Chapter 4
From harmonisation to regulatory competition

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1. Introduction

Over recent decades the shift in EU policy on corporate law issues has been remarkable.[1] During the initial period of EU company law making, mainstream policy was characterised by the goal of harmonising the legal framework for companies all over Europe. According to that approach, the internal market needed to be established through a regulatory programme leading to a stable, non-competitive equilibrium. This was to be based on an EU corporate law regime which guarantees a level playing field between the Member States.

However, under the influence of neo-liberal ideology and following the entrance of the more Anglo-Saxon style according primacy to economic freedoms, which quickly gained ground also in the corporate law community, the legal framework for companies itself became a factor of competition, comparable to other factors such as infrastructure, labour costs or mobility. The new purposes of company law were: flexible models, freedom of choice in relation to establishment, cost reduction, easy set-up and other simplification measures.

The moment of this shift lies somewhere in the early 1990s. In hindsight, the first important impulse at European level came with the conclusion of the Maastricht Treaty in 1992. The subsidiarity principle introduced into EU legislative procedures in that period facilitated a transition from harmonisation to 'soft' law making and open coordination. The Lisbon strategy formulated at the Council meeting in early 2000 emphasised the notion that the Union had to become an entrepreneurial, innovative

1. On this shift see also Horn (2011a and 2011b).

and open Europe. According to the Lisbon Council, the competitiveness and dynamism of businesses were directly dependent on a regulatory climate conducive to investment, innovation, and entrepreneurship. Therefore, further efforts were required to lower the costs of doing business and to remove unnecessary red tape (European Council 2000: conclusions 14 and 15).

This development can be seen as the political expression of an underlying paradigm change in the socio-economic field. Since the late 1990s, the objectives of strengthening shareholders rights and protection for third parties went hand in hand with the aim that company law 'should provide for a flexible framework for competitive business' (High Level Group of Company Law Experts 2002a and 2002b). According to this view, EU harmonisation should strive to further the trend towards increased flexibility and freedom of choice in respect of company forms. In May 1996 the SLIM initiative – Simpler Legislation for the Internal Market – was launched by the European Commission with the objective of identifying ways in which the Single Market legislation could be simplified. The fourth phase of SLIM launched in 1998 included the area of company law. This measure exemplifies the political climate which led to a distinct change in the EU approach. Initially, policy had aimed at providing equivalent safeguards throughout the EU for those who are involved in and affected by the affairs of a company with a view to preventing a race to the bottom. In contrast, the new policy had to facilitate the running of efficient and competitive enterprises in order to 'meet companies' needs'. Legal harmonisation had become 'outdated'. Instead, the legal framework became a factor of competition.

The main messages in communications from the European Union on company law over the past decade became 'smart regulation' and, since 2008, a particular emphasis on 'strategic action plans to reduce the administrative burden'. The competitiveness of the European economy has been the central point of concern and with its Better Regulation agenda (discussed in detail in section 4) the European Commission raised new expectations, especially among small and medium-sized enterprises (SMEs). Better Regulation is seen as a dynamic process that does not simply concern drafting rules but also includes the proper implementation and enforcement of the law by Member States.

In general, the justification for the Better Regulation agenda is the claim that regulatory frameworks in the EU are too unwieldy and complex.

This is seen as a major handicap on EU competitiveness, crippling European companies in relation not just to their US partners but also to emerging competitors coming from Brazil, Russia, India, China and South Africa ('BRICS') (BusinessEurope 2011). However, on Member State agendas with regard to company law, the main worries are not related to the US or emerging competitors. Apart from the presence of skilled labour, logistics and infrastructure, and host country location, all of which are seen as key factors determining business location decisions, companies nowadays weigh up a number of drivers when deciding in which country their registered office and/or head office should be located: national company law for the purpose of group restructuring or rationalising and harmonising the corporate structure of the cross-border group; the possibility of freely transferring the registered office; and above all, tax minimisation possibilities.

The deregulation policy that characterises current national and EU company law reform leads to a situation of an emerging transnational legal pluralism that, in the long run, might stimulate regime-shopping inside the EU rather than contribute to a more sustainable legal setting. This was in fact already expressed as an aim of EU policy in 2002 by the High Level Group of Company Law Experts in their plea for a light regulatory regime: the European Single Market is becoming more and more of a reality and business will have to become competitive *within* this market. Corporate regulation is supposed to serve that purpose.

This chapter is largely based on the results of an inquiry on the interaction of European and national company law, conducted by a unique network of academic and trade union experts, the SEEurope Network. The next section provides information on the network and its inquiry. Section 3 is dedicated to the flagship of EU company law, the SE statute. This is followed by a section on the Better Regulation agenda and whether there is evidence at national level for such an agenda. Section 4 also deals with the interplay between EU and national company law. Section 5 is dedicated to the changes in national company law in recent years followed by a section that deals with significant national disputes on two prominent drivers, attractiveness and competitiveness. In the final section at the end of this contribution serious question marks are raised concerning the role of different actors, including the role of the trade unions in this debate. Some critical comments are formulated with regard to the policy promoted, ending with a plea for an agenda that is more oriented to a stakeholder approach to corporate law reform.

