centros*, para. 35.

[119] *Ibid.*, para. 37.

After *Centros*, Member States' rules regarding minimum capital have been highly criticised by commentators,[120] who not only argued that the legal capital doctrine does not protect creditors,[121] but also that it imposes costs on companies[122] and even on some creditors.[123] According to those critiques, the fact that legal capital is substantially a fixed asset hinders the optimal allocation of goods.[124] In 2002, the aforementioned report issued by the Winter Group highlighted the need for flexibility and simplification of the rules regarding, amongst others, capital requirements, inspired by the U.S. Model Business Corporation Act.

Whereas for private limited companies minimum capital requirements have followed the abovementioned path of consistent lowering without any form of positive harmonisation at an EU level,[125] the minimum capital requirement for public limited companies was set at "25,000 European units of account"[126] by article 6(1) of the Second company law Directive.[127] The provision was later reproduced in article 6(1) of Directive 2012/30 (now article 45(1) of Directive 2017/1132), which accordingly sets the minimum capital requirement at EUR 25,000. In addition, pursuant to article 6(2) of Directive 2012/30 (now article 45(2) of Directive 2017/1132), "every five years the European Parliament and the Council [...] shall examine and, if need be, revise the amount expressed in paragraph 1 in euro in the light of economic and monetary trends in the Union and of the tendency to allow only large and medium-sized undertakings to opt for the types of company listed in Annex I".[128]

---

[120] See L. Enriques and J. R. Macey, "Creditors Versus Capital Formation: The Case against the European Legal Capital Rules", *Cornell Law Review*, 2001, p. 1165 *et seq.*; see also J. Armour, "Legal Capital: An Outdated Concept?", *European Business Organization Law Review*, 2006, p. 5, and W. Schön, "The Future of Legal Capital", *European Business Organization Law Review*, 2004, p. 429.

[121] See Enriques and Macey, "Creditors Versus Capital Formation", cit., p. 1186: "the legal capital doctrine assumes, falsely, that the fixed amount of a firm's legal capital informs current and potential creditors of the resources that a firm possesses and may not freely distribute to its shareholders. In the real world, however, creditors (and potential creditors) care neither about these resources nor about the legal capital rules that are supposed to signal these resources".

[122] See *ibid.*, p. 1195: "the European rules are costly in that they delay company formation and increases of capital through the issuance of new shares [...]".

[123] See *ibid.*, p. 1198: "some creditors [...] would prefer to bear a higher risk of default in exchange for a higher return on their investment. Thus, the legal capital rules benefit risk-averse lenders (like banks) that prefer low-risk and lower-return investments, not risk-preferring capital providers (like finance companies, private equity investors, or venture capitalists) that prefer higher-risk investments because of the higher returns associated with such investments".

[124] It was noticed *supra* that the optimal allocation of the factors of production is one of the main purposes pursued across the EU through the implementation of the four freedoms.

[125] See also M. Andenas and F. Wooldridge, *European Comparative Company Law*, CUP 2009, p. 1, where the authors observe that "the prospect of regulatory competition increasing the number of domestic businesses incorporating abroad, has increased the pressure to reduce capital requirements".

[126] It is important to bear in mind that the Directive only set a minimum standard. Therefore, Member States are free to opt for higher thresholds. The "European units of account" were calculated pursuant to Decision (ECSC) 3289/75 of the Commission of 18 December 1975 on the definition and conversion of the unit of account to be used in decisions, recommendations, opinions and communications for the purposes of the Treaty establishing the European Coal and Steel Community [1975] OJ L 327.

[127] It shall be remembered that the Directive only set a minimum standard. Therefore, Member States are free to opt for higher thresholds.

[128] Annex I concerns the various forms of public limited companies and their similar counterparts allowed by each Member State.

The rationale behind the difference between public and private companies' capital rules is expressed in recitals 2 and 3 of Directive 2017/1132. Accordingly, "in order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to their formation and to the maintenance, increase or reduction of their capital is particularly important" and it is "especially important in relation to public limited liability companies, because their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries".

In summary, aside from the aforesaid criticisms about legal capital rules, it can be noticed that the European legislator has been more concerned about the convergence of legal capital rules for public companies rather than about minimum requirements for private companies—for the latter the process of convergence has been left to the spontaneous action of regulatory competition—albeit three significant factors. Firstly, the problem of undercapitalisation usually involves small-sized companies, more likely to be formed as private companies, while public companies are normally provided with significant capital injections for the very reasons explained by the aforementioned recitals 2 and 3 of directive 2017/1132. Secondly, it might be argued that those reasons are in partial contradiction with the primacy of SMEs across the EU, which, as said before, has often been recalled by the Commission itself. Lastly, the threshold of EUR 25,000 does not seem high enough to provide any significant guarantee for creditors. Interestingly, in fact, the EU itself has set the minimum capital requirement for the *Societas Europaea* at the higher threshold EUR 120,000.[129]

In conclusion, in respect of minimum capital requirements, the effects of regulatory competition, which are necessarily influenced by the concrete economic context in which undertakings carry out their business, seem to have proved more successful than the harmonising action of EU legislation in providing companies with efficient corporate rules.

III.3. How control-enhancing mechanisms are implemented across the EU: non-voting preference shares, multiple voting shares, and loyalty shares

Non-voting preference shares, multiple voting shares (MVS) and loyalty shares are control-enhancing mechanisms which have been criticised for increasing the risk of distorted decisions and of the tunnelling of companies' assets.[130] Depriving some shares of their voting rights and allowing some others to confer multiple voting rights are derogations from the "one share, one vote" principle, which grants to external investors an influence on the business proportional to their stake. Control-enhancing mechanisms, instead, are aimed at granting the stability of ownership, which might be crucial to ensure long-term profits and to bring thus benefits to both shareholders and various types of stakeholders.

