A HARMONIZED EUROPEAN COMPANY LAW: ARE WE THERE ALREADY?

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Abstract

To what extent is EU company law harmonized? This essay first makes the point that still little progress has been made in the direction of company law uniformity within the EU. It then argues that, even leaving aside the question of whether it would be desirable to have a uniform EU company law, that outcome is simply impossible to achieve, due to interest group resistance and the variety in national meta-rules. Yet the essay concludes that, in a narrow meaning, European company laws have been indeed harmonized: European Member States company laws fit together, which may well be what harmonization, not only etymologically, is all about.

Keywords: Company Law; Harmonization; Uniformity of Laws; Meta-rules; *Centros*; Regulatory Arbitrage.

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I. INTRODUCTION: WHAT WE TALK ABOUT WHEN WE TALK ABOUT COMPANY LAW HARMONIZATION

To what extent is EU company law harmonized? Will it become more so in time? Should it? While it would be hard to argue that these are topical questions in the aftermath of the EU referendum in the UK, reflecting upon them provides the occasion for digging deep into issues that are not only key to our understanding of the multi-decade effort to approximate national company laws within the EU, but also at the core of comparative company law. In fact, answering those questions requires one to reflect, inter alia, upon the forces that drive or oppose changes in company law and upon differences in core features of national (company) law, namely in the 'meta-rules' or 'legal ground rules' that shape company law in action.

After highlighting the polysemic nature of the term harmonization, this essay first makes the point that, even after multi-year efforts to move on with the company law harmonization programme, little progress has been made in the direction of company law uniformity within the EU. Next, it argues that, even leaving aside the question of whether it would be desirable to have a uniform EU company law, that outcome is simply impossible to achieve, due to interest group resistance and the variety in national meta-rules.

This essay finally argues that in a narrow, etymological, but arguably more relevant sense, European company law has been indeed harmonized to a considerable extent: mutual recognition of companies, wherever they conduct their business, is a reality; reincorporations are an option for existing EU businesses; organizational arbitrage, while not unfettered, is also possible; and the fact that a foreign business is incorporated under a different company law is no longer a concern for business people engaged in EU cross-border trade.

As a premise to the analysis that follows, it is worth noticing that there are (at least) three possible meanings[1] of the term 'harmonization' with reference to company law:

1. the literal one: pursuant to Article 50(2)(g) of the Treaty on the Functioning of the European Union (TFEU), harmonization can be dubbed as the coordination *to the necessary extent* of 'the safeguards which, for the protection of the interests of members and others, are required by Member States of companies … with a view to making such safeguards *equivalent* throughout the Union';
2. the anti-literal (and extensive) definition: harmonization is most often used as a synonym for uniformity among Member States' company laws, uniformity being, to be sure, an intermediate goal that proponents of this interpretation see as, per se, instrumental to market integration;
3. the etymological one: harmonization can refer to the 'fitting together'[2] of Member States' company laws. Such will be the case when the interaction between the

[1] Actually, the possible meanings are six, because 'harmonization' can equally refer to a process and to the outcome of the same process. See eg EJ Lohse, 'The Meaning of Harmonization in the Context of European Union Law: A Process in Need of Definition' in M Andenas and C Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Elgar 2011) 313. In the following, unless otherwise made clear, the term harmonization will be used to refer to the outcome. For an account of the various phases of the company law harmonization process in the second half of the Twentieth Century see C Villiers, *European Company Law – Towards Democracy?* (Ashgate, 1998) 224-6.

[2] The Greek word *ἁρμονία* comes from the verb *ἁρμόζειν*, which means 'to fit together'. See eg *Dictionary of Derivations of the English Language* (Collins 1931) 173.

various company law regimes is frictionless and the concurrent application of national multiple company laws does not negatively affect transactions between market participants from different Member States.

These three definitions[3] are not necessarily mutually exclusive: they can be seen as different facets of the phenomenon we generically refer to when we talk about (company law) harmonization. Let us now answer the question of the title for each.

II. IS EU COMPANY LAW *LITERALLY* HARMONIZED?

A both functional and literal interpretation of the concept of harmonization can be drawn from Article 50(2)(g), which provides the legal basis for many of the company law harmonization measures that have been enacted so far. Unfortunately, answering the question in the title based on the content of this provision is an elusive quest: as Professor Jan Wouters has put it, Article 50(2)(g) contains a 'fuzzy mandate' and a 'piling up of vague legal terms'.[4]

In fact, harmonization in this sense shares two traits with the concept of beauty: in the same way as beauty is something that is hard to define but almost by definition elicits positive feelings, so may everyone find the vague proposition that *required* safeguards for the protection of the interests of members and others should be coordinated *to the necessary extent* with a view to making such safeguards *equivalent* throughout the Union fully acceptable. But like beauty lies in the eye of the beholder, if one moves from this general proposition to precise harmonization measures, whether these satisfy the conditions of Article 50(2)(g) becomes debatable and we enter the realm of subjectivity.