2. The SEEurope inquiry

SEEurope is a project conducted by an international network of researchers under the leadership of the European Trade Union Institute. The project, which started in 2004, began by observing the transposition into national law of the European legal obligations related to the Regulation on the Statute for a European Company (SE). From that moment on, SEEurope research and monitoring in the field of European corporate law has been conducted with a view to meeting the needs of all practitioners in Europe involved in the founding of an SE and in the policy debate on participation issues in their countries. The network seeks to improve workers' negotiating position by offering information on existing systems of board-level representation and to promote a better understanding of participation among worker and trade union representatives. In addition, SEEurope sees its role as a provider of practical evidence-based research on these issues for the EU institutions.

The SEEurope network worked on a comparative exploratory inquiry in 2011 on national and European corporate law reform. In the resulting research report, which was partly based on national contributions of the network members, the conclusion was that a prominent element of recent national company law reforms has been the effort to outbid direct neighbours (Cremers and Wolters 2011).

The SEEurope inquiry collected information on the possible interaction between EU and national law. The SEEurope experts were asked to analyse in their respective countries whether EU provisions had triggered changes in national legislation or whether there were indications of upcoming developments referring to or anticipating future EU legislation in this field. In parallel, it was investigated whether EU/EEA Member States had requirements that needed to be addressed at the EU level and, if so, what those requirements involved.

The aim was to compile critical developments in order to be able to make a substantial contribution to the EU discussion. It needs to be made clear that EU legislation (and the interaction between national and EU rules) in the field of corporate law should not invite or contribute to regime shopping. In contrast, EU rules should include essentials that contribute to decent rules at national level. The race to the bottom cannot be the main objective of EU policy.

The inquiry did not provide a complete overview of all recent changes in national company law regimes, as this would have been far too ambitious. The investigations pinpointed a few items indicative of the changes in national company law. The focus was on the general characteristics of the changes. The result was therefore not an exhaustive update. The changes highlighted were, for instance, changes with regard to the initial capital requirements (such as one euro companies) and other capital position related issues; changes with regard to the balance of power and to liability (versus minority shareholders, creditors and workers); changes with regard to mandatory financial audits, registration and control; and, finally, changes with regard to arbitration, the protection of stakeholders and the settlement of disputes. In analysing these findings, particular emphasis was placed on the fact that, in recent years, the improvement of transparency and related items of disclosure and information have been put on the agenda. The involvement of different actors in the debate and the impact on worker involvement were also important references in this analysis.

3. The SE case in a nutshell

The EU's objective in establishing different forms of European company statutes, of which the SE Regulation was the most distinct, was to better meet companies' ever-changing needs. However, the most prominent project of harmonisation of European company law, the adoption of the European Company statute (SE), has not become the flagship of a series of successful European statutes. The different statutes (the SE, the SCE for cooperatives, the planned SFE for foundations, and the long pending SPE for private limited companies) were each supposed to provide a corporate vehicle that was uniform and legally certain, yet flexible in order to help companies do business more easily in Europe.

After a decision making process lasting 30 years, the EU Council agreed in December 2000 on the general principles for a Regulation on the Statute for a European Company (Societas Europaea, hereafter SE). The SE Regulation (Regulation (EC) No 2157/2001)[2] and the Council Directive supplementing the Statute for a European Company with regard to the

2. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1.

involvement of employees (SE Directive)[3] were adopted on 8 October 2001. In the slipstream of the SE, the Regulation on the European Cooperative Society (SCE) and the Directive on employee involvement in the SCE were concluded in July 2003.[4] The SE legislation entered into force on 8 October 2004 and, by mid-2007, all EU countries had transposed it into national law. The main purpose of the SE statute was to enable companies to operate their businesses on a cross-border basis under the same corporate regime. Companies could move across borders in the EU by moving their registered seats and headquarters. The aim was *an approximation of Member States' company law* (recital 3 in the preamble to the SE Regulation).

The starting point for any comparison between the attractiveness of national company law and the EU statute was the assumption that the SE might represent an interesting alternative to a domestic public limited liability company. This would be true in cases where there are major differences between the SE statute and national rules and procedures. In the meantime it has become clear that the SE statute has neither resulted in a uniform legal form across the EU nor in a convergence of corporate regimes (Ernst & Young 2009). The SE statute contains several references to national law and, behind its uniform facade, the SE statute is governed mainly by national legislation in various forms. Different documents produced by European Commission services confirm that, in the majority of Member States, the status accorded to an SE is little different from that of a domestic public limited liability company (European Commission 2010b and 2010c). The Reflection Group on the Future of EU Company Law recommended that the Commission should prepare a reform of the SE Regulation, as is required in the initial legislation, and take inspiration from the flexibility available to national companies. According to this Group, the amended Regulation should be simplified, which means that it should limit as much as possible the options offered to the Member States to determine the terms of application of the SE statute (Reflection Group 2011: 30).

3. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.
4. Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1, and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.8.2003, p. 25.

The SE Regulation required the European Commission to present a report on its application, including proposals for amendments where appropriate, five years after its entry into force. DG Internal Market and Services commissioned Ernst & Young to carry out this study, which was finalised in December 2009 and published on the Commission's website in March 2010 (Ernst & Young 2009). Furthermore, the European Commission launched an online consultation to test the outcome of the study (European Commission 2010a), while at the same time organising a conference on the SE statute. The aim of these activities was to examine the Ernst & Young findings and to provide the Commission with input on issues relevant for the assessment (European Commission 2010b). As the discussion on the Ernst & Young report shows, there is a very mixed assessment of the importance of the SE for companies. The argument that it strengthens the European profile or identity of a company has slowly vanished from the scene, and where it is still present, is basically used as a marketing tool.