---

[129] SE Regulation, Article 4(2). It must be noticed, however, that the high costs for the formation of a *Societas Europeaea* have been deemed to be one of the main reasons for its limited success. See, amongst others, Eidenmüller, Engert and Hornuf, "Incorporating Under European Law", cit., p. 32, Mannan and Wuisman, *Freedom of Establishment for Companies in Europe (EU/EEA)*, cit., p. 111, and Ghetti, "Unification, Harmonisation and Competition in European Company Forms", cit., p. 825.

[130] Those critiques are reported by C. Gerner-Beuerle and M. Schilling, *Comparative Company Law*, OUP 2019, p. 384 *et seq*.

Common law systems, that typically belong to countries which adopt liberal policies, have traditionally allowed control-enhancing mechanisms such as dual class structures,[131] in the spirit of contractual freedom. The UK Companies Act 2006, inspired by the Delaware General Corporation Law,[132] allows companies to adopt both voting and non-voting preference shares, and it also allows—even though the matter has been controversial[133]—multiple voting shares. However, MVS are not common in the UK. The reason is probably that, as noticed above, the UK is an outsider system, which favours a fragmented ownership and the predominance of institutional investors, who are normally not attracted by companies issuing that type of shares. In particular, the Listing Rules issued by the Financial Conduct Authority introduce constraints and additional safeguards[134] for outside investors on the listing of companies with control-enhancing mechanisms, especially when those companies are willing to access the premium segment of the stock market.

The approach to the matter in continental Europe is significantly different. In Germany, MVS—which had already been subject to many constraints and restrictions such as a mandatory ministerial authorisation—were prohibited in 1998 by the Stock Corporation Act (*AktG*).[135] Instead, German law allows the articles of association to provide for voting caps,[136] but only if the company is not listed on a regulated market. Section 134(1) of the *AktG*, moreover, prohibits voting caps imposed on individuals, in order to prevent the avoidance of the rules regarding control-enhancing mechanisms. As a matter of fact, applying voting caps to some individuals but not to others would have in practice the same effect of allowing MVS. However, distinguishing between classes of shares, by applying voting caps only to some of them, is not prohibited.

---

[131] Dual class structures allow a company to issue both voting and non-voting shares. The latter are normally "preference" shares that compensate the reduced administrative rights with the enhancement of economic rights, such as preference in case of distribution of dividends.

[132] Title 8, Chapter 1 of the Delaware Code. It is the statute governing corporate law in Delaware.

[133] For an overview on this topic, see Gerner-Beuerle and Schilling, *Comparative Company Law*, cit., p. 386.

[134] An example is the mandatory appointment of independent directors by minority shareholders under Listing Rules 6.1.4B(2) and 9.2.2E.

[135] See Stock Corporation Act, section 12(2), amended by *Gesetz zur Kontrolle und Transparenz im Unternehmensbereich* (*KonTraG*), 1998, article 1(3). However, companies are allowed to adopt a dual structure of voting and non-voting preference shares.

[136] In the case C112/05 *Commission of the European Communities v Federal Republic of Germany* [2007] ECLI:EU:C:2007:623, a landmark case in the field of golden shares, the ECJ held that even though "the capping of voting rights is a common instrument of company law, also used in other Member States" (para. 31), the legal framework (in that case a specific German law known as "VW Law" which at the same time capped voting rights to 20%, required a majority of over 80% of the company's capital for the adoption of certain decisions by the general assembly, and allowed the State to appoint two members of the supervisory board) cannot enable State authorities "to exercise considerable influence on the basis of such a reduced investment" (para. 51). Otherwise, such a legal framework would be, in fact, incompatible with Article 63 TFEU, thus breaching free movement of capital. As the Court noticed, indeed, "by limiting the possibility for other shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, this situation is liable to deter direct investors from other Member States" (para. 52). An overview on golden shares is provided by D. Gallo, "On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments", *European Papers*, 2016, pp. 827-838, and M. Clarich, *Manuale di diritto amministrativo*, Il Mulino, 3rd edn, Bologna 2017, pp. 360-361.

The principle of equality amongst shareholders is also a traditional part of French company law.[137] Non-voting preference stocks (*actions de préférence sans droit de vote*) were introduced in 1978 but only for up to 25 per cent of the legal capital and as long as they carried increased dividend rights. However, the dual-class regime was only effectively implemented and rendered attractive in 2004.[138] Thanks to its reform, today French company law only requires that non-voting preference shares do not represent more than the half of the share capital. It is also possible to provide for voting caps in the articles of association. However, those shall apply to all shares, preventing discrimination amongst shareholders on the same line of reasoning of German law. In fact, French law goes even further as it does not allow the distinction between classes of shares for the purpose of setting voting caps.[139]
Recently, the strict adherence to the "one share, one vote" principle has been further mitigated in continental Europe. As capital markets have been consistently more affected by short-termism[140] and speculative strategies, legislators have looked for adequate tools for incentivising long-period investments. Accordingly, the main idea was to increase administrative rights (voting rights) in proportion to the duration of the ownership of the share (normally referring to the uninterrupted period during which common shares were registered in the so called 'loyalty register'). The ultimate result of this search has been the adoption of the so called "loyalty shares". Unlike MVS, loyalty shares do not necessarily belong to a special class of shares:[141] they can also be common shares owned by an individual shareholder to whom some voting privileges are assigned. Hence, those shares are not capable of transferring those privileges when they are transferred to a different owner.[142] Loyalty shares "attribute to their long-term holders increased voting rights"[143] and have two main aims: first, they facilitate the listing of shares and the increase of the float stock, so that shareholders are provided with a new defensive instrument against hostile takeovers, especially in the context of IPOs*;* second, loyalty shares incentivise stable ownership of shareholders, in order to allow the management to set long-term goals for the development of the company.