It is therefore impossible to answer the question of whether European company law is harmonized in the literal, Article 50(2)(g), sense: that depends on inevitably political evaluations of what 'the *necessary* extent' of the coordination should be.[5] These words of course echo (and originally anticipated) the principles of subsidiarity and proportionality; and it is well known that both these principles are 'open-ended' and 'essentially political',[6] leaving much scope for widely diverging views on whether too much or too little has been done at the EU level in the area of company law. In addition, one should answer the question of what measures would be effective 'safeguards' for the protection of the interests of members and others across the many diverse EU member states, when 'effective company law is context-specific'.[7] Subject to dispute are also the questions of who the 'others' are that company law should include in its purview,[8] when the introduction of safeguards protecting a

[3] One could add a spatial meaning of the term harmonization as expressed in Art 114 TFEU, ie the idea of 'approximation', where more similarity would appear to be a goal in itself. Note, however, that in Art 114 approximation is functional to the internal market. So, this should draw us either to the etymological meaning of the word or to the extensive one (if one takes the view that market integration requires uniformity of laws).

[4] J Wouters, 'European Company Law: Quo Vadis?' (2000) 37 Common Market Law Review 268.

[5] V Edwards, *EC Company Law* (Clarendon Press 1999) 8.

[6] Cf, with specific reference to subsidiarity, S Weatherill, *Law and Integration in the European Union* (Clarendon Press 1995) 172. See also T Tridimas, 'Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The principle of proportionality in the laws of Europe* (Hart 1999) 84.

[7] B Black amd R Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 Harvard Law Review 1914.

[8] Edwards (n 13) 8.

given category of stakeholders is justified, especially when that may come at the cost of prejudicing the interests of members or still 'others', and what it means for such safeguards to be equivalent (and not necessarily uniform).

To conclude, reasonable minds will differ on what needs to be done at the EU level to 'harmonize' company laws according to the Treaty's legal basis and, it follows, on the question of whether company law has been *literally* harmonized within the EU.

III. ARE EU MEMBER STATES' COMPANY LAWS ALREADY UNIFORM?

The prevailing, anti-literal and extensive interpretation of the term harmonization refers to making the company laws across the EU *uniform*.[9] In this meaning, harmony can only be achieved by getting rid of differences, a tedious proposition indeed from a musical or, more generally, an aesthetic perspective. Yet, this anti-literal use of our word, as anticipated, is very frequent among EU law scholars, including those who focus on company law.[10]

Note, incidentally, that uniform rules can also be 'beautiful': they can also serve the function described in Article 50(2)(g), that is, to provide 'adequate safeguards etc'. However, in corporate law it is seldom the case that the need for uniformity (standardization) trumps substance, that is, that a rule's benefits stem from the fact per se of applying across jurisdictions. Accounting law is one of the very few areas where this can frequently be the case: which accounting convention is chosen to present a given piece of financial information is often less relevant than the fact that all companies use the same convention to ensure comparability.[11] But few other corporate law rules do display similar features.[12]

The question of whether EU company law is already harmonized, if one reads it as asking whether EU company law has reached uniformity, is very easy to answer. To be sure, assessing uniformity is like measuring the perimeter of a territory: in the latter case, the larger the scale, the smaller the perimeter; in the former case, the more one looks into the details, the lower the degree of uniformity. Yet, no one in his or her right mind would seriously answer this question in the positive. The most one can say is that there has been approximation in *some* areas, that is, that harmonization has been partial at best.[13]

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[9] See eg S Weatherill, *Cases and Materials on EU law* (Oxford University Press 2014) 521 (dubbing harmonization 'as a process of replacing diverse national rules with common rules for a common market'); C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2013) 656. ('harmonization involves replacing the multiple and divergent national rules on a particular subject with a single EU rule').

[10] See eg S Stolowy and N Schrameck, 'The Contribution of European Law to National Legislation Governing Business Law' (2011) Journal of Business Law 615-16.

[11] See eg D Charny, 'Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities' (1991) 32 Harvard International Law Journal 442-3.

[12] This argument is developed by L Enriques and M Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union' (2006) 27 University of Pennsylvania Journal of International Economic Law 962-4.

[13] See eg C Villiers (n 1) 162-3; J Carruthers and C Villiers, 'Company Law in Europe – Condoning the Continental Drift?' (2000) European Business Law Rev 95-6; M Blauberger and RU Krämer, 'Europeanisation with Many Unknowns: National Company Law Reforms after *Centros*' (2014) 37 West European Politics 794-800.

An approximation of company law has indeed taken place in the last five decades on various issues, both as an outcome of directives and regulations (top-down harmonization) and as an outcome of spontaneous convergence towards uniform rules by the member states (bottom-up harmonization); and if one were to judge from the sheer quantity of harmonizing measures adopted in the last ten years alone, it would be hard to dispute that law-making in this area has become intense.[14] In addition, following *Centros* and *Überseering*,[15] bottom-up harmonization of company law rules addressing legal forms that are typically used by start-ups has been a remarkable development in the same period. But a closer look allows for the conclusion that, weighed for relevance, harmonization has achieved little in terms of uniformity.