Putting it in rather euphemistic terms, the SE Regulation has not 'encountered the overall success expected' (Ernst & Young 2009). The convergence effect has failed as the SE, behind its unified image, is still governed by different national corporate law regimes. In this respect, one could conclude that the ideas related to uniformity or approximation that the EU legislature sought to achieve were already history at the moment of the SE's adoption. The SE form was limping between two approaches: its starting point dated from the early stage of corporate lawmaking based on ideas of harmonisation and convergence, whereas its adoption and transposition into national law took place in a period when corporate policy had shifted to the paradigm of competitive legal pluralism.

In a critical assessment, the ETUI and its SEEurope network formulated several observations that had been neglected hitherto in the debate on the effect and functioning of the SE statute (see Cremers *et al.* 2010). A key point of the ETUI's criticism was the creation of empty and shelf SEs. It was doubted that the intention of the EU legislature in relation to the SE statute was to create companies without economic activities or employees. The Commission assessment failed to provide specific answers to the question why shelf SEs are created in such large numbers. The question does not concern the advantages accruing to a company that buys a shelf SE, but what the EU intends to do to combat this violation of the spirit of the SE legislation, that is, offering a European form of corporate governance and not an instrument for regime-shopping. In the meantime, an 'SE business' initiated by corporate incubators (mainly situated in the Czech Republic) has shifted the SE onto the path of regime shopping related to corporate restructuring, tax evasion or other financial motivations.

Another observation was that, in the meantime, additional EU corporate law has been put in place, such as the Cross-Border Merger Directive,[5] which provides companies with alternative possibilities of moving their company seat. For example, the Cross-Border Merger Directive represents a cutting back of what has already been achieved in the SE directive in terms of worker participation rights. It imposes a higher threshold for mandatory negotiations on board-level participation in comparison to the SE, rising from 25 per cent to 33 per cent of the workforce in countries with worker participation rights; introduces a threshold of 500 in place of no threshold in the SE; limits the scope of negotiations to concern only participation; and contains no consistency with regard to information and consultation. Additionally, European Court of Justice (ECJ) judgments that were catalysts of the new competitive paradigm have had a strong impact on the debate, making it clear that locating the registered seat of a company in one State and the administrative and real seat in another is fully in accordance with the basic rule of freedom of establishment. For those purposes, shelf SEs might be the ideal vehicle. It looks as if the Commission sees it as its objective to incorporate the ECJ cases on freedom of establishment into EU corporate law. All in all, the business environment perspective is now dominant in assessing corporate law; from that point of view, what matters is the identification of 'unnecessary administrative burdens', which should be removed. Against this background, worker participation surfaces as something 'alien', labelled a type of 'burden'.

The most important regulatory issues taken into account by a company deciding in which country its registered office and/or headquarters are to be located are: taxation, national company law, equity and debt restructuring facilities, and corporate restructuring facilities. Important in determining whether a European statute contributes to convergence or divergence is the fact that, in some EU countries, national corporate law has been instrumentally adjusted along the lines of the SE provisions. In

5. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1.

particular, in some countries an option has been provided with regard to company structure at national level or rules on private firms have been eased in order to increase regime competition among Member States. The decision taken by companies to opt for the SE statute seems to have depended to a considerable extent on their assessment of the pros and cons of national regimes and the SE statute, and on 'regime shopping' in relation to tax optimisation and other financial arguments.

Although the Ernst & Young report was an effort to question the role of workers involvement through the backdoor, the fundamental debate on worker participation – achieved by a 'historic compromise' – was not reopened directly in 2010. In July 2011, the European Commission consulted the European social partners on the basis of the document *First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees*. The document identified three problematic areas concerning the rules on employee involvement contained in the SE Directive. The social partners replied in October 2011. BUSINESSEUROPE recommended the Commission to give priority to simplifying the SE Regulation, whilst the ETUC asked for a continuation of the dialogue on improving the SE rules (both the Directive and the Regulation).

All in all, this formed the background for the survey of the interaction between EU and national company law provisions. But before we come to the results of our country-based inquiry it is appropriate to have a closer look at several aspects of the present day corporate agenda in Europe.

4. The Better Regulation agenda

The EU's Better Regulation strategy has several components. The first is the design and application of Better Regulation tools at EU level, notably the simplification of existing rules, including the reduction of administrative burdens and impact assessment. The second is a more consistent application of rules and principles throughout the EU by all regulators. The final component is the reinforcing of constructive dialogue between stakeholders and regulators at the EU and national levels.[6]

6. See: http://ec.europa.eu/governance/better_regulation/brochure_en.htm

In addition to evaluation, the use of 'fitness checks' has been introduced. The European Commission is merging its efforts to reduce the administrative burden with those to simplify legislation and has decided to resort more to stakeholder consultations and impact assessments as essential parts of the policymaking process. The Commission first drew up a 'simplification rolling programme', beginning with 100 simplification initiatives for 2005–2008. Since 2007, the simplification programme has been integrated into the Commission's legislative and work programme.