---

[137] See *Code de Commerce*, Article L225-122(1): *"[...] le droit de vote attaché aux actions de capital ou de jouissance est proportionnel à la quotité de capital qu'elles représentent et chaque action donne droit à une voix au moins".*

[138] *Ordonnance n° 2004-604 du 24 juin 2004 portant réforme du régime des valeurs mobilières émises par les sociétés commerciales et extension à l'outre-mer de dispositions ayant modifié la législation commerciale*.

[139] Pursuant to the *Code de Commerce*, article L225-125, "*les statuts peuvent limiter le nombre de voix dont chaque actionnaire dispose dans les assemblées, sous la condition que cette limitation soit imposée à toutes les actions sans distinction de catégorie, autres que les actions à dividende prioritaire sans droit de vote*".

[140] At the Brussels ECGI roundtable of 18 June 2018 "Loyalty shares", Z. Sautner defined "short-termism" as "taking measures that increase short-term performance at the cost of long-term value".

[141] On this important difference, see Campobasso, *Diritto Commerciale*, cit., p. 208, and Gerner-Beuerle and Schilling, *Comparative Company Law*, cit., p. 390.

[142] Save for the case of death of the shareholder, when the privilege can be inherited together with the inherited shares in countries like Italy.

[143] M. Ventoruzzo, "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", *European Corporate Governance Institute*, 2015, p. 1.

In the Netherlands, the implementation of a loyalty—*in casu* loyalty dividends—scheme was for the first time announced by the company Koninklijke DSM N.V. (DSM) in 2006. The plan of DSM was challenged by many investors on the ground of the shareholders' equality principle contained in Section 2:92, paragraph 1 of the Dutch Civil Code (*Burgerlijk Wetboek*). Even though loyalty shares were eventually never implemented by DSM, in 2007 the Dutch Supreme Court (*Hoge Raad der Nederlanden*)[144] ruled that "this provision [did] not contain a per se prohibition on financial differentiation between shareholders in the articles of association (even without creating a separate class of shares) provided that the arrangement [did] not contravene the general principle of equal treatment of shareholders".[145] Therefore, according to the *Hoge Raad*, the equality principle only applies to shareholders who are in the same position and thus need to be treated equally in equal circumstances. Hence, loyalty shares schemes should be in principle allowed, provided that all shareholders could, in theory, meet the requirements to access those schemes. Since that fundamental judgement, loyalty shares schemes have been often implemented in the Netherlands (where MVS were already allowed) even in the absence of a specific legal basis in Dutch company law. In short, Dutch law does not restrict companies from putting in their articles, at their discretion, loyalty shares schemes.

Following the Dutch path, an important step for continental Europe was taken by France in 2014 through its *Loi Florange*.[146] Thanks to the intervention of the French legislator, now the *Code de Commerce* allows—and in the case of listed companies it becomes even a default rule, unless disapplied by a resolution adopted by a qualified majority of two thirds of the shareholders' meeting—the doubling of voting rights for shareholders that have held their shares for at least two years.[147]

In contrast, Italy, which has historically adhered to the stricter German interpretation of the "one share, one vote" principle, allowed non-voting preference shares for non-listed companies[148] only in 2003 through its reform of company law. That reform, however, maintained the prohibition of MVS and loyalty shares.

On 1 August 2014, a few months after the French reform, the Italian company Chrysler-Fiat reincorporated in the Netherlands, also to take advantage of the control-enhancing system provided by Dutch law. Indeed, the company immediately issued "special voting shares" to shareholders who had kept their shares for at least three years. Ten days later, in reaction to the

---

[144] Rek.nr. 07/11510, 14 December 2007 [2007] ECLI: NL: HR: 2007: BB3523 on the appeal proposed by the public prosecutor in the interest of the law against the judgement of the *Amsterdam Gerechtshof* (Amsterdam Court of Appeal) in *Claimants v. Koninklijke DSM N.V. and Vereniging van Effectenbezitters*, 28 March 2007 [2007] ECLI:NL:GHAMS:2007:BA1717.

[145] J. Delvoie and C. Clottens, "Accountability and short-termism: some notes on loyalty shares", *Law and Financial Markets Review*, 2015, p. 21.

[146] *Loi n° 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle*; however, shares carrying loyalty dividends had been allowed since 1994 in Article L232-14 of the *Code de Commerce*.

[147] *Code de Commerce*, Article L225-123(1) provides that "*un droit de vote double de celui conféré aux autres actions, eu égard à la quotité de capital social qu'elles représentent, peut être attribué, par les statuts à toutes les actions entièrement libérées pour lesquelles il sera justifié d'une inscription nominative, depuis deux ans au moins, au nom du même actionnaire*".

[148] On the other hand, however, non-voting preference shares (*azioni di risparmio*) had been allowed for listed companies since 1974.