A. Top-down harmonization

Ten years ago, I asked the very similar question of what impact the EU company law harmonization programme had had on European company law and corporate governance. My answer was that the progress towards uniformity had been modest and the outcome overall trivial: with the exception of a few sparse rules, accounting law (to some degree) and securities law, EU company law rules could all be classified as optional, market-mimicking, unimportant, or avoidable.[16] One may question whether the analysis back then had been complete and/or convincing.[17] Nowadays, however, the same analysis would need no additional qualifications, were it to include also the measures taken since 2005.

While some new measures have indeed been enacted in the last ten years, not much has changed: despite the number and volume of green papers, action plans, reflection groups' reports and advisory groups' studies,[18] the catch of the last ten years has been decisively

[14] See text following note 15.

[15] Case C-212/97 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919.

[16] L Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?' (2006) 27 University of Pennsylvania Journal of International Economic Law 2.

[17] For a critique, see KJ Hopt, 'Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance' (2015) ECGI Law Working Paper 296 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644156>.

[18] See the European Corporate Governance Forum website where nine statements are available (<http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm>); European Commission, 'Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union-Summary Report' (2006) <http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf>; Sherman and Sterling, ISS and ECGI, 'Report on the Proportionality Principle in the European Union' (2006) <http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf>; European Commission, 'Study on Administrative Costs of the EU Company Law Acquis - Final Report' (2007) <http://ec.europa.eu/internal_market/company/docs/simplification/final_report_company_law_administrative_costs_en.pdf>; European Business Test Panel (EBTP), 'European Survey on European Private Company' (2007) <http://ec.europa.eu/yourvoice/ebtp/docs/epc_report_en.pdf>; European Commission, 'Communication from the Commission on a Simplified Business Environment for Companies in the Areas of Company Law, Accounting and Auditing' COM(2007) 394 final (2007) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0394&from=EN>; RiskMetrics Group, 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (2009)

scant. Sure, no less than 95 new directives and regulations in the area of company law broadly defined. But 58 of them are implementing measures of the International Financial Reporting Standards (IFRS) regulation, 7 are in the area of financial information, 18 are part of issuer securities regulation and 9 are 'housekeeping' measures, amending or recasting previously enacted company law directives with a view to simplify them.[19]

Three new pieces of legislation are left that may escape the triviality label: the first has had a measurable impact in various Member States; the second has facilitated regulatory arbitrage, thereby making the pressure for bottom-up harmonization stronger; the third appears to be an important innovation, but there are doubts it will prove so in practice as well.

The Shareholder Rights Directive[20] has undeniably had an impact on some of the Member States companies' internal governance: attendance at shareholder meetings significantly increased, for instance, at Belgian and Italian companies after measures implementing it came into force.[21] While doing nothing to remove the obstacles to cross-border voting,[22] the Directive importantly mandated the record date, thereby ruling out the deposit of shares as a requirement for voting, whether mandatory or optional, at various Member States' companies meetings.

<http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf>; Mazars, 'Transparency Directive Assessment Report - Prepared for the European Commission Internal Market and Services DG Final Report' (2009) <http://ec.europa.eu/finance/securities/docs/transparency/report-application_en.pdf>; European Commission, 'Green Paper - The EU Corporate Governance Framework' COM(2011) 164 final (2011) <http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf>; Directorate General for the Internal Market and Services, 'Consultation on the Future of European Company Law' (2012) <http://europa.eu/rapid/press-release_MEMO-12-119_en.htm?locale=en>; Marccus Partners, 'The Takeover Bids Directive Assessment Report' (2012) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>; European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Application of Directive 2004/25/EC on Takeover Bids' COM(2012) 347 final (2012) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf>; 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: European Company Law and Corporate Governance - A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies' COM/2012/0740 final (2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0740&from=en>; K Gerner-Beuerle, Paech and EP Schuster, 'Study on Directors' Duties and Liability' (2013) <http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf>.

[19] See J Armour and WG Ringe, 'European Company Law 1999-2010: Renaissance and Crisis' (2011) 48 CML Rev 151-2.

[20] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184/17.

[21] For Belgium, see C Van der Elst, 'Shareholders as Stewards: Evidence of Belgian General Meetings' (2013) Financial Law Institute Working Paper 2013-05 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270938>. For Italy, see Gargantini, 'Oltre la record date. Gli ostacoli al voto transfrontaliero dopo il recepimento della direttiva sui diritti degli azionisti' in L Schiuma (ed), *Governo societario ed esercizio del diritto di voto* (Cedam 2014) 71.

[22] See J Winter, '*Ius Audacibus*; The Future of EU Company Law' in M Tisonet al (eds), *Perspectives in Company Law and Financial Regulation* (Cambridge University Press 2009) 50 (stating that 'the directive is precisely not doing that'). See also MC Schouten, 'The Political Economy of Cross-Border Voting in Europe' (2009) 16 Columbia Journal of European Law 1.

