

Research Report No. 9/2009

The Next 'Great Transformation' of Markets and States in the Transnational Space: Global Assemblages of Corporate Governance and Financial Market Regulation

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Comparative Research in Law & Political Economy

CLPE RESEARCH PAPER 09/2009

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The Next 'Great Transformation' of Markets and States in the Transnational Space: Global Assemblages of Corporate Governance & Financial Market Regulation

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**THE NEXT ‘GREAT TRANSFORMATION’ OF MARKETS AND STATES IN THE
TRANSNATIONAL SPACE: GLOBAL ASSEMBLAGES OF CORPORATE GOVERNANCE
& FINANCIAL MARKET REGULATION**

Abstract: It is a well-known and much explored fact that capital market regulation has had a larger share of activity and visible success within the process of European integration than the long-standing efforts towards the establishment of harmonized rules in the area of corporate governance. While a unified, harmonized or effective market-wide corporate governance regime was identified early on as one of the building blocks of the European project, the historically grown, path-dependent varieties in national corporate law systems proved – for the longest time – resistant to ambitious Europeanization efforts. This paper argues that precisely at the time when companies’ financing structures were being adapted to globally available and moveable capital, corporate governance rules came under immense pressure to address the interests of world-wide operating investors, and that this development resulted in a dis-embedding of the corporation. The corporation at the end of the 20th century was no longer primarily seen as an organizational entity, but had become a financial vehicle, operating in a regulatory framework largely out of control of domestic company law legislation. This emerging regulatory environment consists of supra-national legislation directed at increased efficiency of regional and global financial markets on the one hand and increasingly incentive-oriented, indirect regulation of corporate governance rules, placed to a large degree within the discretion of market actors. The financialization of corporate governance and the emergence of a transnational legal pluralist regime of applicable rules and standards provides a particular challenge to Karl Polanyi’s identified ‘double movement’ in the regulation of increasingly disembedded markets.

And, yet, this is only the first of two analytical steps that must be made to understand the present regulatory challenge. As the study of capital market law and corporate governance in the European Union illustrates, the emerging regimes cannot adequately be represented as either national or international. As they are both and yet neither exclusively, they represent examples of what Saskia Sassen calls ‘global assemblages’ and what I shall here study as *transnational legal pluralism*. While Sassen’s concept provides for a powerful illustration of the autonomy of self-constituting spaces that comprise human, institutional and technological, digital elements, this framework needs to be complemented by a specifically legal perspective on the evolving forms of regulatory approaches and instruments that are present here.

Keywords: European Corporate Law, Financial Market Regulation, Corporate Governance, Varieties of Capitalism, Embeddedness, Global Assemblages, Legal Pluralism, Transnational Law.

JEL classification: K22, K33

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THE NEXT ‘GREAT TRANSFORMATION’ OF MARKETS AND STATES IN THE TRANSNATIONAL SPACE: GLOBAL ASSEMBLAGES OF CORPORATE GOVERNANCE & FINANCIAL MARKET REGULATION^o

Peer Zumbansen*

I. INTRODUCTION

In midst a rapidly unfolding and spreading financial crisis, which many hold to be the worst since the Great Depression of 1929¹, scholarly assessments of market regulatory instruments are prone to be highly volatile, experimental in nature at best. Not particularly well equipped to quip about ‘I told you so’s² or ‘I should have known’s³, lawyers, working in the primarily affected areas of banking and securities regulation, corporate governance and accounting, find themselves struggling with contradicting evidence from ‘experts’ right and left. Much of the retrospective wisdom presented by economists, accountants and market analysts, turns on the in/predictability of the current situation and there seems to be a collective, if increasingly coy⁴ remembering of the exaltation and ‘irrational exuberance’ of times and actions not so long ago. Those that have

^o Paper prepared for the ‘The Social Embeddedness of Transnational Markets’ Workshop in Bremen, 5-7 February 2009, jointly organized by the Collaborative Research Centre 597 “[Transformations of the State](#)” and the ReCon Project WP 9 [<http://www.reconproject.eu/projectweb/portalproject/BremenFeb09.html>]

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¹ P. Krugman, *The Return of Depression Economics and the Crisis of 2008* (Norton, 2009), 4; Barry Grey, ‘Worst week for global markets since 1929’, www.wsws.org, 11 October 2008: <http://www.wsws.org/articles/2008/oct2008/glec-o11.shtml>; ‘Harper calls crisis worst since 1929’, *The Toronto Star*, www.thestar.com, 22 November 2008, <http://www.thestar.com/News/World/article/541832>; Henryk Broder, ‘Portrait Otmar Issing Neuer Kanzlerberater: “Schlimmste Krise seit 1929” In der Hauptrolle der Bundespräsident’, *Der Tagesspiegel*, 21 October 2008, <http://www.tagesspiegel.de/meinung/kommentare/art141.2641082>; Jean-François Barbe, ‘La pire recession depuis 1929?’, *Les Affaires*, 29 July 2008, <http://www.lesaffaires.iucom/article/0/economie/2008-07-29/480591/la-pire-reteacutecession-depuis-1929.fr.html>; Ramon Marimon, ‘Del ‘crash’ de 1929 a la crisis de 2008’, *El Pais*, 12 January 2009, http://www.elpais.com/articulo/opinion/crash/1929/crisis/2008/elpepuopi/20090112elpepiopi_11/Tes

² For those, see R. J. Shiller, *The Subprime Solution. How Today's Global Financial Crisis Happened, and What to do About it* (Princeton University Press, 2008), or G. Soros, *The New Financial Paradigm. The Credit Crisis of 2008 and What It Means* (Public Affairs, 2008)

³ Edmund L. Andrews, “Greenspan ‘shocked’ that free markets are flawed”, *International Herald Tribune*, 23 October 2008, <http://www.iht.com/articles/2008/10/23/business/gspan.php>

⁴ Mathew Padilla, ‘Things we lost in 2008’, *Orange County Register*, 26 December 2008, <http://www.ocregister.com/articles/orange-county-year-2266691-percent-sales>

not (yet) lost house or job but instead, enjoy the privilege of observing and interpreting these ‘interesting times’⁵, find themselves pondering, it seems, about responsibilities for the emphatically embraced views that, for example, house prices could only rise, or that markets could provide not only sufficient incentives to managers to keep stock performance on an upward surge but also provide for the necessary oversight and control. It is within these confinements that current thinking yearningly looks to the past, gloomily observes the present and – in a strangely heartened and resolved manner – sets out to dream up the future. And it is in the centre of the current attempts to address, explain and overcome the crisis, that conceptual and institutional suggestions are running high. Plus ça change, plus c’est la même chose?

Conceptually, of the contenders competing for attention in this future-building exercise, ‘systemic risk management’ appears to come out ahead. While ‘risk’ is not an alien concept to law⁶, its legal treatment poses a particular challenge to legal theory: en lieu of a general legal theory of risk that would necessarily always reflect a particular interpretation of law in general⁷, different legal areas have – over time – been dealing with risk in highly specialized, concrete forms.⁸ The notion of risk is of crucial importance in the present inquiry into the nature of the crisis and the adequacy of possible responses. It serves as a reminder that instead of being asked to devise a regulatory scheme modeled on a simple cause-effect analysis of the current crisis, any regulatory response will have to embrace the particular nature of risk that underlies and informs the present situation. The risks that lie at the heart of the current inquiry into the crisis present a particular set of challenges. In fact, the evidence is too strong that the current situation grows out of a larger complex of contributing elements, which are not adequately squeezed beneath the sub-prime & mortgage collapse alone. Financial innovation, as it skyrocketed over the last decades, a development that had begun hundreds of years ago with the brazen invention of insurance schemes⁹, set free a truly mind-boggling sphere of risk-taking opportunities. Taking stock today, mortgage lending, while tremendously concentrated and over-heated and thus prone

⁵ Alex Tokarev, ‘Interesting Times’, *WORLDmag.com*, Commentary, 30 December 2008, <http://online.worldmag.com/2008/12/30/interesting-times/>; see also George Packer’s wonderful reminiscence on Edmund Wilson’s Great Depression journalism in *The New Yorker*, ‘Edmund Wilson on the Automobile Crisis’, *The New Yorker*, 24 November 2008, <http://www.newyorker.com/online/blogs/georgepacker/2008/11/edmund-wilson-o.html>

⁶ See only Cardozo’s opinion in the 1928 case of *Palsgraf v. Long Island R.R.* [162 N.E. 99 (N.Y. 1928)]. For a discussion of these issues, see J. Oberdiek, ‘Philosophical Issues in Tort Law’, (2008) 3 *Philosophy Compass* 734-748; C. F. Cranor, ‘A Philosophy of Risk Assessment and the Law: A Case Study of the Role of Philosophy in Public Policy’, (1997) 85 *Philosophical Studies* 135-162; see also Dayna N. Scott, ‘Law, Risk and Administration’, *Continuum Magazine*, Special Issue “Osgoode.KNOWLEDGE”, 2009.

⁷ See, e.g., R. A. Posner, *Catastrophe: Risk and Response* (Oxford University Press, 2004).

⁸ See, e.g., J. Steele, *Risks and Legal Theory* (Hart Publishing, 2004); with regard to the risks identified in the current crisis, see only N. N. Taleb, *The Black Swan: The Impact of the Highly Improbable* (Random House, 2007); S. Schwarcz, ‘Systemic Risk’, (2008) 97 *Georgetown L. J.* 193 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008326); O. H. Dombalagian, ‘Too interconnected to fail?: Investment Banks and Systemic Risks’, (2008) *Tulane Law School Working Paper* <http://ssrn.com/abstract=1249441>

⁹ R. J. Shiller, *The New Financial Order. Risk in the 21st Century* (Princeton University Press, 2003)

to implosion¹⁰, only formed part of a seemingly insatiable expansion of borrowing and lending activities concerning commercial real estate, commodities and international equities.¹¹ As the first 'lessons' are being drawn and the first sets of calls for speedy but comprehensive, swift but thorough reform made, it is fast becoming clear that the risk of the financial surge of the last 15 years has and will be borne by investors who in an absolutely disillusioning manner had everything 'on the line'. Yet, a closer look at the investors who are said to have lost their homes and their income soon reveals that in fact many of these investors had already been in a miserable position well before the bubble burst. The close linkage between so-called defined contribution (401-K) plans in the U.S. and the particular corporate finance/governance regime that exclusively focused on a company's short-term performance on the stock market, made of most employees de facto investors. As retirement savings were put into corporate stock, which became reinvested and commodified, these 'savings' became crucially exposed to the volatility of the market. The insecurity of employees' old age investments was only exacerbated through the increasingly aggressive role played by institutional investors, above all, by pension funds that are often plagued by short-term orientation and their fund managers' brief tenure.¹² The current 'crisis', in fact, continues but does not constitute a long-term decline of retirement security.¹³ This has important repercussions for any identification and assessment of the risk(s) connected with the current financial situation.