"shock of losing one of its better-known national champions",[149] the Italian legislator converted into law[150] the so called *"Decreto Competitività"*.[151] The new decree introduced MVS (up to a maximum of three votes per share) for non-listed companies,[152] even allowing them to keep that voting structure once listed. Moreover, the decree introduced loyalty shares, allowing the articles of association to double voting rights of the shares held for at least 24 months by a shareholder.[153] Interestingly, while in France a qualified majority is required to derogate from the default loyalty shares scheme provided by the law ("opt-out" regime), in Italy a supermajority is instead required for the introduction of loyalty shares ("opt-in" regime).

Whereas a majority of scholars believes that the implementation of Italian loyalty shares was clearly stimulated by reasons of regulatory competition,[154] there is also an alternative, minority view:[155] accordingly, the main reason for the reform was to protect Italian listed companies, whose capitalisation had been halved by the 2008 financial crisis, from hostile takeovers, and the aim of rendering the Italian system more attractive could only have had, if any, a secondary role. In particular, it is argued that there is no proven link between loyalty shares and corporate mobility. In fact, on the one hand, even after the introduction of loyalty shares other Italian companies such as Ferrari,[156] Exor[157] and Campari[158] have migrated to the Netherlands and

---

149 Ventoruzzo, "The Disappearing Taboo of Multiple Voting Shares", cit., p. 3.

150 *Legge 11 Agosto 2014, n. 116*.

151 See *supra* note 102.

152 In 2020, the so called "*Decreto Rilancio*" (*Decreto-Legge 19 maggio 2020, n. 34, Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19*) has extended the faculty of issuing MVS also to listed companies. This rule has been provided in the context of a series of measures aimed at preventing the risk of hostile takeovers against Italian companies whose financial situation has been endangered by the pandemic crisis.

153 Article 127-*quinquies* of the *Decreto Legislativo 24 febbraio 1998, n. 58 (TUF), Testo unico delle disposizioni in materia di intermediazione finanziaria*, provides that *"gli statuti possono disporre che sia attribuito voto maggiorato, fino a un massimo di due voti, per ciascuna azione appartenuta al medesimo soggetto per un periodo continuativo non inferiore a ventiquattro mesi [...]"*.

154 This view is also supported by the name by which the reform has been called: "*competitività*" means "competitiveness". See also R. Galullo and A. Mincuzzi, "Da Mediaset a Fiat-Chrysler: perché l'Olanda è il paradiso delle holding", *Il Sole 24 Ore*, 8 June 2019, available at <https://www.ilsole24ore.com/art/mediaset-fiat-chrysler-e-rolling-stones-ecco-perche-l-olanda-attrae-grande-business-ACLjeHP>.

155 This theory is proposed by G. D. Mosco, "Voto maggiorato: prime verifiche d'effettività e prospettive di riforma", in Nuzzo, Palazzolo (eds.), *Disciplina delle Società e Legislazione Bancaria*, cit., pp. 198, 200-203.

156 In 2013 the Italian Ferrari S.p.A. was merged by absorption in the Dutch New Business Netherlands N.V., renamed Ferrari N.V. in 2015.

157 In 2016 the Italian Exor S.p.A. was merged by absorption in the Exor Holding N.V., renamed Exor N.V.

158 However, in 2020, when the Italian Davide Campari - Milano S.p.A. reincorporated in the Netherlands as Davide Campari - Milano N.V., in the press release "Campari Group Announces the Transfer of Registered Office of Davide Campari-Milano S.P.A to the Netherlands", 2020, available at <https://www.camparigroup.com/en/campari-group-announces-transfer-registered-office-davide-campari-milano-spa-netherlands>, the group held that "from a strategic standpoint, through the transfer of the registered office in the Netherlands and the simultaneous introduction of an enhanced voting rights mechanism compared to the current double voting rights mechanism already adopted by the Company, Campari intends to pursue the following objectives: [(*i*)] adopting a flexible share capital structure [...]; [(*ii*)] rewarding long-term shareholders more effectively and extensively [...]; [(*iii*)] benefitting from a highly recognized and appreciated corporate law framework by international investors and market operators [...]".

adopted “special voting shares”. On the other hand, it is also arguable that many other companies which might have benefited from other jurisdictions’ flexible voting systems were not attracted enough to migrate.

The two theories are not necessarily incompatible. It is probably true that, even though control enhancing mechanisms are not *per se* a sufficient reason to justify corporate mobility, they can be one of those reasons. As such, they contribute to regulatory competition to the extent by which they are taken into account together with other factors discussed (i.e. taxation, other corporate governance matters) or mentioned (e.g. labour, capital market structure, antitrust policy, efficiency of the judicial system) in this work. Indeed, it cannot be denied that there is a strong relationship between control-enhancing systems and takeover law, and that the former can play an important role in the context of defensive strategies against hostile takeovers, rendering MVS and, especially, loyalty shares particularly attractive for controlling shareholders.

A new chapter of this saga has been recently opened by the judgement rendered by the Amsterdam Court of Appeal (*Gerechtshof*) on 1 September 2020 in *Mediaset* case.[159] Mediaset S.p.A. is an Italian mass media company controlled by the Italian holding Fininvest S.p.A., which holds 44% of Mediaset’s shares. In 2016 Fininvest accused Vivendi S.A., a French company holding a 29% stake in Mediaset, of having adopted a fraudulent strategy in order to lower the stock price with the aim of facilitating the takeover of Mediaset.[160] This complex litigation has gradually reached an intricate multi-jurisdictional dimension. In particular, Vivendi has requested the *Amsterdam Gerechtshof* to block a cross-border merger by incorporation between Mediaset Italia and Mediaset España. The result of this merger, a newly incorporated Dutch holding entity,[161] would be aimed at the creation of a European Media Hub. The new Dutch entity would adopt a loyalty shares scheme that, according to Vivendi, would unreasonably disadvantage the position of the French company. Surprisingly, the *Amsterdam Gerechtshof* agreed with Vivendi and blocked the merger.