In the Commission work programmes of recent years some initiatives related to company law issues are explicitly mentioned. One of these was the simplification of the Accounting Directives with the objective of allowing Member States to exempt micro-entities from accounting requirements and of reviewing the Accounting Directives (Fourth and Seventh Company Law Directives) to take account of the interests of small businesses. Another was the Directives on reporting and documentation requirements in the case of mergers and divisions. The proposals to reduce the translation and publication requirements of companies also fit in this scheme. The Commission has even justified the proposal for a Council Regulation on a European private company statute (SPE) by reference to the simplification agenda (European Commission 2009: 6). In contrast to harmonisation projects, the SPE proposal leaves national law largely untouched. The goal is to provide SMEs with an alternative form that would exist in parallel to national company forms. As part of a package of measures designed to assist SMEs, referred to as the Small Business Act for Europe (SBA), the Commission proposals also aim at reducing compliance costs for the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies.

At the same time, the Better Regulation principles have been used unsuccessfully by some Member States as arguments against new European legislation, particularly in relation to the EU proposal for the SPE. The German Bundesrat (one of the German Parliamentary chambers) expressed doubts, for instance, about the respect for subsidiarity and whether the proposed harmonisation would achieve the objectives envisaged. The Dutch Parliament asked for a clear justification of the legal basis. They wished to avoid a situation in which national rules prohibiting abuses could be bypassed by European rules. Furthermore, they questioned the purported added value and the Commission's forecast for the effective use of the European private company (SPE). In its answer, the Commission pointed out that including a cross-border requirement as a condition for setting up a European Private Company would be inconsistent with the objective of the proposal, that is, to complete and improve the functioning of the Single Market and to make it more accessible for SMEs.

The question raised in the SEEurope survey was whether there were any signs at national level of an ongoing simplification process along the lines of the EU strategy. At national level we found several initiatives that do not necessarily adhere to the EU agenda, but which nevertheless can be seen as efforts to simplify the 'business environment'.

National company law has been reassessed in the following areas:

- increasing exemptions for SMEs, for instance in the area of auditing standards, information and disclosure;
- flexible size of boards;
- the introduction of 'alternative' forms of annual meetings (teleconferences, digital or other online form of communication);
- the introduction of single information points ('one-stop shops');
- watering down of registration conditions and lowering of establishment thresholds, for instance capital requirements (this will be treated further in section 6).

It is fairly obvious that several of these simplification measures conflict with the pursuit of transparent and effective regulation. Some administrative obligations are not only useful, but can also be indispensable to monitor legality; or they serve other purposes than directly benefitting business. Relaxation of the registration requirements reduces the volume of information disclosed and opens the door to bogus practices and the misuse of legal persons and companies. Transparency is not improved by exemptions from (or by watering down) auditing standards.

Almost all observers stress that legislative developments in the EU have had a strong influence on national debates. It is important to note, however, that the range of impacts is fairly wide.

Company law in the 'old' Member States often goes back to the early stages of capitalism, with a subsequent history of constant modification and transnational interaction. EU developments were inspired by national changes and the founding fathers of the European Community were, of course, 'biased' by the national models they knew or wanted to 'defend'. In that respect, we can observe mutual interaction and input. In this regard, the UK is a special case. The expectation there is that EU company rules should assist in freeing up the market in other Member States, which should encourage and make more transparent cross-border activity. Other Member States have reacted to this development, and as a result some national rules and traditions have come under fire.

The implementation of EU legislation has brought in new elements, which previously did not figure on national agendas. The introduction of a free choice between a single-tier or dual-tier system of corporate governance, for example, has clearly been introduced in many countries as a result of EU debates and deliberations. It is highly questionable whether this free choice, which was 'alien' to several jurisdictions, would have been introduced so quickly without the SE legislation.

The 'new' Member States all had to implement the *acquis communautaire* (often from scratch) and therefore had less influence on the model developed.[7] Candidate countries had to deal with chapter 5 (now chapter 6) of the screening guide of the *acquis* dedicated to company law. The company law *acquis* includes rules on the formation, registration, merger and division of companies. In the area of financial reporting, the *acquis* specifies rules for the presentation of annual and consolidated accounts, including simplified rules for small and medium-sized enterprises. The application of International Accounting Standards is mandatory for some public interest entities. In addition, the *acquis* specifies rules on the approval, professional integrity and independence of statutory audits (European Commission 2005).

5. Changes in national company law

The SEEurope experts reported on major changes in company law in their country over the past decade. The basic legal models provided for public and private companies were very similar in most countries. This partially stems from the 'one size fits all' nature of the rules. As a result, the statutory framework has historically applied to one-person private

7. An overview of the chapters of the *acquis* is provided in How does a country join the EU? http://ec.europa.eu/enlargement

companies as well as to large public companies. Public debates on company law reform and corporate governance codes have often focused on the governance problems of large publicly-held firms, and policymakers' recommendations traditionally pinpointed such firms. These reforms assumed that corporate structures and director-specific provisions matter. Listing rules developed for stock exchanges were often given statutory authority, requiring that publicly-listed companies disclose compliance with a corporate governance code or explain in what instances they had not applied the code (referred to as 'comply or explain'). Private companies were encouraged to conform, but there was no requirement for disclosure of compliance.