Close up, the picture of the current crisis is in fact one of many layers and shades. This provides a formidably humbling context for any search for responses, remedies, solutions. Complementing the current inquiry into systemic risk and its management, just touched upon, *institutionally*, then, the talk today is concerned with the need for a 'strong' hand, and the inevitability of 'intervention', of 'more' and of 'better' control and oversight. It is this widely shared sense of emergency out of which grow the suggestions for general toughness and diligence. This paper takes issue with this enthusiasm for institutional responses, the creation of tougher rules, new monitoring agencies and more severe accountability. It does so for the simple reason that things are not that simple.¹⁴ Striking evidence for the complexity of the situation and, correspondingly, of the regulatory concepts and instruments that we are in need of developing is provided by the history of the regulatory state itself. This paper will briefly touch on the

¹⁰ G. Soros, *The New Financial Paradigm. The Credit Crisis of 2008 and What It Means* (Public Affairs, 2008), XV

¹¹ D. W. Arner, 'The Global Credit Crisis of 2008: Causes and Consequences', (2009) *University of Hongkong, Asian Institute of International Financial Law, AIIFL Working Paper No. 3* <http://ssrn.com/abstract=1330744>, 1

¹² S. Jacoby, 'Finance and Labor: Perspectives on Risk, Inequality and Democracy', (2008) *SSRN Working Paper*, available at <http://ssrn.com/abstract=1020843> (in P. Zumbansen & C. Williams eds., *The Embedded Firm: Labour, Corporate Governance, and Finance Capitalism*, 2009) forthcoming, 7

¹³ C. E. Weller, 'Lessons from the Financial Crisis for Retirement Security: Building Better Retirement Plans. Testimony before the U.S. House of Representatives Committee on Education and Labor "The Impact of the Financial Crisis on Workers' Retirement Security"', 7 October 2008', (2008) <http://edlabor.house.gov/testimony/2008-10-07-ChristianWeller.pdf>, 1, 2 (listing, in particular, 'limited retirement plan coverage, little retirement wealth, and increasing risk exposure of the individual')

¹⁴ See the intriguing plea for straight-forward, no-nonsense laws by R. A. Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995).

development of regulatory law during and after the height of the regulatory state in Western Europe, if only to illustrate the deeply complex landscape of direct and indirect regulation, by government agencies, courts, private parties and numerous organizations that fit nicely neither in the public nor the private arena. While this is well known generally¹⁵, it is certainly true in the area of financial regulation, capital market law and corporate governance¹⁶, with which this paper is primarily concerned.

The following observations focus on the intricate correlation between the *conceptual* notion of risk management and on the *institutional* dimension of ‘market regulation’ or ‘state intervention’ in the area of capital market law and corporate governance. In a strict sense, geographically, the paper will use examples from the European Union, but the concerned regulatory regimes can more adequately be understood as ‘global assemblages’¹⁷, or, as I will argue, as examples of *transnational legal pluralism*.¹⁸ As such, they are – on the one hand – neither exclusively national (domestic) nor international, while – on the other – not eliminating or overcoming the nation state.¹⁹ Rather, these assemblages, in their description through the Chicago sociologist, Saskia Sassen, are constituted through persistent local activity and interpretation and are as such comprised of human, institutional as well as technological elements, the latter resulting predominantly from the breathtaking advances in information technology (‘digitalizations’).²⁰ In contrasting the concept of transnational legal pluralism with that of Sassen’s global assemblages, I will suggest that despite the convincing account of the changed and yet crucial relation between the national and the global that Sassen presents, there is a continuing need for a specifically legal perspective on the reconfiguration of ‘spaces and places’ that is so powerfully shaping human activity and policies. It is here where it is important to draw on earlier writing in legal sociology and legal pluralism.

¹⁵ See only C. Sunstein, *After the Rights Revolution. Reconceiving of the Regulatory State* (Harvard University Press, 1990); M. Stolleis, *A History of Public Law in Germany 1914-1945 (Thomas Dunlop transl.)* (Oxford University Press, 2004); A. C. Aman Jr., ‘Administrative Law for a New Century’, in M. Taggart (eds.), *The Province of Administrative Law* (Hart Publishing, 1997).

¹⁶ For a highly instructive account and analysis, see C. Bumke, ‘Regulierung am Beispiel der Kapitalmärkte’, in K. J. Hopt, R. Veil and J. A. Kämmerer (eds.), *Kapitalmarktgesetzgebung im Europäischen Binnenmarkt* (Mohr Siebeck, 2008); C. Bumke, ‘Kapitalmarktregulierung. Eine Untersuchung über Konzeption und Dogmatik des Regulierungsverwaltungsrechts’, (2008) 41 *Die Verwaltung [DV]* 227-257

¹⁷ For this concept, see S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006); a preparation of the argument of the national-global intertwinedness is given in S. Sassen, *The Global City* (Princeton University Press, 1991), and S. Sassen, *Globalization and Its Discontents. Essays on the New Mobility of People and Money* (The New Press, 1998); for a discussion and application, see now M. Amstutz/V. Karavas, ‘Weltrecht: Ein Derridasches Monster’, in G.-P. Calliess, A. Fischer-Lescano, D. Wielsch and P. Zumbansen (eds.), *Soziologische Jurisprudenz. Liber Amicorum für Gunther Teubner zum 65. Geburtstag* (Walter de Gruyter, 2009)

¹⁸ For a presentation, see P. Zumbansen, ‘New Governance’ in European Corporate Governance Regulation as Transnational Legal Pluralism’, (2008) 15 *European L.J.* 246-276 [available at <http://ssrn.com/abstract=1128145>]

¹⁹ Sassen, *Territory – Authority – Rights*, op. cit., 325.

²⁰ Sassen, *Territory – Authority – Rights*, op. cit., 349 (noting the importance of focusing on financial centres, not ‘markets’, “as key nested communities enabling the construction and functioning of such cultures of interpretation.”)

The paper will proceed in three steps. First, I will contrast the pursued regulatory strategies in the two areas of capital market law and corporate governance in the EU. The central assumption of this complementary presentation of these two areas, that have seen a surge in regulatory activity – in Europe and beyond – is that in particular the transformation of corporate finance during the last two decades has led to a far-reaching approximation of both areas. This is a remarkable development, as it raises intriguing questions regarding, for one, the methodology that informs the conceptual construction and demarcation of legal doctrinal fields. In other words, how and why do we (continue to) distinguish between capital market law and corporate governance (law)? Secondly, the apparent overlapping and intertwining of these two distinct regulatory areas presents formidable challenges for our understanding of the law and the specific regulatory instruments relied upon governing each or both of the concerned areas.

In the second section I will reflect on the driving forces behind the continuing regulatory reform process in both areas and discuss recurring concepts such as harmonization ('maximum', 'minimum', 'reflexive') and regulatory competition against the analysis of market embeddedness provided by Karl Polanyi in the 1940s and the 'Varieties of Capitalism' studies by scholars such as Hollingsworth²¹ and Hall/Soskice²² in recent years. The third and last section seeks to provide an explanation for the particular forms of legal regulatory regimes that are emerging in the named areas. Contrasting or complementing Sassen's account of 'global assemblages', I will argue for a legal pluralist reading of the emerging regulatory regimes.

II. CAPITAL MARKET REGULATION AND CORPORATE GOVERNANCE: WHO ARE KAIN AND ABEL IN THE QUEST FOR AN EFFICIENT EUROPEAN SECURITIES MARKET?

A. IN SEARCH OF A HARMONIZED EUROPEAN SECURITIES MARKET

In the context of this paper, we can confine ourselves to a brief overview and assessment of the developments made with respect to the regulation of capital market law. During the last years, extensive and comprehensive studies have become available that pay adequate due to the important growth of this area of regulatory activity and scholarly inquiry. Common to these

²¹ J. R. Hollingsworth, 'The Institutional Embeddedness of American Capitalism', in C. Crouch and W. Streeck (eds.), *Political Economy of Modern Capitalism. Mapping Convergence and Diversity* (Sage, 1997); J. R. Hollingsworth, 'New perspectives on the spatial dimensions of economic coordination: tensions between globalization and social systems of production', (1998) *5 Review of International Political Economy* 482-507

²² P. A. Hall/D. Soskice (eds.), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001)

assessments is the assumption that long-term, economic growth in Europe is being closely linked to an effectively and supportively regulated securities market.²³ Namely, the European Commission and the European Court of Justice [ECJ] have been playing decisive roles in the context of shaping a continuously evolving, regulatory framework in this area. Central to the Commission's regulatory efforts was the 1999 release of the Financial Services Action Plan ["FASP"], which in its wake spurred a tremendously dynamic series of legislative initiatives. The FASP came into being at a time, when there was very little movement and even less advance in the area of corporate law harmonization – some even spoke of an 'almost empty' agenda²⁴ Programmatic and regulatory initiatives in the context of the FASP have included the inauguration of the *Lamfalussy* Commission, which in 2001, after a the release of a preliminary report and the initiation of a consultation process, produced its comprehensive final report where it addressed and discussed the challenges and needs to work towards an efficient and dynamic securities market in Europe.²⁵ Echoing the views shared by a wide spectrum of scholars and practitioners in the area, the Report, from the outset, identified the immediate necessity to bring swift reform to the existing regulatory framework in European financial regulation. This reform had become necessary mainly in light of the breathtaking advances made in financial activity around the world over the past 15-20 years, the consequences of which for securities regulation on the one hand and corporate (organization and finance) law on the other were becoming more and more obvious.²⁶