Even though it is not clear yet whether or not this judgement will be capable of overruling the *DSM* judgement, it is possible to imagine that the adoption of loyalty shares schemes in the future will need careful justification in order to avoid the challenges coming from minority shareholders. In particular, the Dutch Court observes in the ruling that the aforementioned Section 2:92 of the Dutch Civil Code was aimed at the implementation of article 42 of the Second Company Law Directive (now article 85 of Directive 2017/1132), which states that “the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position”. Therefore, the Dutch provision shall be interpreted by taking into account the CJEU case law, even when it is applied to subjects which do not immediately fall into the scope of the Directive. Consequently, given that loyalty shares schemes breach the principle of equality amongst shareholders, they need an objective justification. The justification, in addition, must

---

[159] *Vivendi S.A. v. Mediaset Investment N.V.* [2020] ECLI:NL:GHAMS:2020:2379.

[160] F. Gerosa, “Mediaset, Vivendi e Simon chiedono l'iscrizione al registro del voto maggiorato in Olanda”, *Milano Finanza*, 22 August 2019, available at <https://www.milanofinanza.it/news/mediaset-vivendi-e-simon-chiedono-l-iscrizione-al-registro-del-voto-maggiorato-in-olanda-201908221141104018>.

[161] B. Cornelisse, M. S. Damsté, M. van Agt, B Kemp and P. Hezer, “Recent developments in Dutch loyalty share schemes”, 2020, available at <https://www.lexology.com/library/detail.aspx?g=f7198b73-a946-4a2e-95c5-8370d2733f2c>.

meet the requirements of a four-prong test similar to the test provided by the ECJ[162] for the assessment of restrictive measures in the context of the four fundamental measures: *(i)* it must be introduced for a legitimate aim; *(ii)* it must be suitable for reaching that aim ("suitability" or "appropriateness");[163] *(iii)* it must be necessary, meaning that there must not be equally effective available means that would have a less negative impact on the position of shareholders ("necessity"); and *(iv)* it must be proportionate *strictu sensu*, meaning that the disadvantages it brings cannot outweigh the advantages, taking into account all the various interests involved that should be balanced ("balancing stage").

The decision of the Dutch court, however, is not satisfying with regards to a number of aspects. It is not clarified, for example, whether it is the scheme structure or the applicability of the scheme itself that should be scrutinised through this test. It can be thus whether the EU is aware of the growing need for uniform rules on the matter. The answer to that question probably lies in the process that brought to the Shareholder Rights Directive II (SHRD II).

In particular, even though the report[164] drafted by the Reflection Group on the future of EU company law[165] recommended the adoption of a regulation seeking to incentivise long-term, stable shares ownership through instruments such as loyalty shares,[166] neither the Commission's Action Plan 2012[167] nor the subsequent SHRD II, which is aimed at encouraging shareholder engagement in the long-term, mention loyalty shares offering enhanced voting or dividend rights. This is true notwithstanding that, in its opinion on first reading, the European Parliament had proposed the amendment of recital 9(a) of the SHRD II providing that "in order to encourage positive and long-term shareholder engagement, mechanisms incentivising long-term shareholding should be put in place".[168] Moreover, the Parliament had also gone further by proposing a new article 3(e)(a) which explicitly mentioned loyalty shares, providing that a "[...] Members State shall define the qualifying period in order to be considered a long-term shareholder, but this period shall not be less than two years. The mechanism [...] shall include one or more of the following advantages for long term shareholders: additional voting rights; tax

---

162 For an overview on the case law of the Court of Justice on the proportionality test see, amongst others, G. Scaccia, "Proportionality and the Balancing of Rights in the Case-law of European Courts", *Federalismi.it*, 2019, p. 8 *et seq*.

163 See V. Kosta, "The Principle of Proportionality in EU Law: An Interest-based Taxonomy", in J. Mendes (ed.), *EU Executive Discretion and the Limits of Law*, OUP 2019, pp. 198-199, where the author observes that the distinction between step *(i)* and *(ii)* is traditional of German law, whereas the ECJ normally considers them together.

164 Reflection Group on the future of EU company law, "Report of the Reflection Group on the future of EU company law", Brussels, 5 April 2011, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851654>.

165 The Group was established in 2010 by the Commission to provide a report for a conference to be held in Brussels during May 2011.

166 See "Report of the Reflection Group on the future of EU company law", cit., paragraph 3.1.3 ("Long term ownership"): "[...] The Group therefore feels that EU regulation should seek to secure that companies all across the EU have the option (clearly EU regulation would have an enabling character) to include clauses allowing for differential voting rights or additional profit distribution rights in their Articles of association".

167 See *supra* note 2.

168 Committee on Legal Affairs of the European Parliament, "Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement", 2015, amendment n. 6.

incentives; loyalty dividends; loyalty shares".[169] It is not clear why the Parliament abandoned that position in its opinion on first reading in 2017.