The second important piece of (enabling) legislation is the Cross-Border Merger Directive.[23] While it would be hard to qualify cross-border mergers as a core area of company law, from a dynamic perspective, the Cross-Border Merger Directive makes regulatory arbitrage easier[24] and, therefore, potentially enhances bottom-up harmonization. A well-known example of a company that engaged at the same time in a cross-border merger and in regulatory arbitrage is Fiat's combination with U.S. company Chrysler to create Fiat Chrysler Automobiles (FCA) in 2014: the choice was made to incorporate the resulting company in the Netherlands, one of reasons for that choice being that Fiat's controlling shareholders could take advantage of the absence of a ban on 'loyalty shares' in Dutch company law (unlike in Fiat's incorporation state, Italy, until then) and hence reinforce their grip on the company.[25]

Finally, the new provisions requiring companies to provide non-financial disclosures[26] are, at least on paper, an important innovation in the area of companies' disclosures. They *may* arguably have an impact not only on disclosures but, because of their implications, on companies' behaviour. Yet, because the rules will apply only to annual accounts published after 1 January 2018, it is far too early to tell whether in practice companies are indeed going to provide substantial new contents in the newly required disclosures.[27] And commentators have raised doubts about whether the new disclosures will go much beyond a box-ticking exercise.[28]

These proven or possible exceptions aside, the core areas that were identified as still the exclusive domain of national company laws ten years ago, such as the internal organization of the company, directors' duties, conflicts of interest between dominant and minority shareholders, shareholder remedies and so on, largely remain so, with the exception of mostly procedural aspects relating to shareholder voting rights.[29]

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[23] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L 310/11.

[24] See below n 52-8.

[25] See eg M Ventoruzzo, 'The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat' (2015) Bocconi Legal Studies Research Paper.

[26] Art 19a and 29a, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19, as amended by Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

[27] Art 4, Directive 2014/95/EU.

[28] See DG Szabó and KE Sørensen 'New EU Directive on the Disclosure of Non-Financial Information (CSR)' (2015) Nordic & European Company Law Working Paper 15-01 <http://ssrn.com/abstract=2606557>.

[29] In the area of directors' duties and liability, divergence among Member States' laws is perhaps not as big as it was in the past, but still the rules and their enforcement can hardly be said to be uniform. See eg K Gerner-Beuerle and EP Schuster, 'The Evolving Structure of Directors' Duties in Europe' (2014) 15 European Business Organization Law Rev 191.

B. Bottom-up harmonization

The post-*Centros* phenomenon of start-up cost-based regulatory arbitrage has arguably led to more uniformity among Member States' company laws:[30] many states reacted to it by changing their laws affecting the costs of setting up new companies, namely by repealing or watering down minimum capital rules and the procedural requirements, such as the mandatory involvement of public notaries for the formation of a company.[31] But that kind of regulatory arbitrage has proved to be short-lived:[32] as an outcome, the pressure spontaneously to converge on legal solutions favouring companies' formation soon petered out. Of course, other factors are still in place that may lead to a path of bottom-up convergence in the field of company law. But the process is arguably slow and divergence is still apparent in a number of areas uncovered by top-down harmonization, such as company groups, shareholder remedies, and so on.

IV. AND *CAN* THEY BE UNIFORM?

After almost 50 years since the first action was taken in the area of top-down company law harmonization, divergence is thus still there and the programme has failed to reach its (admittedly ambitious) goal of making company laws across the EU uniform. There are many reasons for this failure,[33] but two stand out and are so substantial as to warrant the prediction that no meaningful progress will ever be made in the direction of a uniform EU company law via top-down harmonization. First, national interest groups, such as dominant shareholders and suppliers of corporate law-related services, are most likely to continue to have the upper hand whenever meaningful harmonized rules are proposed. Second, differences in national 'meta-rules' will be an obstacle to full, real-world uniformity.

A. Interest group resistance

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[30] M Ventoruzzo, 'Cost-Based and Rules-Based Regulatory Competition: Markets for Corporate Charters in the US and in the EU' (2006) 3 New York University Journal of Law & Business 91.

[31] M Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press forthcoming). To be sure, not in all countries was the repeal of minimum capital provisions and other measures of the same kind a response to regulatory arbitrage. For instance, in Italy, where UK-formed pseudo-foreign companies never gained any traction (M Becht, L Enriques and V Korom, '*Centros* and the Cost of Branching' (2009) 9 Journal of Corporate Law Studies 174), they were rather attempts at obtaining a better ranking in the highly influential *Doing Business Report*. See E Brodi, 'Svolgere attività d'impresa senza capitale di rischio: brevi note sulla nuova fisionomia della società a responsabilità limitata' (2014) Analisi giuridica dell'economia 206.

[32] See WG Ringe, 'Corporate Mobility in the European Union–a Flash in the Pan? An Empirical study on the Success of Lawmaking and Regulatory Competition' (2013) 10 European Company and Financial Law Rev 230.