Despite the fact that the FASP regulatory initiatives partake of a very recent history, the wide-ranging assessments of their structure, aspirations, their successes and shortcomings are fast beginning to fill symposia, edited collections and bibliographies, not to mention the slew of working papers appearing, in short succession, in the Social Science Research Network (www.ssrn.com). Central to the debates surrounding the state of the European Financial Market after the introduction of a number of Directives is the concern over the inconsistency of the Directives' implementation by the individual Member States. The verdict, for the time being at least, is that due to the many political differences on the one hand and existing variations of securities regulation institutions across Europe a harmonized securities market is still far away.²⁷ Looked at closely, the Prospectus²⁸, Market Abuse²⁹, Takeover Bids³⁰ and Transparency³¹

²³ See, e.g., K. J. Hopt/E. Wymeersch (eds.), *Capital Markets and Company Law* (Oxford University Press, 2003); M. G. Warren, *European Securities Regulation* (Kluwer Law International, 2003); E. Ferran, *Building an EU Securities Market* (Cambridge University Press, 2004)

²⁴ L. Enriques/M. Gatti, 'EC Reforms of Corporate Governance and Capital Markets Law: Do They Tackle Insiders' Opportunism?' (2007) 28 *Northwestern Journal of International Law and Business* 1-33, 4

²⁵ For a chronology and related documents, go to http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm

²⁶ See, e.g., T. M. J. Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht. Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens zur Etablierung von Standards', (2008) *Zeitschrift für Europäisches Privatrecht* 480-505, 482

²⁷ See only L. Enriques/M. Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' (2007) *Proceedings of the 7th Nordic Company Law Conference* <http://ssrn.com/abstract=982282>

²⁸ http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm

Directives allow for a range of varying implementation regimes that are altogether committed to the idea of 'optionality'³² but, as a consequence, fall short of bringing about an effectively levelled playing field for actors in the European Market. At the same time, the Lamfalussy Commission consolidated and formalized the operation of a monitoring mechanism with a stick, embodied by the European Securities Committee – ESC on the one hand and the Committee of European Securities Regulators – CESR on the other. These play an important role in the evolving multi-polar process of European securities regulation. After the political orientation is identified through the Council and the Parliament, the Commission and the Parliament – in collaboration with ESC and CESR – design the more concrete implementation and execution procedures. It is after this process that in a third step the CESR through the different regulatory agencies it brings together produce recommendations, benchmarks standards. Despite these being without legally binding power, they are meant to nevertheless provide a compellingly coherent reference mark for the implementation of the introduced measures.³³ On a fourth and last step it is the Commission that is in charge to assess the successful implementation of the regulations.

As we will discuss in more detail later in this paper (III., IV.), the particular dynamics of this regulatory area raise significant questions concerning the way in which legislative goals are being identified, which interests are being considered and how these feed into the constitution and re-constitution of distinct doctrinal and conceptual fields. As in other areas, markedly European Contract law and, more specifically, European consumer protection law³⁴, the pursuit of a European regulatory framework in capital markets law and corporate governance occurs against highly charged assessments of the underlying assumptions and goals that inform the regulatory process. Market efficiency represents, in this context, a highly persuasive formula that, when studied more closely, does not by itself contain much clarification as to the interests and goals that are actually being pursued. This dilemma, that certainly seems to plague any reform agenda in complex regulatory areas, is further exacerbated by the fact that the European

²⁹ http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

³⁰ http://ec.europa.eu/internal_market/company/takeoverbids/index_en.htm

³¹ http://ec.europa.eu/internal_market/securities/transparency/index_en.htm

³² Sceptically: L. Enriques/M. Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' (2007) *Proceedings of the 7th Nordic Company Law Conference* <http://ssrn.com/abstract=982282>; for a helpful conceptual discussion, see G. Hertig/J. A. McCahery, 'Optional rather than Mandatory EU Company Law: Framework and Specific Proposals', (2007) *European Company and Financial Law Review [ECFR]* 341-362.

³³ T. M. J. Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht, op.cit., at 484

³⁴ See U. Mattei/F. Nicola, 'A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda', (2006) 41 *New Engl. L. Rev.* 1-66; T. Wilhelmsson, 'Varieties of Welfarism in European Contract Law', (2004) 10 *European Law Journal* 712-733; G. Howells/T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age?' (2003) 28 *European Law Review* 370-388; G.-P. Calliess, 'The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a coherent European Contract Law: A Comment on the ECJ's and the FCJ's "Heininger" Decisions', 3 *German L. J.* available at: http://www.germanlawjournal.com/past_issues.php?id=175 (2002)

securities market (or, the European Company Law Scene³⁵) constitutes an even more complex arena and context than a historically evolved regulatory area in a particular state.³⁶ As will be argued more fully below (III), substantive law reforms in Europe regularly occur with the open-ended European integration project in their background.

Before we briefly highlight the particular dimensions of European Corporate Governance Regulation [ECGR], we shall pause for a moment to reflect on the connections between capital market law and corporate governance. The different speeds at which each area has been developing in Europe could suggest that it would indeed be possible to neatly distinguish between them as clearly distinct, conceptually and doctrinally contained regulatory areas. There are several elements at play that point into the opposite direction, which we briefly want to allude to under the heading of the ‘financialization of the corporation’.

B. THE FINANCIALIZATION OF THE CORPORATION

Since 1980, the financialization of the corporation has led to a widely held acceptance of subjecting every element of a business firm to varied processes of securitization³⁷, involving a fast proliferating landscape of investment actors.³⁸ This strategy, pursued by companies across the world, is pursued to attract a highly diversified investment of global investment pools. Far-reaching deregulation with regard to capital control during the 1980s has facilitated an unprecedented flow of capital across national boundaries, allowing for securitizations, often repeatedly, of a large number of assets, including pension claims, real estate and commercial claims. With companies designing corporate strategy primarily with stock performance in mind, shareholder value became the dominating principle in assessing corporate performance, fuelled by a seemingly unstoppable growth in index values.

The focus on short-time volatility of corporate shares to evaluate a company’s merits and prospects would quickly become the only perspective from which we would try to understand a

³⁵ C. Schmitthoff, 'The Future of the European Company Law Scene', in C. Schmitthoff (eds.), *The Harmonisation of European Company Law* (The U.K. Nat'l. Committee of Comparative Law, 1973)

³⁶ For an illustration of the latter, see R. Romano, *The Genius of American Corporate Law* (The American Enterprise Institute Press, 1993); for the former: R. Buxbaum/K. J. Hopt, *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.* (Walter de Gruyter, 1988)

³⁷ R. Dore, 'Financialization of the Global Economy', (2008) 17 *Industrial and Corporate Change* 1097-1112, 1099: “The basic financial innovation on which the pyramid of ever more arcane financial instruments is built is securitization.”

³⁸ F. Partnoy/R. Thomas, 'Gap Filling, Hedge Funds and Financial Innovation', in Y. Fuchita and R. E. Litan (eds.), *New Financial Instruments and Institutions. Opportunities and Policy Challenges* (Brookings, 2007)

firm.³⁹ But this narrowing of gaze came at the price of also blinding out that the firm's environment had dramatically been transformed over the course of a few decades. To the degree that the advancement of communication and information technology revolutionized the transfer of derivatives, sometimes as a company's virtual assets, across vast strategic spaces, the attention given to stock performance eventually removed the firm from its geographical environment by elevating it into a purely ethereal realm. In consequence of its financialization, the share or other security of the corporation (its 'reference asset' for the creation of another synthetic security) became radically virtualised. What architects of synthetic credit instruments call the reference asset, which can be the original subject of a loan or security, became radically virtualised in relation to the business corporation. The corporation, in turn, was reduced to an anchoring point for independently originated financial programs, thereby positioning the corporation no longer in a real economy, but in an artificial space of financial engineering.

In the end the firm as we have come to understand it over the past 20 years, had even outgrown even the ideal model of a nexus of contracts.⁴⁰ In order to remain operational, the model had to be adapted to the processes of financial engineering, which – at least partially – moved the corporation out of the centre of the labyrinth of contracts in which it, or its securities, are entangled. The financialization of the corporation and its securities entailed a radical separation of the corporation itself from the instruments that represent claims in, of, or against the corporation. The corporation had become a nodal point for an ephemeral crossing, interlinking and overlapping of financial vectors, channelled through the glass structure of the legal person, with almost to no relation to the original 'business' of the corporation. A dream fulfilled, with money flowing in and out of the firm, the corporation had become a virtual realm for strategic investment.

The financialization of corporate governance is powerfully reflected in the fast rise in importance of financial experts in the board of directors, the importance of financial expertise in the making of business decisions and, finally, in the transformation of the educational environment for the supporting professions – including lawyers, consultancies and accountants. The flip-side of this is the dramatic erosion of labour interests representation in the contemporary business corporation. Where corporate activity had for a long time been marked by a lively public political discussion of different constituencies' interests in the firm, its financial and physical virtualization⁴¹ increasingly erased the reference points for a general assessment of what corporations were doing.

³⁹ W. Lazonick/M. O'Sullivan, 'Maximizing Shareholder Value: A New Ideology for Corporate Governance', in W. Lazonick and M. O'Sullivan (eds.), *Corporate Governance and Sustainable Prosperity* (Palgrave Macmillan, 2002)

⁴⁰ For a reminiscence, see A. A. Alchian/H. Demsetz, 'Production, Information Costs, and Economic Organization', (1972) 62 *American Economic Review* 777-795; M. C. Jensen, *A Theory of the Firm. Governance, Residual Claims, and Organizational Forms* (Harvard University Press, 2000).

⁴¹ See, e.g., W. H. Davidow/M. S. Malone, *The Virtual Corporation. Structuring and Revitalizing the Corporation for the 21st Century* (Harper Collins, 1992); for the foundations, see M. Castells, *The Rise of the Network Society, The Information Age: Economy, Society and Culture, Vol. I. (2nd ed., 2000)* (Blackwell, 1996).