Significantly, however, in the draft bill[170] recently issued by the Spanish Ministry of Economy loyalty shares are introduced in the *Ley de Sociedades de Capital* within the context of the (albeit late) implementation of SHRD II. The draft bill, highly criticised by Spanish literature,[171] follows the path given by Italy and proposes an "opt-in" system. The Spanish case might suggest that, although the SHRD II does not explicitly concern them, loyalty shares are now considered by Member States a priority for the purposes and in the fields covered by the Directive.

Lastly, it has been noticed above[172] that takeover law is unavoidably involved in control-enhancing mechanisms and "tenured voting" matters. Such involvement is confirmed, for example, by the fact that the aforementioned Italian *Decreto Competività*, introducing MVS and loyalty shares, was integrated with the revision of the Italian system of thresholds concerning mandatory public offers. The question that arises, indeed, is whether and how tenured voting should be considered when calculating those thresholds.

The Takeover Bids Directive does not include shareholders' agreement, which are another example of alteration of the relationship between ownership and control, amongst the events capable of triggering the public offer obligation.[173] However, in Italy and France the votes acquired thanks to control-enhancing mechanisms are taken into account in order to assess when the mandatory offer obligation arises. Consequently, it has been argued that "tenured voting also represents a response to regulatory competition within Member States. In this respect, however, Europe is a special environment, where regulation—specifically, takeover regulation—strongly influences companies and shareholders to efficiently bargain in shaping the most appropriate structure of their voting power" and that "deviations from the one share, one vote principle at the level of single Member States may require a tailor-made adaptation of the law, touching sensible areas for the integrity of the European market and bearing the risk of excessive fragmentation across Europe".[174]

---

[169] *Ibid.*, amendment n. 42.

[170] *Anteproyecto de Ley por la que se modifica el texto refundido de la Ley de Sociedades de Capital, aprobado por el Real Decreto Legislativo 1/2010, de 2 de julio, y otras normas financieras, para adaptarlas a la Directiva (UE) 2017/828 del Parlamento Europeo y del Consejo, de 17 de mayo de 2017, por la que se modifica la Directiva 2007/36/CE en lo que respecta al fomento de la implicación a largo plazo de los accionistas*.

[171] See, amongst the others, A. G. Martínez, "The Case Against the Implementation of Loyalty Shares in Spain", *Oxford Business Law Blog*, 2019, available at <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/case-against-implementation-loyalty-shares-spain> and J. C. González Vázquez, "The So-Called Loyalty Shares: An Unnecessary Mistake (Albeit An Avoidable One)", *The Corner*, 24 November 2020, available at <https://thecorner.eu/spain-economy/the-so-called-loyalty-shares-an-unnecessary-mistake-albeit-an-avoidable-one/90925/>.

[172] See also C. Mosca, "Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law", *Michigan Business & Entrepreneurial Law Review*, 2019, p. 272 *et seq*.

[173] Nevertheless, Article 5(1) of the Directive provides that "where a natural or legal person, as a result of [...] the acquisition by persons acting in concert with him/her, holds securities of a company [...] which, added to any existing holdings [...] of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company".

[174] Mosca, "Should Shareholders Be Rewarded for Loyalty?", cit., p. 280.

In conclusion, regulatory competition seems to have stimulated spontaneous transnational convergence in the field of control-enhancing mechanisms that has provided national company laws with efficient tools in order to enhance shareholding stability and tackle speculative short-termism. However, this phenomenon does not seem effective enough to satisfy the need for legal certainty and avoid potential harmful effects deriving from some crucial differences between Member States' corporate laws. Hence, with all of this taken into consideration, an intervention of harmonisation at the EU level, albeit not foreseen in the short-term, appears desirable.

IV. Concluding remarks. Corporate governance as an insufficient albeit complementary incentive for cross-border reincorporation

It has been noted that "there is no uniform assessment of company law harmonization in the European Union".[175] Indeed, literature is divided between those authors who believe that it has been a successful process and those who think instead that the European effort to regulate the subject has proved to be a failure.[176]

It can be argued that transnational convergence of corporate governance within the European context has often been limited by the significant room for manoeuvre conceded to national lawmakers. Consistent with the concept of "reflexive governance", neither "top-down" nor "bottom-up" harmonisation have fully taken place.

On the one hand, pure "top-down" harmonisation, such as the one provided by first-generation directives or by the SE Regulation,[177] seems unsuitable to take into account the path dependence of corporate governance. Indeed, the shift from a German to a UK-inspired model, particularly evident after *Centros*, has not avoided the polarisation into two, sometimes competing, positions: outsider and insider systems. Whereas the premises are purely theoretical and concern the way in which company law looks at the corporate purpose, the outcomes of those different approaches can be seen in practice in the most part of legislative choices made by Member States. Therefore, even though "the divergent EU countries were member states in a transnational federation with legislative and executive authority, which on many dimensions sought to 'harmonize' local regimes" and "company law and corporate governance practices seemed a natural target"[178] for that process of integration, practical cases have shown that the balance between transnational convergence and path dependence has not been found in a series of matters. Those matters, in turn, have provided companies with various available regimes they could opt for.

On the other hand, "bottom-up" harmonisation, meaning in this case that companies could in theory all opt for the "best" corporate governance structure offered across the EU, is hindered by the different features, strategies, and objectives that each company has. This path dependence, in

---

[175] Gelter, "EU Company Law Harmonisation", cit., p. 3.

[176] *Ibid.*; on the same topic see also J. N. Gordon, "Convergence and Persistence in Corporate Law and Governance", in Gordon and Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance*, cit., p. 28 *et seq.*

[177] Nevertheless, it has been argued that a weakness of the SE Regulation is in fact to leave too many important matters to the discretion of national laws. See for example Mannan and Wuisman, *Freedom of Establishment for Companies in Europe (EU/EEA)*, cit.