[33] See eg Armour and Ringe (n 16) 129, for an additional explanation based upon the varieties of capitalism literature's view of the role of corporate law within the set of complementary institutions that shape a country's corporate governance framework. See also Villiers (n 1) 171-5, where further cultural, political, and economic explanations for continuing differences in national company laws.

First of all, the forces that push against that goal are always strong and powerful when the Commission dares to be ambitious in any core area of corporate law and to do more than just Europeanize existing popular measures already present at the Member States level.

A good recent illustration of this is provided by the recent attempt by the European Commission to impose a single set of EU rules on related party transactions (RPTs) for listed companies: the original proposal was watered down significantly under the pressure of a number of Member States, not necessarily by making it laxer,[34] but for sure uniformity-wise.

More precisely, the European Commission's proposal identified larger RPTs by using a quantitative threshold and required that they be subject to both disclosure and approval by a majority of the shareholders other than the related party.[35]

The Council text waters down (uniformity-wise) these provisions in its own version of the draft Directive.[36] The dilution does not affect disclosure itself, but the criteria to identify larger RPTs and the company's internal approval process. The Council text grants Member States much wider discretion on how to define material related party transactions and when to grant exemptions from the rule. In addition, according to the same text, RPTs have to be

> approved by the general meeting *or* by the administrative or supervisory body of the company *according to procedures which prevent a related party from taking advantage of its position and provide adequate protection for the interests of shareholders who are not related party, including minority shareholders*,

with the only condition that the director or the shareholder on the other side of the transaction will have to be excluded from voting.

It is only slightly unfair to summarize the Council's text on RPTs as requiring Member States to provide at least for *some* disclosure and *some* kind of approval procedure for *some* related party transactions. That contrasts quite sharply with the idea of uniformity. What is worse, incidentally, is that it may provide a precious opportunity for dominant shareholders to lobby successfully against the more stringent rules on related party

[34] See L Enriques, 'Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)' (2015) 16 European Business Organization Law Rev 1 (criticizing a number of features in the Commission proposal that made it little effective in terms of minority shareholder protection).

[35] See European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement' COM(2014) 213 final, Art 9c <www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:213:FIN>.

[36] See Council of the European Union, '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' <http://data.consilium.europa.eu/doc/document/ST-7315-2015-INIT/en/pdf >. The European Parliament's own text closely tracks the Council's. See European Parliament, 'Amendments adopted by the European Parliament on 8 July 2015 on the proposal for a directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement' COM(2014)0213 – C7-0147/2014 – 2014/0121(COD) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0257+0+DOC+XML+V0//EN>.

transactions currently in place in individual Member States.[37] The previous experience with the Takeover Bids Directive's optional board neutrality rule, is sufficiently telling in this respect: as Paul Davies and his co-authors have shown, some of the Member States moved from a board neutrality rule to one allowing board defences against takeovers when they implemented the Takeover Bids Directive:[38] that is, the market for corporate control within those countries moved exactly in the opposite direction than the Directive had envisaged.

One may wonder whether things may change after Brexit. That could well be the case, if any evidence existed either of interest group resistance to harmonizing measures coming predominantly from the UK or of UK interest groups having opposing interests to those prevailing in continental Europe, so that, with the former out of the way, the latter could successfully coalesce to push for a given uniform legislative outcome. Yet, resistance to harmonizing measures is definitely not a British-only tradition, as the generalized opposition at the Council level against many of the proposals put forth by the European Commission in the field of shareholder rights exemplifies. And while one may expect pro-institutional investors, and therefore pro-shareholder pressures, to come more from the UK than from elsewhere, given its comparatively large asset management and insurance industry, continental European dominant shareholders and insiders appear historically to have had little appetite for advocating for an increase in harmonized rules. Rather, they have opposed EU legislation.[39] It would be surprising if that will no longer be the case in the future.

B. The insurmountable divergence in legal ground rules

Assume that it were indeed possible to reach an agreement on harmonization measures that made the body of EU company law overall uniform. Would uniformity in the law on the books translate into uniformity in the law in action across EU Member States? The reason for being doubtful about that lies in the divergence in meta-rules across EU Member States. Meta-rules have been defined by Pierre Legrand as 'the rules developed by a legal system (or, more accurately, by the actors within a legal system) in order to help it manage its body of rules'.[40] Such rules are not necessarily legal in nature. They also include any practice or convention that may entrust individuals, groups or institutions allocate with the power, if only *de facto* but consistently across time, to provide interpretations of the law that are held to be reliable by affected parties.[41] The virtual impossibility of convergence in meta-rules across

[37] Enriques (n 30) 31.

[38] PL Davies, EP Schuster and E Walle de Ghelcke, 'The Takeover Directive as a Protectionist Tool?' in U Bernitz and WF Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010) 139.

[39] See Enriques (n 13) 61-2.

[40] P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 57.