As suggested above, the financialization of the corporation led to significant changes in the corporate regulatory framework. The ‘financialization’ of the business corporation, which arguably had always been part of the corporate identity⁴², does, however, exhaust itself neither in the adaptation of corporate finance to globally available, highly diversified investment tools and opportunities nor in the wide-ranging turn of regulatory policy towards shareholder value that gave rise to the ‘corporate governance movement’ of the last decade in corporate law theory and practice.⁴³ Moreover, the financialization paradigm eventually led to a dramatic reconfiguration of the ‘embedded corporation’⁴⁴ by upsetting and shifting the institutional framework of the corporation’s regulatory environment⁴⁵ with tremendous consequences on both the domestic and the transnational level. As national governments found themselves drawn into highly charged political debates over the goals of corporate law reform, that themselves were increasingly likened to existential questions of national survival⁴⁶, the European lawmaker, too, came under growing pressure to follow up on long-standing promises and aspirations to work towards a more effective level playing field for European companies.⁴⁷

C. THE UPS AND DOWNS, RIGHTS AND LEFTS OF EUROPEAN CORPORATE GOVERNANCE

The varied history of European corporate law regulation is marked by the diversity of interests and concerns invested in this area of regulation. While the legislative record was, until recently, not altogether comprehensive⁴⁸, ECGR has in the last years become one of the most vibrant

⁴² L. E. Mitchell, *The Speculation Economy. How Finance Triumphed over Industry* (Berrett-Koehler Publishers, 2007)

⁴³ S. Deakin, 'The Coming Transformation of Shareholder Value', (2005) 13 *Corporate Governance* 11-18

⁴⁴ S. M. Jacoby, *The Embedded Corporation. Corporate Governance and Employment Relations in Japan and the United States* (Princeton University Press, 2004)

⁴⁵ See only J. Hoffmann, 'Co-ordinated Continental European Market Economies Under Pressure From Globalisation: Germany's "Rhineland capitalism"', (2004) 5 *German Law Journal* 985-1002; J. W. Cioffi, 'Corporate Governance Reform, Regulatory Politics, and the Foundations of Finance Capitalism in the United States and Germany', (2006) 7 *German L. J.* 533-562

⁴⁶ T. Baums, 'Interview: Reforming German Corporate Governance: Inside a Law Making Process of a very new nature', (2001) 2 *German Law Journal* at: http://www.germanlawjournal.com/past_issues.php?id=43

⁴⁷ C. Schmitthoff, 'The Future of the European Company Law Scene', in C. Schmitthoff (eds.), *The Harmonisation of European Company Law* (The U.K. Nat'l. Committee of Comparative Law, 1973); G. Hertig, 'Western Europe's Corporate Governance Dilemma', in T. Baums, K. J. Hopt and N. Horn (eds.), *Corporations, Capital Markets and Business in the Law. Liber Amicorum Richard M. Buxbaum* (Kluwer Law International, 2000); J. Winter, 'Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe', (2002) at http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf

⁴⁸ For an overview of the legislative acts in the area of company law up to 2000, see J. Wouters, 'European Company Law: Quo Vadis?' (2000) 37 *Common Market Law Review* 257-307, and V. Edwards, *EC Company Law* (Oxford

sectors of norm-creation and regulatory interaction. As such, ECGR has become a regulatory universe of its own, with a large portfolio within the Commission's Internal Market division and a seemingly tireless expert community feeding into the policy and norm making process at every turn. With ECGR long having left the confines of the European Court of Justice, the Council and Parliament, it has expanded into an extremely versatile, comparative and transnational legal field. ECGR constitutes a *semi-autonomous* field, comprised both of hard law and social norms, which are in a constant relation of complementarity, fusion and irritation.⁴⁹ As such ECGR presents formidable challenges for legal, economic, sociological or political analysis. From the point of view of legal pluralism, the particularity and intricacy of ECGR lies in its mixed constitution of law and 'social norms'.⁵⁰ Seen through the legal pluralist lens, ECGR develops as a co-evolutionary process, where the imposition of law – which encompasses regulations, directives, recommendations and judgments – is both shaping and being shaped by the norms evolving outside of its imposition. Similar to the unpredictability of consequences and effects of rights/principles-transplants⁵¹, ECGR faces enormous challenges in terms of legal certainty and strategy, given its many sources of potential disturbance, irritation, and complementing points due to its complex regulatory agenda. With view to the challenges facing the EU from the substantive enlargement in 2004, Silvana Sciarra observed: 'As the tradition of comparative legal scholarship in Europe has taught us, the attempt to pursue a "transplant" of legal institutions uncritically is both a sign of disregard for traditions different from the one to be transplanted, and, very often, is an inefficient solution.'⁵²

University Press, 1999); for a more recent discussion of state and prospects of EC company law making, see K. J. Hopt, 'European Company Law and Corporate Governance: Where does the Action Plan of the European Commission Lead?' in K. J. Hopt, E. Wymeersch, H. Kanda and H. Baum (eds.), *Corporate Governance in Context* (Oxford University Press, 2005); for a continuously updated listing of directives, regulations and recommendations, see the website of the European Commission at http://ec.europa.eu/internal_market/company/index_en.htm (last visited 5 April 2008)

⁴⁹ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746; G. Teubner, 'Eigensinnige Produktionsregimes: Zur Ko-evolution von Wirtschaft und Recht in den varieties of capitalism', (1999) 5 *Soziale Systeme* 7-25

⁵⁰ P. Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law', (2006) 12 *Eur. L. J.* 534-556; see generally S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869-901; H. W. Arthurs/C. Mummé, 'From Governance To Political Economy: Workers As Citizens, Stakeholders and Productive Social Actors. Paper for the First International CLPE Conference: The Corporate Governance Matrix: Unfolding the New Agenda, Osgoode Hall Law School, Toronto, 20-21 October 2005', (2005) *CLPE Research Paper Series* (www.comparativeresearch.net), published in (2007) 45 *Osgoode Hall Law Journal* 439-470

⁵¹ G. Teubner, 'Legal Irritants: How Unifying Law Ends Up In New Divergences', in P. A. Hall and D. Soskice (eds.), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001); K. Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development', in P. Cornelius and B. Kogut (eds.), *Corporate Governance and Capital Flows in a Global Economy* (Oxford University Press, 2003).

⁵² S. Sciarra, 'The Convergence of European Labour and Social Rights: Opening to the Open Method of Coordination', in G. A. Bermann and K. Pistor (eds.), *Law and Governance in an Enlarged European Union* (Hart Publishing, 2004), 155 (with reference to Kahn-Freund, (1974) 37 *Modern Law Review* 1)

Adding to the difficulties arising from the multilevel and multi-stakeholder dimension in company law regulation in Europe, ECGR has been amplifying the tensions that underlie the conceptual and architectural distinction between ‘company’ and ‘capital market’ law, which are deeply embedded in a country’s market Regulation histories.⁵³ Struggling with competing policy goals regarding the enhancement of market freedoms as they relate to capital market rules on the one hand and to corporate governance law on the other, ECGR is driven to actualize ‘the best of both worlds’. Yet, while corporate law itself appears to continue to withstand all attempts at deconstruction and demystification by other conceptual frameworks as to what corporations do⁵⁴, ECGR finds itself deeply involved in a large, ever-so amorphous market-building project. The ‘function’ of the firm, as necessarily implicated within ECGR, must now extend far beyond the financial-organisational dimensions that have recently again been depicted as the ‘what’, ‘how’ and ‘why’ of corporate law. Within the European project, in particular after the Lisbon Summit 2000⁵⁵ and its most recent reinvigoration in form of a ‘social makeover’⁵⁶, corporate law has become a strategic token in a complex multilevel governance game that brings a much wider range of players to the policy-making table than any single Market regulation unit would reasonably want to assume responsibility for.

While the to-do-list for ECGR, only seems to keep growing in view of pressing competitive, social, environmental and monitoring demands⁵⁷, it has in fact always been evolving in a

⁵³ R. Wiethölter, *Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht* (C. F. Müller, 1961); R. Buxbaum/K. J. Hopt, *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.* (Walter de Gruyter, 1988); F. Kübler, ‘The Impact of Equity Markets on Business Organization: Some Comparative Observations Regarding Differences in the Evolution of Corporate Structures’, (2001) 2 *European Business Organization Law Review [EBOR]* 669-683; H. Merkt, ‘Zum Verhältnis von Kapitalmarktrecht und Gesellschaftsrecht in der Diskussion um die Corporate Governance’, (2003) 48 *AG* 126-136; H. Eidenmüller, ‘Forschungsperspektiven im Unternehmensrecht’, (2007) 62 *Juristenzeitung [JZ]* 487-494; N. Moloney, ‘New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation’, (2003) 40 *Common Market Law Review* 809-843; for the U.S., see only R. Romano, ‘The Sarbanes-Oxley Act and the Making of Quack Corporate Governance’, (2005) 114 *Yale L. J.* 1521-1611

⁵⁴ See only Robert C. Clark, *Corporate Law* (Little Brown, 1986), at 5 (regarding the importance of incorporating labour law into one’s study of business corporations); but see R. Kraakman/P. L. Davies/H. Hansmann/G. Hertig/K. J. Hopt/H. Kanda/E. B. Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Oxford University Press, 2004)

⁵⁵ ‘THE LISBON SPECIAL EUROPEAN COUNCIL (MARCH 2000): TOWARDS A EUROPE OF INNOVATION AND KNOWLEDGE’ ([HTTP://EUROPA.EU/SCADPLUS/LEG/EN/CHA/C10241.HTM](http://europa.eu/scadplus/leg/en/cha/c10241.htm)) (LAST VISITED 5 APRIL 2008)

⁵⁶ Euractiv: Lisbon Agenda gets social makeover (18 March 2008), reporting on the 13-14 March 2008 Summit’s recommendations to move away from its purely “growth and jobs” focus of the past three years and to put the environment and citizens more “in the foreground” (<http://www.euractiv.com/en/innovation/eu-lisbon-agenda-gets-social-makeover/article-171013>) (last visited 5 April 2008)

⁵⁷ See the Commission’s Action Plan of 2003 “MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION – A PLAN TO MOVE FORWARD” [COM (2003) 284 Final]; see also the Director General’s for Internal Market and Services’ Summary Report of 2007 on the “Consultation and Hearing on Future Priorities on the Action Plan [...]”; on the tasks lying ahead, see K. J. Hopt, ‘European Company Law and Corporate Governance: Where does the Action Plan of the European Commission Lead?’ in K. J. Hopt, E. Wymeersch, H. Kanda and H. Baum (eds.), *Corporate Governance in Context* (Oxford University Press, 2005).