However, most small firms and, in several countries, even many large companies are not listed. Non-listed companies, whether family-owned firms, group-owned firms, private equity and hedge funds, joint ventures and unlisted mass-privatised corporations and SMEs have particular problems. Innovations and changes in approaches to regulatory governance in non-listed companies will probably focus more on the protection of investors and creditors from managerial opportunism. In these circumstances, an effective legal governance framework must offer different mechanisms. The result, therefore, is legal pluralism involving a mixture of hard law and voluntary social norms.

The history of national and European company law-making and regulation has been marked in recent years by a growing diversity of interests and concerns. As a consequence, a hybrid and partially contradictory package of company rules has been developed. In general terms, as was expressed in several SEEurope contributions, the national changes range from the introduction of regulations necessary for disclosure and monitoring to deregulation in order to improve the 'business environment'. A plea for the strengthening of auditing principles and disclosure (after the financial crisis) can go together with the creation of substantial exemption mechanisms for SMEs. Adequate registration is crucial for transparency and for monitoring and enforcement of existing rules or the fight against 'letterbox companies', but – according to employers' – may obstruct or hinder the smooth functioning of business. Lowering the threshold of capital requirements is seen as a stimulus for innovative entrepreneurs, but at the same time creates possibilities for the establishment of sham businesses. Since the early 2000s, the mainstream thinking in this area seems to be that the objective of combating fraud and abuse of companies as accepted legal forms should be achieved through specific law enforcement instruments outside company law, and should not be allowed to hinder the development and use of efficient company law structures and systems (High Level Group 2002b). The financial crisis has not (yet) changed this unfortunate starting point.

Based on the country reports, a few crucial items of concern that have been discussed over the past decade are identified:

(a) Balance of power and interaction between primary stakeholders
In general terms, the balance of power and interaction in the triangle of labour, capital and management has been modified in recent years in favour of shareholders (in listed companies). The position of shareholders has been strengthened (for instance, in the Netherlands by the right to appoint and dismiss the supervisory board or the right of approval of strategic board decisions) and there has been more attention to the protection of minority shareholders. In some countries, the position of the supervisory board members has been modified (for instance, in Austria: more rights and more duties) or strengthened (in Germany with a law that strengthens the role of the supervisory board in giving advice and supervision). In several countries the legal position and responsibilities of directors have been reformulated with management being portrayed as having a primary duty to protect shareholder value. This is fully in line with the position formulated in 2002 by the High Level Group of Company Law Experts: 'Good corporate governance requires a strong and balanced board as a monitoring body for the executive management of the company. Executive managers manage the company ultimately on behalf of the shareholders' (High Level Group 2002b: 59). Corporate governance and shareholders' rights are about controlling the directors as the agents of the shareholders or, if control comes too late, about holding the directors accountable. The position of worker representatives has not been an item apart from – very recently – in Poland and the Czech Republic, where a weakening of workers' involvement has been announced.

(b) Transparency and disclosure
Better information for shareholders and creditors, in particular better disclosure of corporate governance structures and practices (such as remuneration of board members) were already mentioned in the reports of the High Level Group, inspired by the existing US regulatory response to scandals such as Enron. The group admitted that 'remuneration through grants of shares and rights to acquire shares does not take away fully the conflict of interests of executive directors and has some

negative side effects' (High Level Group 2002b: 68). As the share price is related to the reported financial performance of the company, the executive directors, who are also primarily responsible for accounting for the company's performance, have an incentive to produce financial accounts which overstate the performance of the company. Nevertheless, the recommendation was formulated that there was no need for a prohibition of remuneration in shares and share options, but that appropriate rules should be in place in terms of disclosure and of prior approval at the shareholders' meeting. The issue of a fair remuneration policy as such was not on the legislative agenda. This is in line with the policy of the European Commission. As yet the ambition has been to issue only a *recommendation* fostering an appropriate regime for directors' remuneration.

In the SE inquiry it was found that, in some western European countries, and especially those that were hit hard by the financial crisis, stronger rules on information and on transparency with regard to remuneration are being discussed, including legislation to require provision of information on company loans to directors. But in most cases this has not gone much further than the consideration of a requirement for a mandatory or advisory vote by shareholders on the remuneration policy. As a result of the crisis, a heightened general debate on the limitation of remuneration practices (in both the private and the public sector) has been initiated. Our impression is that, although this gives rise to a lot of public noise and media hype, in practice, there is little substantive legislation that systematically promotes a long-term perspective.

In Central and Eastern Europe (CEE) the debate seems to be completely lacking. The legislative process in those countries over the past ten years has been dominated by the implementation of the *acquis communautaire*. Moreover, most CEE countries are not (yet) a location for important financial institutions or other global players.

With regard to transparency and disclosure the country reports suggest that initiatives in the social field are mainly based on non-binding rules.