[41] Cf also K Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford University Press 2005) 254 (using the somewhat similar concept of 'legal ground rules', defined as those allocating 'substantive and procedural powers to either individuals or the collective/state').

EU member states[42] explains why the same body of statutory law may still produce different outcomes in the process of identifying the legal rule ultimately applicable to the same individual situation.

In an environment, like European company laws', characterized in each of the Member States by scant litigation in corporate law matters or, at most, by highly focused litigation, such as Germany's focus on suits challenging the validity of shareholder meeting resolutions,[43] how corporate law is complied with (and therefore, for practical purposes, interpreted) also depends, for example, on who provides legal advice to corporations and under what market conditions. Differences in the various professions' role in the market for company law advisory services will easily lead to differences in interpretation. For instance, whether public notaries (a category of professionals broadly protected from competition) rather than law firms or corporate secretaries (both operating in a market with lower barriers to entry) play a key role in ensuring compliance with corporate law is bound to have an impact on how rules are interpreted and evolve over time: ceteris paribus, the former may be more inclined to provide solutions that are less deferential to contractual freedom than the latter. Additional factors that contribute to divergent legal outcomes are, inter alia, the degree of courts' specialization in company law cases, the quality and prevailing methodological approach of a given jurisdiction's legal scholarship, the degree to which company law in action is also shaped by specialized public enforcement agencies such as securities regulators due to their remit and courts' deference to their determinations, and so on.

It goes without saying that market players and the courts that are called to decide upon company law issues will be aware of the principle of harmonious interpretation as enshrined in the case law of the Court of Justice of the European Union (CJEU).[44] But differences in meta-rules across EU jurisdictions will likely act as a covert but steady centrifugal force. While the differences within continental European countries in meta-rules may not be as stark as between them and those of countries with a common law tradition, civil law countries have each their own idiosyncrasies. In addition, the indirect effect doctrine requires a national court to do anything in its power ('*está obligado a hacer todo lo posible*') to achieve the result laid down by EU legislation.[45] But, as an outcome of its country's own meta-rules, the discretion to do anything in its power will vary and possibly lead to different results.

More significantly, national meta-rules may lead courts inadvertently to give divergent interpretations of harmonized rules, simply because a given outcome, which might be what best corresponds to the EU legislator's purposes, is plainly impossible to conceive of under national meta-rules, making it harder for national lawyers and courts to perceive that a violation of the obligation of harmonious interpretation has taken place. Given the scarcity of

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[42] See Legrand (n 40) 74-78 (with specific regard to the 'irreducible differences' between common and civil law meta-rules). Needless to say the UK, which will soon leave the EU, is not the only Member State from the common law tradition. See also infra text following n 48.

[43] See eg M Gelter, 'Why do shareholder derivative suits remain rare in continental Europe?' (2012) 37 Brooklyn Journal of International Law 881-7.

[44] See Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfal* [1984] ECR 1891; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

[45] Case C-106/89 *Marleasing* (n 39) para 8 (in the official English translation, the wording is even weaker: 'the national court called upon to interpret it is required to do so, as far as possible, …').

litigation, a non-adversarial environment for company law interpretation is unlikely to lead to the emergence of inconsistencies with EU law.

Finally, if uniformity itself becomes the goal to achieve by way of harmonized rules, individual Member States' legal professionals and courts will find the principle of harmonious interpretation itself of little assistance in interpreting company law provisions: the only way to obtain uniformity will be to refer the question to the CJEU; and yet, only the study of comparative company law will allow practitioners to envisage the need for CJEU's intervention on the interpretation of a given company law provision. While that sounds intuitively good from the perspective of comparative legal scholars and the demand for their services, it is unlikely to increase their output to a point that will ensure uniformity in EU company law in action.

V. DO THEY ALREADY FIT TOGETHER?

There is one meaning of the word harmonization that warrants a positive answer to the question of whether EU company laws are harmonized, and that's the etymological one. Admittedly, the 'fitting together' of EU company laws is not what we usually talk about when we talk about company law harmonization;[46] yet, this meaning has itself a legal basis in the TFEU, and precisely in Articles 26 and 49 thereof:[47] if the aim of the harmonization programme generally is to ensure the functioning of the internal market and the right of establishment, then what is necessary and arguably sufficient for that purpose is that national Member States' company laws fit together. To achieve that goal, both negative harmonization and positive harmonization are needed: on the one hand, unjustified legal obstacles to free movement of companies in the various markets should be removed. In addition, rules must be put in place to make sure, firstly, that the concurrent application of (different) national company laws creates no undue burdens on economic activity and, secondly, that its users do not face high company-law related transaction costs when they operate cross-border.

EU company laws do fit together if a positive answer can be given to the following four questions:

1. Are companies from one Member State recognized as such in other Member States without being subject to its company law provisions, whatever (part of their) business they conduct there (mutual recognition)?
2. Can an existing company seamlessly move to another jurisdiction, that is, convert into a company of a different jurisdiction without having to liquidate at the border (freedom of reincorporation)?
3. Can an existing company restructure its business across borders without changing its legal form, that is, without having to reincorporate as a new entity (organizational arbitrage)?
4. Can market participants conduct business with companies from a different Member State without prohibitive transaction costs (familiarity)?