particularly accentuated and contested field of contrasting and competing Member State agendas in pursuit of national prosperity, of which corporate and capital market law had always been a central building block.⁵⁸ As such, ECGR has never sat comfortably within the wider market integration agenda. The real challenges of company law harmonization, however, became impressively obvious during the exhausting struggle over the adoption of a regulation concerning the creation of the European Company statute, originally initiated already in the 1970s, and eventually passed after many more compromises, in 2001.⁵⁹ Another illustration of how ECGR has been inextricably caught up in the European 'Varieties of Capitalism'⁶⁰ was, without doubt, the long contest over a European Takeover Directive⁶¹, which resulted in 2004 in a Directive full of loop-holes and opt-out clauses.⁶² Eddy Wymeersch recently called the moment of adopting the Directive a 'provisional semi-final point in a process that has taken more than 17 years, and according to some even more than 30 years on the way to opening up the European markets for corporate control.'⁶³ At the time, André Nilsen observed that '[T]he Takeover Directive sees light after a long and acrimonious journey through the institutional labyrinth in Brussels.'⁶⁴

As the regulatory trajectory of ECGR continues to unfold, we must be even more sensitive to the degree to which this enterprise remains deeply embedded in the particular dynamics of multilevel governance of European integration on the one hand⁶⁵ and the globalization of

⁵⁸ J. W. Cioffi/S. S. Cohen, 'The state, law and corporate governance: the advantage of forwardness', in S. S. Cohen and G. Boyd (eds.), *Corporate Governance and Globalization. Long Range Planning Issues* (Edward Elgar, 2000)

⁵⁹ E. Werlauff, 'The SE Company - A New Common European Company from 8 October 2004', (2003) 14 *European Business Law Review [EBLR]* 85-103; C. Teichmann, 'The European Company - A Challenge to Academics, Legislatures and Practitioners', (2003) 4 *German L. J.* 309-330

⁶⁰ P. A. Hall/D. Soskice (eds.), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001)

⁶¹ See R. J. Gilson, 'The Political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment', in K. J. Hopt and E. Wymeersch (eds.), *European Takeovers. Law and Practice* (Butterworths, 1992), and E. Wymeersch, 'Problems of the Regulation of Takeover Bids in Western Europe: A Comparative Survey', in K. J. Hopt and E. Wymeersch (eds.), *European Takeovers. Law and Practice* (Butterworths, 1992).

⁶² For the history, see C. Kirchner/R. W. Painter, 'Takeover Defenses under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform', (2002) 50 *American Journal of Comparative Law* 451-476; P. Zumbansen, 'European Corporate Law and National Divergences: The Case of Takeover Law', (2004) 3 *Wash. U. Glob. Stud. L. Rev.* 867-886; for a recent analysis, see Blanaid Clarke, 'Takeover Regulation: Through the Looking Glass', (2007) CLPE Comparative Research in Law & Political Economy Research Paper No. 18, available at: www.comparativeresearch.net/papers.jsp; for a US-UK comparative perspective, see John Armour & David Skeel Jr., 'Who Writes the Rules for Hostile Takeovers, and Why? - The Peculiar Divergence of U.S. and U.K. Takeover Regulation', (2007) *Georgetown L. J.* 1727-1794.

⁶³ Eddy Wymeersch, 'The Takeover Bid Directive, Light and Darkness', (January 2008) *Financial Law Institute Working Paper No. 2008-01*, available at <http://ssrn.com/abstract=1086987>, at 2

⁶⁴ A. Nilsen, 'The EU Takeover Directive and the Competitiveness of European Industry', (2004) *The Oxford Council on Good Governance* <http://www.oxfordgovernance.org/fileadmin/Publications/EY001.pdf>

⁶⁵ See M. Jachtenfuchs, 'The Governance Approach to European Integration', (2001) 39 *Journal of Common Market Studies* 245-264; I. Bache/M. Flinders (eds.), *Multi-level Governance* (Oxford University Press, 2004); but see now

markets and regulatory processes on the other.⁶⁶ Under such conditions, an assessment of the concrete forms of norm-creation presents great challenges due to ECGR's complex appearances ranging from 'hard' to 'soft' law to norms that are developed, promulgated and disseminated by a panoply of public and private actors.⁶⁷ Therefore, instead of trying to free ECGR from its embeddedness in this complex regulatory environment, the emphasis must be on the exact opposite. Precisely by embracing the embeddedness of ECGR as a *transnational legal field* can we begin to better see the concrete as well as the amorphous forms of change. Embeddedness is here understood in the following four dimensions:

- a) ECGR is informed by the policy and legislative dynamics between corporate law and capital-market law (securities regulation) as well as between corporate law and labour law, categorizations of functionally separable legal areas that can be found in all advanced industrialized societies and that are increasingly challenged through global forces of rule-making;
- b) ECGR is entangled in the European 'Varieties of Capitalism' with regard to corporate and labour regulation, as evidenced for example in the struggle over the Takeover Directive and the statute of the *Societas Europaea*;
- c) ECGR as part of the larger project towards the completion of the European internal market⁶⁸, in particular in the post-Lisbon environment of knowledge society politics within the EU⁶⁹
- d) ECGR as semi-autonomous field, marked by a vibrant and yet precarious, always threatened balance between official law making, transnational consultations, expert committee preparatory work, recommendations, communications and standardization, that we see unfolding on the domestic, EU-supranational and transnational level.

C. F. Sabel/J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', (2008) 14 *European L.J.* 271-327.

⁶⁶ See e.g. D. Rodrik, 'Governance of Economic Globalization', in J. S. Nye and J. D. Donahue (eds.), *Governance in a Globalizing World* (Brookings, 2000); David S. Law, 'Globalization and the Future of Constitutional Rights', (2008) *Nw. U. L. Rev.* 1-82, at 31: 'Although globalization appears to have levelled off in the world's wealthiest countries in recent years – and the "social" component, in particular, now lags behind the "economic" and the "political" components – the overall trend across all countries remains one of increasing globalization.'

⁶⁷ For a succinct account of this regulatory development, see D. Trubek/L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination', (2005) 11 *European Law Journal* 343-364.

⁶⁸ C. Barnard/S. Deakin, 'Market Access and Regulatory Competition', in C. Barnard and J. Scott (eds.), *The Law of the Single European Market. Unpacking the Premises* (Hart Publishing, 2002)

⁶⁹ See the Presidency Conclusions of the Council of the European Union [7652/08], March 13-14, 2008, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/99410.pdf, at 4: 'The implementation of the broad-based innovation strategy is key to realising EU ambitions in the area.' For an intriguing historical background, see Dominique Pestre, Science, Society and Politics. Knowledge Societies from an Historical Perspective. Report to the Science, Economy and Society Directorate, European Commission, January 2007, available at: http://ec.europa.eu/research/science-society/document_library/pdf_06/historical-perspectives_en.pdf.

To better illustrate where the current debate on European corporate governance including comparative corporate governance stands from and to perhaps gain a better view on where it might be going, some comparative history is necessary. Within the US. Scholarly discourse – which powerfully feeds into and informs a global discussion about corporate governance standards, their convergence or divergence, among the defining landmarks are: the Berle-Dodd debate of the 1930s about the responsibilities of management, the Berle-Means treatise on “Modern Corporation and Private Property” – this treatise, which famously observed that in liquified capital markets and with a professional management, shareholders face a monitoring problem due to the ‘separation of ownership and control’, has become again, some 75 years later, focus of renewed attention (*Bratton, Wachter, Tsuk Mitchell*) – this leads to a renewed inquiry into the conditions of US embedded capitalism then and now. It therefore enriches the political analysis provided for by scholars such as Mark Roe and potentially links it to ongoing work among economic sociologists such as Granovetter⁷⁰ and Beckert⁷¹ on the one hand and recent developments within new institutional economics on the other. Further, the rise of Law & Economics in Anglo-American and Anglo-Saxon corporate law, which has come to be the most persuasive and most influential unified approach to describe the nature of corporations.⁷² It is against this background, mixed with some comparative law, that the above named scholars have posited that there will be more convergence than divergence and that shareholder primacy will become the definitive theory of corporate governance regulation.⁷³ Closely related is the so-called Legal Origins Thesis, put forward by renowned economists *La Porta, Lopez-de-Silanes, Shleifer & Vishny* during the last one and a half decades: their claim is, abbreviated, that countries with common law tradition have higher levels of effective investor protection, liquid capital markets and growing prosperity whereas countries of the civil law tradition do not. Common law jurisdictions are found to be featuring a high level of outside control on corporations, whereas civil law countries are known as so-called insider-systems of corporate governance. This thesis has been attacked from various sides (Spamann, Siems, Deakin/Ahlering, Roe, Jackson, Licht). More recently, even, the recognition of the shortcomings of the ‘economic man’ has been informing the fast rise to fame of the field of behavioural economics (Jolls, Sunstein, Thaler), which has been contributing to an ever more engaged debate about corporate actors’ behaviour and the need for regulators to take a more

⁷⁰ M. Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness', (1985) 91 *American Journal of Sociology* 481-510

⁷¹ J. Beckert, 'The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology', (2007) *Max-Planck-Institut für Gesellschaftsforschung/Max-Planck-Institute for the Study of Societies, MPIfG Discussion Paper 07/1*

⁷² For an interesting analysis, see B. R. Cheffins, 'The Trajectory of (Corporate) Law Scholarship', (2004) 63 *Cambr. L. J.* 456-506

⁷³ H. Hansmann, 'How Close is the End of History?' (2006) 31 *J. Corp. L.* 745-750; but see W. W. Bratton/J. A. McCahery, 'Comparative Corporate Governance and Barriers to Global Cross Reference', in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002); S. Deakin, 'Reflexive Governance and European Company Law, in: *CLPE Research Paper Series 2007*', in: available at: www.comparativeresearch.net; P. Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law', (2006) 12 *Eur. L. J.* 534-556

differentiated, less heavy-handed and yet slightly paternalistic approach towards regulation. The overall gist has been one we might wish to call enlightened deregulation: it clearly builds on a distinct evolutionary pattern of post Welfare-state regulatory hubris and as such forms natural alliances with the administrative law shift towards participatory governance and indirect regulation through less ‘interventionist’ means such as ‘transparency’ and ‘disclosure’ – well, nudging.⁷⁴

In Europe, this comparative history is very present. The turn to ‘law and finance’ is occurring very persuasively⁷⁵ and with consequences for the continuously evolving regulatory landscape. This landscape is so intricately constituted through a combination of technological advance, institutional change and discursive practice that Saskia Sassen is rightly speaking of ‘cultures of interpretation’.⁷⁶ As the European Commission continues to pursue a very effective dual agenda of revisiting and expanding the reach of capital market law Directives on the one hand and on indirectly reforming company law rules on the other, we find a powerful illustration of the emerging culture of interpretation. Making the ‘European Company Law Scene’ one of the most vibrant law- and norm-making markets worldwide⁷⁷ the European Commission has been pursuing one of the most sophisticated strategies of indirect, soft-law making by delegating far-reaching bench-marking and best-practice formulation authorities to expert committees, on whose work the Commission has since been issuing far-reaching recommendations that more often than not have been preparing Directives.⁷⁸

These ECGR developments represent thus a series of highly diversified norm-setting processes that have been resulting in a veritable explosion of corporate governance codes in Europe and elsewhere.⁷⁹ With the proliferation of corporate governance codes, influenced and pushed by international⁸⁰ and transnational activities of norm setting, discussion and thought exchange⁸¹, it has become increasingly difficult to identify a single institution or author of a set of norms.