(c) Corporate governance issues

Corporate governance issues have been on the agenda since the late 1990s. However, the most prominent voices from the business community keep stressing its voluntary character and their desire to remain with self-regulation. They generally argue that a European corporate governance code would not offer significant added value but would simply add an additional layer between international principles and national codes. Furthermore, the European Commission has always emphasised that the key input for codes on corporate governance should come from the market and market participants. These codes are a means of building up reputation through voluntary compliance with rules of good behaviour. On this view, the EU can seek to coordinate the efforts of Member States to improve corporate governance through changes in their company laws, securities law (such as listing rules) or in their codes of corporate governance in order to facilitate the convergence of the corporate governance efforts of Member States. So far, the European Commission has complied with this wish with a soft law policy including non-binding recommendations. As a consequence, the only widespread forms of 'regulation' are voluntary corporate governance codes in their different national forms.

(d) Diversity

The main publications in the 2000s on modernising the EU regulatory framework for company law made no reference to the profile of the board's composition from the gender perspective. Annual corporate governance statements only had to state why individual non-executive or supervisory directors were qualified to serve on the board. Until recently, the stimulus and initiative came from outside the EU.[8]

The issue of putting more women on the boards of public limited companies has been picked up most prominently in Norway. A law concerning state-owned and municipal companies entered into force in January 2004, with a two-year transitional period. It was expected that public limited companies would follow suit voluntarily, with the legal provision setting a norm which was not legally binding. But as public limited companies did not act in 2004 and 2005, the government decided to move to full enforcement and Norway imposed a quota in 2006. By the end of 2010 all companies included at least one woman on their board, while 83 per cent had more than three women. Spain, which introduced quotas in 2008, increased the number of women on boards by 67 per cent.[9]

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8. The European Parliament called on the European Commission in a resolution adopted in spring 2011 to submit a plan to bring about phased increases in gender diversity with the aim of achieving at least 40 per cent representation for each gender on the boards of directors of financial institutions (within a reasonable period).
9. See: http://www.ft.com/cms/s/0/525d2ee4-cfff-11df-bb9e-00144feab49a.html#ixzz1HAQn3cGh

Some European countries – such as Germany and Belgium – are considering the regulation of diversity if companies do not change voluntarily. This debate has not (yet) affected workers' participation at board level. However, in Norway the rules also apply to the board and, importantly, worker representatives and shareholder representatives are counted as two different groups. Thus, female worker representatives may not compensate for a lack of female shareholder representatives and vice versa.

6. Attractiveness and competitiveness

Since the early 1990s, European countries have sought to attract and keep companies by lowering corporate tax rates. This downward trend has resulted in substantially lower tax levels. According to the OECD Tax Database and the World Tax Database, the average rates in the 'old' EU Member States fell from around 42 per cent in 1980 to 28 per cent in 2009. Corporate tax in the CEE countries ended even lower, at just 19 per cent in 2009.[10] As a result, countries are constantly seeking to underbid one another.

The question has to be raised whether a similar process has already taken place in the field of company law. Although there are indications that the entrance of foreign company forms at the national level is increasing in countries such as Germany, partly stimulated by recent ECJ rulings on freedom of establishment, there is not sufficient evidence to conclude that this is a growing trend. In some countries, the search for more attractive and competitive national legal forms is motivated by a desire to find a response to the limited company form (Ltd) provided for in UK law. The Ltd has no capital requirements and can be operated in any Member State. Some Member States take the view that it is important to create more competitive legal forms to prevent the widespread use of this UK legal form. The Reflection Group on the European Company Law assumes that this is the dominant development as many Member States appear to be in favour of increased flexibility by introducing options from other jurisdictions to supplement those already known (2011: 12). Other Member States have taken measures to anticipate the possible loss of companies having a national legal form as a consequence of the

10. See: www.oecd.org/ctp/taxdatabase and www.bus.umich.edu/otpr/otpr/default.asp

upcoming SPE Regulation. All in all there is reason to expect that company law will be subject to even more diversity in the future with more options and flexibility within the Member States.

Two major developments in terms of company establishment are visible in almost all countries: the lowering of capital requirements and the simplification of the registration procedure.

(a) Lowering of capital requirements

In several Member States, capital requirements for the establishment of companies have been lowered. Reasons often cited in support such changes are the entrance of UK limited companies (not subject to any minimum capital requirements) and the need to increase the attractiveness of national legal forms. A further justification can be found in official statements by the European Commission and their main advisors, although the advice issued was neither consistent nor uniform. In the 2002 consultative document the High Level Group of Company Law Experts came up with possible justifications: 'The only real function the current minimum capital requirement appears to have is to deter individuals to light-heartedly start up a company. They will have to furnish a minimum capital before they can start. The question is if this is sufficient reason to continue to require a minimum capital. If not, the alternatives are to either abolish the minimum capital requirement or to raise the minimum capital considerably' (High Level Group 2002a: 25). According to the High Level Group, many states are successful in ensuring protection for the general interests concerned by less intrusive external means. But, in its final report, the Group had to admit, 'we are not convinced that minimum capital, at its present levels, performs any other useful functions, but there is no evidence that it constitutes a hurdle to business activity either. It is probably wise not to spend much time on minimum capital in a reform to make the current system more efficient, and to direct attention to issues which are more relevant' (High Level Group 2002b: 82). In the Ernst & Young assessment of the SE, the conclusion was drawn that its minimum capital requirement of 120 000 euro 'turned out not to be a deterrent for small and medium enterprises' given that a large number of the SEs already established are small to medium-sized companies (Ernst & Young 2009: 240).