[178] Gordon, "Convergence and Persistence in Corporate Law and Governance", cit., p. 51.

fact, precludes the possibility of finding an absolute “best” or “most convenient” corporate governance. Furthermore, factors such as legal uncertainty and re-incorporation costs, which often outweigh the benefits deriving by the adoption of a specific *lex societatis*, render regulatory arbitrage less attractive for companies when its very purpose lends itself only to corporate governance advantages.

With all this taken into consideration, some limited forms of legal arbitrage have taken place. Especially, corporate governance issues seem to have played a complementary role: despite appearing insufficient when considered independently, they have often contributed to a justification for corporate mobility when considered together with other reasons (primarily fiscal advantages). In general, companies have been looking for flexible regimes with regards to matters such as shareholder rights and obligation. Consequently, countries like the UK or the Netherlands, which provide liberal shareholder-oriented solutions, have been particularly successful in the market for (re)incorporations.

In turn, mechanisms of regulatory competition and consequent convergence took place. The efforts of the EU legislator to keep the pace with those dynamics were not always successful. Instead, national courts (e.g. the Dutch court on the loyalty share schemes cases) and governments (e.g. the Italian government intervention after Chrysler-Fiat reincorporation in the Netherlands) have often intervened and reshaped the subjects before the proposed directives and regulations could enter into force and harmonise a certain sector.

The last question concerns the assessment of the effects that this competition can cause within the regulatory framework of corporate governance. In general, it was noticed that regulatory competition in this field is more likely a race to the top. This is especially true when it is compared to tax competition. Indeed, it can be observed that corporate governance models are always non-discriminatory, thus there is no room for “targeted competition”, meaning that neither better conditions nor preferential regimes are offered exclusively to foreign investors. Moreover, the advantages provided by certain governance structures are relative and subjective, whereas the advantage provided by tax competition is always monetarily quantifiable and necessarily entails a diminution of tax income and the consequent reduction of public expenditure and welfare. Ultimately, while those stakeholders which are more exposed to the risk of negative externalities (mainly creditors) benefit from the success of the company under normal conditions, on the contrary the social system usually suffers from the harm caused by the diminution of tax income.

In particular, within the EU, regulatory competition related to corporate governance matters has generally been a tool for the enhancement of the correspondence between small and medium-sized enterprises (efficient legal forms and accessible capital requirements), core to the European economy, and adequate legal structures that could boost their potentiality instead of hindering their development. It seems, therefore, that competition between corporate law systems pursue the optimal allocation of resources. Hence, it appears highly compatible with the main goal of the internal market.

Nevertheless, the spontaneous transnational convergence stimulated by regulatory competition seems to have also left some grey areas of legal uncertainty, such as in the case of control-enhancing mechanisms, within which positive integration might be desirable in order to avoid harmful asymmetries.

In conclusion, all things considered, Brexit will probably be particularly harmful for this sector. Indeed, the UK has traditionally acted as a leading and powerful innovator at EU level and stimulating competitor at national level. It is, however, too soon to gauge the damage caused by the loss of a key-actor in the encouragement and promotion of this race to the top.

Bibliography

M. Andenas and F. Wooldridge, *European Comparative Company Law*, CUP 2009.

J. Armour, "Legal Capital: An Outdated Concept?", *European Business Organization Law Review*, 2006, p. 5.

P. Atrill and E. McLaney, *Accounting and Finance for Non-Specialists*, Pearson, 10th edn., London 2017.

L. Bebchuk and M. J. Roe, "A Theory of Path Dependence in Corporate Ownership and Governance", *Stanford Law Review*, 1999, p. 127.

T. Biermeyer and M. Meyer, "Cross-border Corporate Mobility in the EU: Empirical Findings (Vol. 2)", ETUI, 2019, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477495>.

T. Biermeyer and M. Meyer, "The Use of Corporate Mobility Instruments and Brexit: An Empirical Analysis", *European Company Law*, 2020, p. 15.

G. F. Campobasso, *Diritto Commerciale. Diritto delle Società (vol. 2)*, UTET, 2nd edn, Turin 2015.

M. Clarich, *Manuale di diritto amministrativo*, Il Mulino, 3rd edn, Bologna 2017.

D. Corapi, "Corporate Governance", in A. Nuzzo, A. Palazzolo (eds.), *Disciplina delle Società e Legislazione Bancaria. Studi in Onore di Gustavo Visentini*, LUISS University Press, Rome 2020, p. 90.

B. Cornelisse, M. S. Damsté, M. van Agt, B Kemp and P. Hezer, "Recent developments in Dutch loyalty share schemes", 2020, available at <https://www.lexology.com/library/detail.aspx?g=f7198b73-a946-4a2e-95c5-8370d2733f2c>.

S. Deakin, "Regulatory Competition Versus Harmonisation in European Company Law", *ESRC Centre for Business Research*, Working Paper 163-2000.

S. Deakin, "Reflexive Governance and European Company Law", *European Law Journal*, 2009, p. 224.

J. Delvoie and C. Clottens, "Accountability and short-termism: some notes on loyalty shares", *Law and Financial Markets Review*, 2015, p. 19.

H. Eidenmüller, A. Engert and L. Hornuf, "Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage", *European Business Organization Law Review*, 2009, p. 1.