⁷⁴ For a powerful illustration, see now R. Thaler/C. Sunstein, *Nudge. Improving Decisions about Health, Wealth and Happiness* (Yale University Press, 2008)

⁷⁵ B. Haar, 'Law and Finance - Kapitalmarktentwicklung in interdisziplinärer Perspektive', (2008) 63 *Juristenzeitung [JZ]* 964-974; H. Fleischer, 'Zur Zukunft der gesellschafts- und kapitalmarktrechtlichen Forschung', (2007) *ZGR* 500-510

⁷⁶ S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006), 349

⁷⁷ E. Wymeersch, 'Convergence or Divergence in Corporate Governance Patterns in Western Europe?' in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002); L. Enriques/P. Volpin, 'Corporate Governance Reforms in Continental Europe', (2007) 21 *J. Econ. Persp.* 117-140

⁷⁸ G. Hertig/J. A. McCahery, 'Optional rather than Mandatory EU Company Law: Framework and Specific Proposals', (2007) *European Company and Financial Law Review [ECFR]* 341-362

⁷⁹ See the list of codes in various countries at www.ecgi.org.

⁸⁰ OECD; WCFCG; IVCGN

⁸¹ ECGI, INSEAD, Euroshareholders etc.

Instead, the production and dissemination of corporate governance rules has for some time now taken on the nature of migrating standards⁸² and a cross-fertilization of norms is now regarded as eminent and necessary in shaping future corporate activity. A distinct feature of this de-territorialized production of norms is the radical challenge these processes pose for our understanding of what we call law proper. With the dissemination of corporate governance codes, disclosure standards and rules, best practices and codes of conduct, not only corporate and securities law, but also other fields of law – such as labour and employment law – change. It is this strangely amorphous space that due to its intricate relation to concrete places such as nation states, spheres of political decision making, of protest and so on creates a dramatic challenge for attempts to foster institutional conditions for public policy debates.

Loyal to the new institutional economists' reading, this liquidification of institutions constituted by the decentralization of norm producers is repeated, mirrored and reflected in the hybridization of the norms themselves. Everything can become an 'institution', from a fully-fledged regulatory apparatus to a hand-shake among business partners. It is in this sense, that the study of the proliferation of corporate governance codes and company law production in general and of the rules of remuneration disclosure in particular feeds into a broader research into the changing face of legal regulation in globally integrated marketplaces, that themselves become representations of society – exactly the nightmare that Polanyi so aptly depicted.⁸³ What shines through particular developments in individual jurisdictions in this regard, is a most poignant exhibition of particular legal and political cultures and political economies of law making and economic regulation.⁸⁴

⁸² See for a comparable analysis of migrating human rights standards, C. Scott/R. Wai, 'Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential of Transnational "Private" Litigation', in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004).

⁸³ K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (Beacon Press, 1944), 57: "The control of the economic system by the market is of overwhelming consequence to the whole organization of society: it means no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system. [...] The vital importance of the economic factor to the existence of society precludes any other result. For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws. This is the meaning of the familiar assertion that a market economy can function only in market society."

⁸⁴ P. Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law', (2006) 12 *Eur. L. J.* 534-556

III. THE EPHEMERAL ‘DOUBLE MOVEMENT’ IN ECMR AND ECGR⁸⁵

The process of European capital market law and corporate governance harmonisation offers itself as a case in point for an inquiry into the intricate process of European integration. At the same time, it illustrates the nature of legal evolution as reflected in the increasingly multilevel and trans-territorialised norm production in the law of corporate governance. On the one hand, business has for a long time now come to be organised in a globe-spanning manner, with historically strong attempts to liberate itself of nation states’ regulatory aspirations or constraints.⁸⁶ This is part of the nation state’s larger struggle over regulatory sovereignty with regard to the economic processes that unfold within and beyond national borders. On the other hand, however, corporations remain, in many respects, embedded in a complex field of historically grown, institutionally and legally structured frameworks of national regulation and administration.⁸⁷ And, because national corporate laws are embedded in such distinct socio-economic cultures, historically grown legal and industrial regimes, scholars in comparative corporate governance have become increasingly aware of the methodological challenges in comparing different corporate governance régimes.⁸⁸ After early critiques of a functional approach to comparative law⁸⁹ had contributed to comparative legal scholarship’s becoming

⁸⁵ The following section draws in part on P. Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law', (2006) 12 *Eur. L. J.* 534-556, and on P. Zumbansen, 'New Governance' in European Corporate Governance Regulation as Transnational Legal Pluralism', (2008) 15 *European L.J.* 246-276 [available at <http://ssrn.com/abstract=1128145>]

⁸⁶ C. Schmitthoff, 'International Business Law: A New Law Merchant', (1961) 2 *Current Law and Social Problems* 129-153; J.-P. Robé, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order', in G. Teubner (eds.), *Global Law Without A State* (Aldershot, 1997); F. D. Ly, 'Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation', in V. Gessner, R. P. Appelbaum and W. F. Felstiner (eds.), *Rules and Networks. The Legal Culture of Global Business Transactions* (Hart Publishing, 2001); A. C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Economy* (Cambridge University Press, 2003)

⁸⁷ M. O'Sullivan, 'Corporate Governance and Globalization', (2000) 570 *The Annals of The American Academy of Political and Social Science [ANNALS]* 153-172; J. W. Cioffi/S. S. Cohen, 'The state, law and corporate governance: the advantage of forwardness', in S. S. Cohen and G. Boyd (eds.), *Corporate Governance and Globalization. Long Range Planning Issues* (Edward Elgar, 2000); that 'culture' matters greatly, has been acknowledged widely, see only B. R. Cheffins, 'Current Trends in Corporate Governance: Going from London to Milan via Toronto', (1999) 10 *Duke J. Comp. & Int'l L.* 5-42; J. Fanto, 'The Role of Corporate Law in French Corporate Governance', (1998) 31 *Cornell Int'l L.J.* 31-91; R. Buxbaum/K. J. Hopt, *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.* (Walter de Gruyter, 1988); K. J. Hopt, 'Common Principles of Corporate Governance in Europe?' in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002); Á. R. Oquendo, 'Breaking on Through to the Other Side: Understanding European Corporate Governance', (2001) 22 *U. Pa. Int'l Econ. L.* 975-1027, 976.

⁸⁸ David C. Donald, 'Approaching Comparative Company Law', (2008) *Fordham J. Corp. & Fin. L.* forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092452; K-J Hopt, 'Comparative Company Law', in: (2006) Mathias Reimann & Reinhard Zimmermann eds., *Oxford Handbook of Comparative Law* 1161-1191.

⁸⁹ J. Hill, 'Comparative Law, Law Reform and Legal Theory', (1989) 9 *Oxford Journal of Legal Studies* 101-115.

much more nuanced, contextualised, and differentiated⁹⁰, contemporary works place great emphasis on the particular cultures of corporate governance norms, the role of institutions, policies, path dependency, and innovation.⁹¹

“Corporate governance practices are partly cultural and historical products. In this context, culture can be defined as the conceptual framework whereby individuals, generally of the same country, understand and mediate the pressures of the world and motivate as well as explain their actions. As the corporation is a meaningful and purposeful human response to economic and social pressures, culture clearly informs corporate governance practices.”⁹²

Indeed, the considerably short history of European company and capital market law regulation provides numerous illustrations of this observation. In spite of a strong push for streamlining in some areas, particularly in capital market law due to increased demands for transparency and more efficient management control⁹³, it is likely that national obstacles will continue to crowd the route towards a European wide company law⁹⁴, structural challenges that have certainly also held a fully harmonized securities market at bay.⁹⁵ European company law reflects the persisting challenges to European integration in that it highlights the difficulties of creating a body of law

⁹⁰ See for example the helpful study by W. W. Bratton/J. A. McCahery, 'Comparative Corporate Governance and Barriers to Global Cross Reference', in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002).

⁹¹ See foremost M. J. Roe, 'Path Dependence, Political Options and Governance Systems', in K. J. Hopt and E. Wymeersch (eds.), *Comparative Corporate Governance. Essays and Materials* (Walter de Gruyter, 1997).

⁹² J. Fanto, 'The Role of Corporate Law in French Corporate Governance', (1998) 31 *Cornell Int'l L.J.* 31-91, at 36.

⁹³ H. Davies/D. Green, *Global Financial Regulation. The Essential Guide* (Polity, 2008), 127; L. Enriques/M. Gatti, 'EC Reforms of Corporate Governance and Capital Markets Law: Do They Tackle Insiders' Opportunism?' (2007) 28 *Northwestern Journal of International Law and Business* 1-33, 2 “At the European Community (“EC”) level, the company law reform agenda was almost empty during the 1990s [...] Things started to change in 1999, when the Commission launched an ambitious plan to integrate EU financial markets through law: the Financial Services Action Plan....”