(b) Easier registration

In addition to changes to capital requirements, simplification of the registration procedure is considered a popular measure to create a more attractive national legal form for incorporation. Most changes are introduced with particular reference to SMEs and contain measures to simplify registration systems and license applications, restrict the number of regulations and reduce the number of rules with regard to supervisory boards, etc. The fast track actions formulated by the European Commission to ease disclosure, registration and translation requirements are explicitly mentioned as key parts of the Action Programme on reducing administrative burdens in the European Union (European Commission 2008). The EU's reasoning in this area, as expressed in several Better Regulation documents, is simple and it seems that many countries follow the same reasoning. Namely, it is said that companies will benefit from reduced procedural requirements, as well as simplified and harmonised rules for accreditation, verification and registration. In addition, SMEs will benefit from reduced verification and reporting obligations and lower registration fees. As it is obvious, however, that most SMEs are national entities anchored in a particular locality or region, often pursuing activities that have no global dimension, intra-EU competition is not put forward as an argument in the relevant documents.

The lowering of requirements in order to boost one's position in the competitive rivalry between countries can be called into question. Lessons can be learned, for example, from the beggar-thy-neighbour tax competition mentioned above. The policy of reducing corporate tax has seriously impaired the ability of governments to respond effectively to the crisis, and to regulate their economies in a sustainable manner. Tax competition between countries that provides a possibility to relocate a company's headquarters to low-tax jurisdictions can easily lead to a race to the bottom, resulting in serious erosion all over Europe. Minimising costs to businesses on the basis of an alleged 'administrative burden' that takes no account of benefits to other stakeholders or the qualitative dimension of fundamental rights and provisions risks upsetting the traditional balance in European welfare states. Less regulation, therefore, is not necessarily better regulation.

In this intra-EU competition a crucial role is played by the ECJ's rulings on freedom of establishment. According to the ECJ, it constitutes a restriction on the freedom of establishment when a Member State (the 'host' State) refuses to recognise the legality of a company formed in accordance with the law of another Member State in which it has its registered office on the ground that the company has moved its centre of administration to the host State and when the effect of this refusal of recognition is that the foreign company cannot bring legal proceedings to defend its rights under a contract in the host State unless it is reincorporated under the law of that State. The ECJ has ruled that the freedom of establishment requires the recognition of foreign companies established in accordance with the law of another Member State. It is not the purpose of this chapter to go into the details of these disputes, but it is obvious that the potential impact of these rulings on national principles governing worker participation is substantial. In Germany, in particular, the consequences of these rulings for board-level participation rules are hot topics of debate and a whole range of positions has been formulated assessing whether it is permissible for Member States to introduce protective national provisions. The full consequences remain to be clarified. Following the ECJ judgments in *Centros*,[11] *Überseering*[12] and *Inspire Art*,[13] a debate has started on whether a Delaware-like scenario could develop in the EU.

The US state of Delaware is trying to attract (re)incorporations with advantageous corporate legislation. If more US states introduce such measures a race to the bottom might commence. The fear is that the ECJ case-law will lead to an equivalent of the Delaware scenario in the EU. The initial steps taken in this regulatory competition between Member States are already visible. In order to attract companies from other European countries, the ultimate goal is to become the country with the most corporate benefits.

7. Concluding remarks

The development of the corporate regulatory framework and the related directives in the EU has often been divided in corporate law theory into ‘generations’ (Villiers 1998). In that scheme, the first generation is characterised by uniformity and prescription, the second generation by the optional choice of already existing national forms and practices, the third generation by increased flexibility and the fourth generation provides only a very general framework in a context of complete decentralisation. The first generation (which prevailed until the late 1970s) was still dominated by a policy in favour of a cooperative equilibrium and

11. Case C-212/97 Centros [1999] ECR I 1459.
12. Case C-208/00 Überseering [2002] ECR I-9919.
13. Case C-167/01 Inspire Art [2003] ECR I 10155.

opposed to a race to the bottom. The next generations tried to provide business with more incentives by introducing greater flexibility and a range of options. This resulted, for example in the case of the SE following disagreements among the Member States, not in the introduction of a business form that provided a complete set of uniform rules without reference to national law, but to a significantly more flexible approach in relation to national law. In practice, it must be concluded, however, that, in the absence of uniform rules, a European business form does not bring real benefit in comparison to national business forms.

Without going into the details of this theory, it should be noted that the analysis is not complete as it focuses too heavily on legal norms. In this chapter the 'political economy' aspect of the corporate debate has been highlighted. After the demise of the harmonisation era, the corporate law debate has been dominated by the question whether the relevant policy proposed can deliver a sufficiently attractive tool for larger firms to engage in forum shopping activities. As a result, regulatory competition or legal pluralism steered by competition has come to the forefront and company law-making has become a factor in competition. The only convergence that can be registered is the deregulation and cutting back of requirements. There is a market for lawmaking at national and at EU level.

One question we still have to deal with concerns whether the risk of regime-shopping is serious. Or is this merely an (unintended) side effect of the legislative process that aims to infuse more flexibility into the laws of the Member States relating to company law? Scholars so far have mainly expressed doubts about a European Delaware in the field of company law: 'Since its inception, the cooperative equilibrium has remained stable and largely intact, as a result of learning and adaptive changes made by the Member States and the European Commission. But, as demonstrated in the USA, the breakdown of a highly stable equilibrium could occur rapidly.' (McCahery & Vermeulen 2005). The stability of the equilibrium depends crucially on the continued ability of Member States to protect their present legal system against possible competitive pressures from other Member States.