[46] See M Andenas, C Baasch Andersen and R Ashcroft, 'Towards a Theory of Harmonisation' in *Theory and Practice of Harmonisation* (n 3) 577.

[47] According to Art 26 TFEU, '[t]he Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'. Art 49 spells out the freedom of establishment.

In the following, an overall affirmative answer is given to each of these questions. It should be noted that it is a completely different question, and one that is not addressed here, whether the outcome of the overall frictionless interaction among the various national company laws that is described below is also ideal from a policy perspective or, to use the framework of this essay, whether the existing framework is also conducive to literal harmonization rather than increasing the need for uniform company law measures to protect the interests of members and others.

A. Mutual Recognition

After *Centros* and *Überseering*, mutual recognition is no longer a concern for European companies. The real seat doctrine cannot be applied as against corporations set up in another Member State, who have their real seat in the host jurisdiction: even if they exclusively conduct their business there, the host jurisdiction may not deny them legal personality. And *Inspire Art* has seriously curtailed attempts to impose domestic rules on pseudo-foreign corporations by striking down Dutch rules that aimed to protect the interests of creditors by imposing minimum capital requirements, ie a legal doctrine that European company law itself has traditionally appeared to hold as important.[48]

Of course, there are plenty of grey areas: company law rules applying to foreign companies as such are still consistent with the TFEU if they pass the *Gebhard* test. Yet, it is astonishing to note that after *Inspire Art* (a test case like *Centros* itself) no additional case has been brought to the court to test the legitimacy of company law rules applying to pseudo-foreign entities.[49] No matter how low litigation levels are within the EU, this would appear to imply that Member States do not try or manage to impose and/or enforce meaningful domestic corporate law rules to pseudo-foreign companies.

B. Freedom of Reincorporation

When it comes to free movement of companies, there is no doubt that an existing company can achieve the outcome of reincorporating under the laws of a different Member State,

[48] See Art 6, Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of Members and others, are required by Member States of companies within the meaning of the second paragraph of Art 54 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 [2012] OJ L 315/74.

[49] One important exception may be found in the European case law extending insolvency courts' jurisdiction, now pursuant to Art 6(1) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19, to liability suits against directors of insolvent corporations (see C-295/13, *H v H.K.* [2015] OJ C 46/9): behaviour by directors of foreign entities before they entered insolvency proceedings in their host ('centre of main interest') Member State will in fact be subject to the host state's directors' liability rules, which are otherwise an integral part of company law functionally defined. See also *Kornhass* (Case C-594/14 *Simona Kornhaas v Thomas Dithmar als Insolvenzverwalter über das Vermögen der Kornhaas Montage und Dienstleistung Ltd* [2016] OJ C 48/5), which is in line with the cases cited above, but frames its holding in terms that appear to cast doubt on the implications of *Centros* and its progeny. While some commentators have been quick to see *Kornhass* as a first sign that the CJEU is ready to put *Centros* behind it, others have warned that it would be a mistake to read too much into that opinion. See WG Ringe, '*Kornhaas* and the Limits of Corporate Establishment' (Oxford Business Law Blog, 25 May 2016) <https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/kornhaas-and-limits-corporate-establishment>.

subject, it goes without saying, to the latter's own company and private international law rules.[50]

The absence of any positive harmonization instrument making it possible for companies to transfer their legal seat or, which is the same, to engage in a cross-border conversion, is in fact no serious obstacle to reincorporations.[51] At least two EU-wide legal mechanisms exist to move from one jurisdiction to another:[52] companies may set up a *Societas Europaea* (SE) in the country of destination or engage in a cross-border merger with a company established there. In either case, a reverse merger with a shell company especially set up in the destination jurisdiction will let the company reincorporate there, in the case of a cross-border merger with no further impact on its operations stemming from the move itself.[53] Of course, the procedures a company has to go through in order to create an SE or to execute a cross-border merger are cumbersome and costly and could well be simplified.[54] Yet, the tools are there and they do not seem to impose insurmountable obstacles to well-motivated (and reasonably large and/or well-resourced) market participants.[55] The transaction costs of such a move appear in fact to be small, also in light of the US experience: there, businesses engage in regulatory arbitrage either at the incorporation stage (when, on this side of the Atlantic, *Centros* allows for cheap and almost unfettered choice) or, later on, when a significant transaction, such as an initial public offering (IPO) or a genuine cross-border merger (think, again, of FCA[56]), is to be executed that usually entails costs much higher than

[50] In the light of *Cartesio* (Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, para 110), a company may not reincorporate in a real-seat-doctrine Member State without also moving its 'real seat' there (whatever real seat means according to that Member State's law), which may obviously discourage the choice of reincorporating in *that* Member State.