⁹⁴ See L. Enriques, 'Company Law Harmonization Reconsidered: What Role for the EC?' (2005) *ECGI Law Working Paper No. 53/2005* (November) <http://ssrn.com/abstract=850005>; G. Hertig/J. A. McCahery, 'An Agenda for Reform: Company and Takeover Law in Europe', in G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, 2004), 24: “...EU Company law can be viewed largely as an incomplete and rather ineffective set of provisions.” See already K. J. Hopt, 'Europäisches Gesellschaftsrecht - Krise und neue Anläufe', (1998) 43 *Die Aktiengesellschaft (AG)* 96-106; K. J. Hopt, 'Common Principles of Corporate Governance in Europe?' in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002); A. Rebérioux, 'European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement', (2002) 40 *Journal of Common Market Studies* 111-134; P. Zumbansen, 'European Corporate Law and National Divergences: The Case of Takeover Law', (2004) 3 *Wash. U. Glob. Stud. L. Rev.* 867-886; J. S. Knudsen, 'Is the Single Market an Illusion? Obstacles to Reform of EU Takeover Regulation', (2005) 11 *European Law Journal* 507-524, 515.

⁹⁵ L. Enriques/M. Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' (2007) *Proceedings of the 7th Nordic Company Law Conference* <http://ssrn.com/abstract=982282>

for social actors who have been relying on national rules, institutions, and customs within the nation state.⁹⁶ This process has nothing but consistently highlighted the immense political and socio-economic obstacles growing out of Member States' different 'varieties' and 'models' of capitalism,⁹⁷ often associated with substantive costs in bringing about an effective regulatory régime for companies operating and investing on the European market.⁹⁸

Any attempt, therefore, at assessing and evaluating the regulatory goals of the ECGR and capital market law agenda needs to begin with the premise that such rules are now developed in and emerging from a multilevel process of norm-production. With this, a study of European company law necessarily has to take into consideration the impact of different localities and types of norm-production on the emergence of European wide rules and standards, but also the persisting patterns of political opposition against reform.⁹⁹ The German rules governing worker participation in business corporations have, in that respect, become a notorious example of a régime deeply embedded in the country's political economy. To touch on one part of the legal framework would likely result in a turmoil involving numerous other norms and institutions governing co-determination.¹⁰⁰ Likewise, the long and painful struggle over a European takeover

⁹⁶ See only F. Kübler, 'The Rules of Capital Under Pressure of the Securities Markets', in K. J. Hopt and E. Wymeersch (eds.), *Capital Markets and Company Law* (Oxford University Press, 2003), 100-101; N. Reich, *Understanding EU Law. Objectives, Principles and Methods of Community Law, 2nd ed.* (Intersentia, 2005), 349; S. Deakin, 'Reflexive Governance and European Company Law, in: *CLPE Research Paper Series 2007*', in: available at: www.comparativeresearch.net

⁹⁷ Most recently: J. S. Knudsen, 'Is the Single Market an Illusion? Obstacles to Reform of EU Takeover Regulation', (2005) 11 *European Law Journal* 507-524, 524; see already the intricate critique by M. Rhodes/B. v. Apeldoorn, 'Capital Unbound? The Transformation of European corporate governance', (1998) 5 *Journal of European Public Policy* 406-427 (reprinted in Thomas Clarke, ed., *Theories of Corporate Governance. The Philosophical Foundations of Corporate Law* (London/New York: Routledge, 2004), 243; A. Rebérioux, 'European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement', (2002) 40 *Journal of Common Market Studies* 111-134. For a recent exposition of the "Models of Capitalism", see C. Crouch, 'Models of Capitalism', (2005) 10 *New Political Economy* 439-456.

⁹⁸ G. Hertig, 'Western Europe's Corporate Governance Dilemma', in T. Baums, K. J. Hopt and N. Horn (eds.), *Corporations, Capital Markets and Business in the Law. Liber Amicorum Richard M. Buxbaum* (Kluwer Law International, 2000); G. Hertig/J. A. McCahery, 'An Agenda for Reform: Company and Takeover Law in Europe', in G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, 2004), 39-40; F. Kübler, 'The Rules of Capital Under Pressure of the Securities Markets', in K. J. Hopt and E. Wymeersch (eds.), *Capital Markets and Company Law* (Oxford University Press, 2003), 101-103; L. Enriques, 'Company Law Harmonization Reconsidered: What Role for the EC?' (2005) *ECGI Law Working Paper No. 53/2005 (November)* <http://ssrn.com/abstract=850005>, 16-22.

⁹⁹ G. Hertig/J. A. McCahery, 'An Agenda for Reform: Company and Takeover Law in Europe', in G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, 2004), at 24; E. Wymeersch, 'About Techniques of Regulating Companies in the European Union', in G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, 2004).

¹⁰⁰ See, e.g., K. Pistor, 'Codetermination: A Sociopolitical Model with Governance Externalities', in M. Blair and M. J. Roe (eds.), *Employees and Corporate Governance* (Brookings Institution, 1999); M. J. Roe, 'German Co-Determination and German Securities Markets', in K. J. Hopt, H. Kanda, M. J. Roe, E. Wymeersch and S. Prigge (eds.), *Comparative Corporate Governance. The State of the Art and Emerging Research* (Oxford University Press,

régime did clearly reflect the complexities of a regulatory, socio-economic minefield made up of cultural predispositions, institutional traditions (*Volkswagen*¹⁰¹) and established networks—all of which make any capital market law-oriented reformer frown, at best.¹⁰²

'New' or alternative modes of governance have been emerging in response and reaction to the regulatory challenges that inevitably arise from these distinct variances in 'Member States' regulatory design. The most remarkable regulatory innovation in recent years is without doubt the so-called *Open Method of Coordination* [OMC], which, after emerging during the 1990s in the realm of politically contested national, economic and employment policies, had been formally adopted at the 2000 Lisbon Summit. Its defining feature has been the proceduralisation of regulatory governance by benchmarking and disseminating non-binding objectives and standards across a growing body of regulatory areas.¹⁰³ 'In the years following the Lisbon Summit, the OMC [...] appeared to have become the governance instrument of choice for EU policymaking in complex, domestically sensitive areas, where diversity among the Member States precludes harmonisation but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.'¹⁰⁴ The departure of the OMC from the more rigid norm-generation and enforcement program of the 'Community Method' has been both welcomed and criticised.¹⁰⁵ What Francis Snyder identified as 'the challenge of sites' facing the European Constitutionalist project¹⁰⁶, indeed constitutes the framework for the proliferating norm-generation processes of ECGR. As we will see in the example of regulating the disclosure requirements for executive compensation, this area of ECGR is marked by a deep, underlying tension between increasingly decentralised, indirect regulatory forms on the one hand and vaguely defined and yet broadly conceived policy

1998); M. Weiss, 'Zur aktuellen Bedeutung des Mitbestimmungsurteils - BVerfGE 50, 290 ff.' (2000) 83 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 405-418.

¹⁰¹ See the Commission's move against Germany with regard to the public holdings in the Volkswagen Group: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/410&format=HTML&aged=0&language=EN&guiLanguage=en>; for a background, see J. Adolff, 'Turn of the Tide? The "Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets', in: 3 *German Law Journal* No. 8 (1 August 2002) available at: http://www.germanlawjournal.com/past_issues.php?id=170; on the ECJ's 2007 Volkswagen decision, see P. Zumbansen/D. Saam, 'The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism', (2007) 8 *German L.J.* 1027-1051.

¹⁰² C. Kirchner/R. W. Painter, 'Takeover Defenses under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform', (2002) 50 *American Journal of Comparative Law* 451-476.

¹⁰³ D. Hodson/I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Coordination', (2001) 39 *Journal of Common Market Studies* 719-746

¹⁰⁴ C. F. Sabel/J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', (2008) 14 *European L.J.* 271-327, at 292

¹⁰⁵ See e.g. J. Scott/D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', (2002) 8 *European Law Journal* 1-18;

¹⁰⁶ F. Snyder, 'European Constitutionalism in the 21st Century', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century, vol. 1* (Hart Publishing, 2004), at 13

goals against which the adequacy and the success of lower-level norm-setting processes will be measured, on the other. At the same time, EU internal corporate governance negotiations are increasingly becoming disembedded from the exclusionary European context as they are complemented, irritated and shaped by those norms and principles ('best practices' and 'guidelines' that are disseminated on the transnational level, promulgated, for example, by actors such as the OECD).¹⁰⁷

Seen, thus, under the magnifying glass, ECGR can be described to unfold as a particular open-ended and contestable practice.¹⁰⁸ Even a cursory overview of the emerging features of ECGR suggests strong corollaries between ECGR and emerging general forms of 'new'¹⁰⁹ or 'experimental' EU governance¹¹⁰ on the one hand and between ECGR and transnational governance forms in corporate and labour law on the other.¹¹¹

On the 'inside' of the European integration process, recent years have seen a tremendous drive towards the creation of ever-more flexible forms of indirect regulation, benchmarking and rule/standards production through expert groups and advisory committees. As Simon Deakin has recently argued¹¹², expert groups such as the *European Corporate Governance Forum*¹¹³, while importantly building on recent experiences with the Winter I and II groups and their vital contribution to break the deadlock over the Takeover Directive, nevertheless reinforce and further accentuate the drive towards a 'right' standard in corporate governance regulation despite the declarations that many years of debating the convergence and divergence of corporate governance standards¹¹⁴ should support the view that 'no one size fits all'.¹¹⁵

¹⁰⁷ See the *OECD Principles of Corporate Governance*, rev. 2004, available at http://www.ecgi.org/codes/documents/principles_en_final.pdf.

¹⁰⁸ See N. Reich, *Understanding EU Law. Objectives, Principles and Methods of Community Law*, 2nd ed. (Intersentia, 2005), 307: 'Governance is concerned with achieving this balance between legitimate and illegitimate uses of autonomy.'

¹⁰⁹ Critically: Scott/Trubek, 'Mind the Gap', *supra*; see also K. A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance', (2002) 8 *European Law Journal* 102-132.

¹¹⁰ Sabel/Zeitlin, 'Learning from Difference', *supra*.