But, in this regard, the European Commission cannot be said to be of much help. To a certain extent, the SE rules, for instance, aimed to limit the right of establishment of pseudo-foreign companies and to create barriers to the introduction of competition concerning corporate form.

But nowadays, the Czech Republic is leading the way in SE formation, with more SEs on its commercial register than any other EU country and businessmen familiar with the law on the sale of shelf companies have not hesitated to provide interested buyers with such ready-made SEs. The question, of course, should not be what the main advantages are for a company to buy a shelf SE, but rather what the Commission intends to do to combat this violation of the spirit of the SE legislation. The Commission's reasoning, confronted with criticism on the production of shelf SEs – that is, SEs with no activities or employees, usually set up by specialist company providers for the purpose of selling them on to interested buyers – is very simple: the creation of shelf SEs by specialist providers in certain countries can be explained by the fact that making shelf companies available for sale is common there. Moreover, according to European Commission services, it is perfectly legal to create empty national limited companies.

A well-governed company should be accountable and transparent to its employees, its shareholders and other stakeholders. If competitiveness and attractiveness become the key messages of the agenda for national and European company lawmaking, it risks promoting a beggar-thy-neighbour policy in the Member States. It will guide Member States towards reforms of their national legislation which promote rent-seeking at other countries' expense. Domestic company law reform could then easily lead to a patchy process of transnational legal pluralism. The outcome is predictable: less specific protection of various stakeholders (minority shareholders, creditors and so on), dilution of workers' participation, fewer requirements with regard to registration, no capital requirements and increased exemptions from the legislation in force. The EU Better Regulation policy may not have been intended as – and certainly must not be allowed to become – an instrument for putting national regulations in competition with each other. However, key areas for possible reform and simplification must be tackled without jeopardising essential guarantees for transparency.

In this whole process the policy with regard to the involvement of the workforce is key. Reports that look at employee participation in the neutral sense of being part of public policy provisions or analysis that labels workers' rights as burdensome and presses for administrative cost reductions to enable companies to achieve the same production level with reduced manpower are of little help. Also the vision of the Reflection Group, namely, that the appropriate attitude for the EU legislature is not to ask Member States which have not considered such a system or have deliberately decided against it to introduce it, fits in this type of reasoning (Reflection Group 2011: 53). First, these positions fail to acknowledge that participation rights are fundamental rights, enshrined in the various Treaties. Second, they are often already biased in their wording: which stakeholder's perspective is used to calculate social costs? Have the costs for workers of short-termism ever been calculated? Why does workers' involvement always have to be defended whilst the dictate of the market is taken for granted? Third, the narrow focus on labour costs of several studies in this area does not give justice to other costs that are seen as 'normal' in an organisation. For instance, what about the use of legal advisors or external business consultants (or are these just supplying services)? And, finally, the argument that the introduction of workers' involvement imposes 'a particular element of the national company law of some Member States on other Member States, where it is alien to the domestic law' is a non-argument (Reflection Group 2011). A whole range of legal obligations and internal rules can be labelled alien to particular national jurisdictions, for instance the one-tier board that previously only existed in certain Member States, but these became an integral part of the SE rules.

The paradigm shift in the corporate law debate identified here is the expression of a fundamental political change in the modelling of Europe that occurred gradually after the first enlargements (with the UK, Ireland and Denmark). In the European Community of twelve Member States, the cooperative equilibrium in the area of corporate law was still sufficiently stable to neutralise the diversity of legal regimes and, at the same time, to guarantee respect for each other's lawmaking autonomy. But the euphoric march of neo-liberalism following the fall of the Berlin Wall and the enlargement to a community of 27 Member States paved the way for this change. The European Union is no longer a community of Member States whose acquis communautaire includes corporate law mechanisms as the constitutional framework for an economic development based on cooperation and solidarity ('one for all, all for one'). The EU is nowadays first and foremost an internal market founded on competition, also between the Member States. Company law no longer functions as a Europe-wide principle for a decent level playing field and contrary to a race to the bottom. It is left to the Member States to use it as a safeguard or to see it as a factor in the competitive race, subject to market forces ('every man for himself and the market for us all'). From the epistemological perspective the corporate law community served, not initiated.

The paradigm change in corporate law-making that led to the introduction of competitive legal pluralism marks the advancement of neo-liberalism in the corporate law community. A corporate legal framework that is left to the market, or putting it somewhat differently, is subordinated to the market as simply one of the pliable factors in competition is everything but a precondition for stable and sustainable growth and investment. National and European legislators need to identify their own responsibilities. The crisis has demonstrated the limits of this type of corporate governance practice and has forced a rethink with regard to the finality of this form of governance in the context of corporate social responsibility. The question of whose interests a business corporation is intended to serve should be at the heart of EU policy in this area. Otherwise, it will be time to analyse the burdensome effects of capital. Cost-effective and efficient competition cannot do without fairness and social justice. Corporate regulation must constitute a building block of a socio-economic policy that favours decent and sustainable long-term investment, based on reliable and genuine establishments with strong involvement of key stakeholders.

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