H. Eidenmüller, “Collateral Damage: Brexit’s Negative Effects on Regulatory Competition and Legal Innovation in Private Law”, *European Corporate Governance Institute*, Working Paper 403-2018.

H. Eidenmüller, “Comparative Corporate Insolvency Law”, in J. N. Gordon, W. Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance*, OUP 2018, p. 1003.

L. Enriques and J. R. Macey, “Creditors Versus Capital Formation: The Case against the European Legal Capital Rules”, *Cornell Law Review*, 2001, p. 1165.

I. Ferrero Ferrero and R. Ackrill, “Europeanization and the Soft Law Process of EU Corporate Governance: How Has the 2003 Action Plan Impacted on National Corporate Governance Codes?”, *Journal of Common Market Studies*, 2016, p. 878.

D. Gallo, “On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments”, *European Papers*, 2016, p. 823.

R. Galullo and A. Mincuzzi, “Da Mediaset a Fiat-Chrysler: perché l’Olanda è il paradiso delle holding”, *Il Sole 24 Ore*, 8 June 2019, available at <https://www.ilsole24ore.com/art/mediaset-fiat-chrysler-e-rolling-stones-ecco-perche-l-olanda-attrae-grande-business-ACLjeHP>.

M. Gelter, “EU Company Law Harmonisation between Convergence and Varieties of Capitalism”, *European Corporate Governance Institute*, Working Paper 335-2017, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977500>.

C. Gerner-Beuerle, F. M. Mucciarelli, E. Schuster and M. Siems, “Why Do Businesses Incorporate in Other EU Member States? An Empirical Analysis of the Role of Conflict of Laws Rules”, *International Review of Law and Economics*, 2018, p. 14.

C. Gerner-Beuerle F. Mucciarelli, E. Schuster and M. Siems, “The Illusion of Motion: Corporate (Im)Mobility and the Failed Promise of Centros”, European Business Organization Law Review, 2019, p. 425.

C. Gerner-Beuerle and M. Schilling, *Comparative Company Law*, OUP 2019.

F. Gerosa, “Mediaset, Vivendi e Simon chiedono l'iscrizione al registro del voto maggiorato in Olanda”, *Milano Finanza*, 22 August 2019, available at <https://www.milanofinanza.it/news/mediaset-vivendi-e-simon-chiedono-l-iscrizione-al-registro-del-voto-maggiorato-in-olanda-201908221141104018>.

R. Ghetti, “Unification, Harmonisation and Competition in European Company Forms”, *European Business Law Review*, 2018, p. 813.

S. L. Gillan and J. D. Martin, “Corporate Governance post-Enron: Effective Reforms, or Closing the Stable Door?” *Journal of Corporate Finance*, 2007, p. 929.

R. J. Gilson, “From Corporate Law to Corporate Governance”, in J. N. Gordon, W. Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance*, OUP 2018, p. 3.

J. C. González Vázquez, "The So-Called Loyalty Shares: An Unnecessary Mistake (Albeit An Avoidable One)", *The Corner*, 24 November 2020, available at <https://thecorner.eu/spain-economy/the-so-called-loyalty-shares-an-unnecessary-mistake-albeit-an-avoidable-one/90925/>.

J. N. Gordon, "Convergence and Persistence in Corporate Law and Governance", in J. N. Gordon, W. Ringe (eds.), *The Oxford Handbook of Corporate Law and Governance*, OUP 2018, p. 28.

H. Hansmann and R. Kraakman, "The End of History for Corporate Law", *Yale International Centre for Finance*, 2000, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=204528>.

V. Kosta, "The Principle of Proportionality in EU Law: An Interest-based Taxonomy", in J. Mendes (ed.), *EU Executive Discretion and the Limits of Law*, OUP 2019, p. 198.

M. Mannan and I. Wuisman, *Freedom of Establishment for Companies in Europe (EU/EEA)*, Ars Aequi Libri, Nijmegen 2019.

A. G. Martínez, "The Case Against the Implementation of Loyalty Shares in Spain", *Oxford Business Law Blog*, 2019, available at <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/case-against-implementation-loyalty-shares-spain>.

D. Millon, "Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law", *Washington & Lee Public Legal Studies Research Paper Series*, Working Paper 11-2010, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625750>.

C. Mosca, "Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law", *Michigan Business & Entrepreneurial Law Review*, 2019, p. 245.

G. D. Mosco, "Voto maggiorato: prime verifiche d'effettività e prospettive di riforma", in in A. Nuzzo, A. Palazzolo (eds.), *Disciplina delle Società e Legislazione Bancaria. Studi in Onore di Gustavo Visentini*, LUISS University Press, Rome 2020, p. 195.

G. B. Portale, "Il Diritto Societario tra Diritto Comparato e Diritto Straniero", *Rivista di Diritto Societario*, 2013, p. 325.

G. Scaccia, "Proportionality and the Balancing of Rights in the Case-law of European Courts", *Federalismi.it*, 4-2019, available at <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38092>.

W. Schön, "Playing Different Games? Regulatory Competition in Tax and Company Law Compared", *Common Market Law Review*, 2005, p. 331.

W. Schön, "Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence", in I. Richelle, W. Schön and E. Traversa (eds.), *State Aid Law and Business Taxation*, Springer, Berlin Heidelberg 2016, p. 3.

W. Schön, “The Future of Legal Capital”, *European Business Organization Law Review*, 2004, p. 429.

M. Ventoruzzo, “The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat”, *European Corporate Governance Institute*, Working Paper 288-2015, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574236>.