[51] Note, incidentally, that *Cartesio* (ibid) falls short of negatively harmonizing cross-border conversions, because, in para 112, it grants the Member State of destination a mere option to grant entry and change of applicable law to companies engaging in cross-border conversions. Yet, as later clarified by *Vale* (Case C-378/10 *Vale Építési kft* EU:C:2012:440), no such option exists if the Member State of destination allows domestic companies to engage in 'intra-border' conversions. See also AW Wiśniewski and A Opalski, 'Companies' Freedom of Establishment after the ECJ Cartesio Judgment' (2009) 10 European Business Organization Law Rev 615; O Mörsdorf, 'The Legal Mobility of Companies Within the European Union Through Cross-Border Conversion' (2012) 49 CML Rev 652.

[52] Member States may provide for additional tools. See eg E Ferran, 'Corporate Mobility and Company Law' (2016) 79 MLR 814-15.

[53] If the SE statute is used, the resulting European Company will have to have its administrative seat in the country of incorporation. The same is true, in the case of cross-border mergers, when the state of destination follows the real seat doctrine, which therefore acts as a curb on reincorporations to certain destinations (but cannot be used to prevent migrations from real seat Member States to registered seat Member States).

[54] See European Company Law Experts Group, 'Response to the European Commission's Consultation on the Future of European Company Law' (2012) Columbia Law and Economics Research Paper 420, 8-9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2075034>; L Enriques 'A New EU Business Combination Form To Facilitate Cross-Border M&A: The Compulsory Share Exchange' (2014) 35 University of Pennsylvania Journal of International Law 541.

[55] See contra GJ Vossestein, 'Transfer of the Registered Office: The European Commission's Decision not to Submit a Proposal for a Directive' (2008) 4 Utrecht Law Rev 60.

[56] See text preceding n 22.

those arising from cross-border merger rules themselves.[57] Even more importantly, tax obstacles in the form of exit taxes have at least been made surmountable via negative and positive harmonization in recent years.[58]

C. Organizational Arbitrage

When it comes to cross-border restructurings without a corresponding change in applicable law, an obstacle may be found, again, in the international private law of companies: *Cartesio* clarifies that real seat doctrine Member States may prevent companies from moving their real seat to another Member State while at the same time maintaining incorporation in the original home state.

That may have implications for choices unrelated to company law, namely those pertaining to tax law and insolvency law, in that it may create a barrier to moves instrumental to changing the tax and/or insolvency law applicable. That will be the case, in practice, if the connecting factors that are sufficient to hold that a company has its centre of main interests in a given country according to the European Insolvency Regulation (EIR) or to hold that it has the fiscal domicile there are such as to also warrant the finding that the company also has its real seat there, pursuant to the individual Member State's real seat doctrine. When that is the case (and it will not necessarily be the case), the only way to move the headquarters will be by also reincorporating, for example via a cross-border merger. Because the costs of reincorporating will be trivial compared to the cost of relocating headquarters, this should be no serious obstacle to organizational arbitrage.

D. Familiarity

Finally, it would seem that, also thanks to positive harmonization (and chiefly to the First Company Law Directive's rules on companies' invalidity and authority,[59] despite the latter's incompleteness and optionality[60]), businesses are nowadays finding it straightforward to trade cross-border with entities qualified as companies by other jurisdictions. Whether this is more thanks to positive harmonization or to improvements in information and communication technologies and the sheer increase in cross-border trade within the EU, which itself facilitates verification of information, would be an interesting question to explore, but not a relevant one for the purposes of the present section.

[57] See eg JR Macey and G Miller, 'Toward an Interest Group Theory of Delaware Corporate Law' (1987) 65 Texas Law Rev 481-2.

[58] See C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, EU:C:2011:785. See also Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34.

[59] See Art 10-13 Directive 2009/101/EC 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 258/11.

[60] Enriques (n 13) 30.

VI. CONCLUSION

EU company laws are not uniform, despite half a century of harmonization measures, and will most likely never be. Yet, they do fit together well, if that means that private parties may set up companies that will be recognized as such across the EU to do business anywhere within the EU, reincorporate midstream in a different Member State at reasonable cost (possibly with the exception of the few countries of destination that adopt the real seat doctrine), reorganize their business across EU Member States' borders without the need for reincorporating (again, with the exception of companies set up in real state doctrine Member States) and do business with companies from other Member States without facing unreasonable company-law related transaction costs.

In a less ambitious meaning, thus, the long quest for a harmonized European company law has been successful. More, of course, can be done to make diverse national company laws fit even better together, such as by simplifying the tools for mid-stream reincorporations, namely the rules on cross-border mergers. It goes without saying that attempts to make European company laws more uniform and more 'beautiful' will never stop. And no attempt has been made here to argue that the present landscape is already one that provides the right degree of protection for the interests of members and others across the EU. But it is comforting to think that, if those attempts fail, much has already been achieved in the field of company law that is instrumental to the TFEU's goal of market integration.