¹¹¹ P. Zumbansen, 'The Parallel Worlds of Corporate Governance and Labor Law', (2006) 13 *Indiana Journal of Global Studies* 261-312; for a powerful analysis, see C. M. O'Brien, 'Reframing RECON: Perspectives on Transnationalisation and Post-national Democracy from Labour Law', in C. Joerges and P. F. Kjaer (eds.), *Transnational Standards of Social Protection. Contrasting European and International Governance* (ARENA Centre for European Studies, 2008); C. M. O'Brien, 'Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law', (2008) 9 *German Law Journal* 1007-1042

¹¹² S. Deakin, 'Reflexive Governance and European Company Law, in: *CLPE Research Paper Series 2007*', in: available at: www.comparativeresearch.net, available at <http://ssrn.com/abstract=1002678>

¹¹³ See the website at http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.

¹¹⁴ See e.g. J. N. Gordon, 'Pathways to Corporate Governance? Two Steps on the Road to Shareholder Capitalism in Germany', (1999) 5 *Columbia Journal of European Law* 219-241; R. J. Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function?' (2001) 49 *Am. J. Comp. L.* 329-357; E. Wymeersch, 'Convergence or Divergence in Corporate Governance Patterns in Western Europe?' in J. A. McCahery, P. Moerland, T. Raaijmakers

Paradoxically, the operational method of the OMC, originally designed to promote greater flexibility and pressure to foster a race to the top in social standards, transforms itself in the context of the ECGR into an engine towards 'best practice in corporate governance'. The utilitarian, soft-law approach as here employed, leads to considerably different results than would have been hoped for in other areas of the OMC. With view to the earlier described tensions between different regulatory trajectories of corporate governance – consisting of an amalgamation of company law, securities regulation, taxation and insolvency law – the pursuit of 'best practices' is determined by a considerably narrower scope of functional concerns. At this point, the goals of this pursuit are fused too fast and probably too uncritically with the functional orientation of the post-Lisbon Innovation and Competitiveness Agenda. By emphasizing the need to ensure the economic performance and, connected herewith, the integrity and stability of financial institutions¹¹⁶, corporate governance as a regulatory field is taken out of the more complex regulatory context we have seen unfold over the course of the 20th century.¹¹⁷

As the globalisation of corporate activity and finance undermines any attempt at effectively re-domesticating corporate governance into the previously contained political economies of nation-states, the more appropriate conceptual approach would be to argue for the need for a transnationalization of corporate governance regulation. In the case of ECGR this would mean to first recognise the need for a differentiated assessment of different nation-state regulatory experiences and their presently continuing variations and innovations¹¹⁸, which lies at the heart of our revisiting Polanyi's critique of disembeddedness and his positing of the 'double movement'.¹¹⁹ The next step would then not consist in 'translating' specific regulatory

and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002).

¹¹⁵ See Frits Bolkestein, *Corporate Governance in the European Union*, Speech of October 18, 2004 on the occasion of the Inauguration of the ECGF in The Hague, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/460&format=PDF&aged=1&language=EN&guiLanguage=en>; See J. Winter, 'Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe', (2002) at http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf, at 9, 72.

¹¹⁶ Bolkestein, preceding note

¹¹⁷ See e.g. A. A. Berle, *The 20th Century Capitalist Revolution* (Harcourt, Brace & World, 1954); M. J. Roe, 'Path Dependence, Political Options and Governance Systems', in K. J. Hopt and E. Wymeersch (eds.), *Comparative Corporate Governance. Essays and Materials* (Walter de Gruyter, 1997); E. Berglöff/E.-L. v. Thadden, 'The changing corporate governance paradigm: implications for developing and transition economies', in S. S. Cohen and G. Boyd (eds.), *Corporate Governance and Globalization. Long Range Planning Issues* (Edward Elgar, 2000).

¹¹⁸ For the example of Germany, see only U.Noack/D.Zetsche, 'Germany's Corporate and Financial Law 2007 (Getting) Ready for Competition', (2007) *Center for Business and Corporate Law Research Paper* No. 06/2007, available at: <http://ssrn.com/abstract=986357>.

¹¹⁹ K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (Beacon Press, 1944), end of chapter 6, at 76: "Social history in the nineteenth century was thus the result of a double movement: the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones. While on the one hand markets spread all over the globe and the amount of goods involved

instruments onto the transnational sphere, but, instead, in fostering a radically functionalist understanding of corporate governance. Such an approach would go beyond the now abundant references to ‘best practices’, which owe their content more to the ideological battles out of which they are emerging than to a truly functionalist governance model. Such a model would have to be developed with the complete corporation, its markets, governance structures, dynamics and contextual performance practices in mind. Building on work regarding ‘reflexive law’ in the area of corporate governance and corporate environmental responsibilities¹²⁰, a more adequate governance approach would have to start with the corporation itself, complementing simultaneously continuing assessments of the organisational functionalities of the corporation.¹²¹ While such functionalist approaches to corporate governance are only now emerging¹²², their promise lies in their pursuit of governance models that are evolving directly out of the practice, management and operation of complex business entities on uncertain markets.

While this approach would place great emphasis on self-regulation, which would in turn create additional pressure on the regulatory systems with a mandatory-law approach to corporate law¹²³, *reflexive corporate governance* would eventually emerge as a more adequate and flexible approach to corporate law regulation while – at the same time – not necessarily being insulated from ongoing assessments of this hybrid regulatory enterprise. Instead of reacting to the long, tiresome and frustrating harmonisation attempts in European company law with a turn to expert rule and market governance, reflexive corporate governance would allow for a clearer view of how political governance and corporate self-regulation can be mutually reinforcing and optimizing by constantly exposing regulatory choices and practices to scrutiny. The prime advantage of this approach would be that the regulatory challenges facing today’s transnational corporations could be assessed in correlation with the ongoing transformation of the political economies in which companies are legally constituted.¹²⁴ A reflexive approach to corporate

grew to unbelievable dimensions, on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market relative to labour, land, and money. While the organization of world commodity markets, world capital markets, and world currency markets under the aegis of the gold standard gave an unparalleled momentum to the mechanism of markets, a deep-seated movement sprang into being to resist the pernicious efforts of a market controlled economy.”

¹²⁰ G. Teubner, 'Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person', (1988) 36 *Am. J. Comp. L.* 130-155; E. Orts, 'Reflexive Environmental Law', (1995) 89 *Northwestern University Law Review* 1227-1340; K.-H. Ladeur, 'Die Prozeduralisierung des Unternehmens', in D. Hart (eds.), *Privatrecht im "Risikostaat"* (Nomos, 1997)

¹²¹ R. Kraakman/P. L. Davies/H. Hansmann/G. Hertig/K. J. Hopt/H. Kanda/E. B. Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Oxford University Press, 2004)

¹²² For the example of a transnational regulatory framework of corporate environmental responsibilities of Multinational Chemical Enterprises, see the excellent study by Martin Herberg, *Globalisierung und private Selbstregulierung* (2007).

¹²³ See K. J. Hopt, 'Common Principles of Corporate Governance in Europe?' in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds.), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002).

¹²⁴ For the observation that even the ECJ’s decisions in *Centros* and others since 1999, which facilitated greater corporate mobility, have neither significantly induced more foreign incorporation nor more regulatory competition,

governance is even more pressing as the dramatically unfolding debate over a present transition from a 'real economy' to a 'financial economy'¹²⁵ suggests that neither a return to embedded capitalism corporate governance regulation nor a undeterred belief in the 'end of history of corporate law'¹²⁶ with its dubious promises of triumphant shareholder value maximization are a viable option. This means that what would previously have been an interest-pluralist assessment of choices in corporate governance regulation with view to allegedly opposed and eventually irreconcilable stakeholder interests can now be transposed into a more comprehensive and contextual analysis of the corporation's functions, in particular, of its embeddedness in operational and regulatory practices.

IV. THE TRANSNATIONAL TRANSFORMATION OF THE LEGAL ORDER

A. LAW AND TRANSNATIONAL RULE-MAKING

The recent respective developments in ECMR and ECGR suggest an intriguing transformation of the role of legal regulation. While scholars in the different variations of new institutional economics¹²⁷ on the one hand and of behavioural economics on the other¹²⁸ provide for important insights into the sticky nature of institutions and mindsets that shape economic development, there has been relatively little attention given to the evolving forms and instruments of legal regulation. This is particularly regrettable as a more engaged dialogue between law and the named theoretical orientations in economics would likely result in more satisfying answers to the questions that seem to stubbornly seem to surround the institutionalist explanations of complex situations.¹²⁹ Where such dialogue is initiated on the part of open-

see W.Bratton/J.McCahery/E.Vermeulen, 'How does Corporate Mobility Affect Lawmaking? A Comparative Analysis, (2008), ECGI Law Working Paper No. 91/2008, available at: <http://ssrn.com/abstract=1086667>

¹²⁵ Frank Partnoy, 'Financial Innovation and Corporate Law', (2007), University of San Diego Legal Studies Research Paper No. 07-89, available at: <http://ssrn.com/abstract=976931>

¹²⁶ H. Hansmann/R. Kraakman, 'The End of History for Corporate Law', (2001) 89 *Geo. L. J.* 439-468; H. Hansmann, 'How Close is the End of History?' (2006) 31 *J. Corp. L.* 745-750

¹²⁷ E.g., D. C. North, *Understanding the Process of Economic Change* (Princeton University Press, 2005); D. C. North, 'Capitalism and Economic Growth', in V. Nee and R. Swedberg (eds.), *The Economic Sociology of Capitalism* (Princeton University Press, 2005); E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000).

¹²⁸ See, e.g., C. Sunstein, 'Social Norms and Social Roles', (1996) 96 *Colum. L. Rev.* 903-968; C. Sunstein (eds.), *Behavioural Law & Economics* (University of Chicago Press, 2000); C. Jolls, 'Behavioral Law and Economics', in P. Diamond (ed.), *Economic Institutions and Behavioral Economics* (Princeton University Press, 2007), with responses by Ian Ayres and Christoph Engel.

¹²⁹ See, e.g., the discussion by P. A. David, 'Path Dependence and varieties of learning in the evolution of technological practice', in J. Ziman (eds.), *Technological Innovation as an Evolutionary Process* (Cambridge

mindful economists, important insights have been gained with regard to the relevance of 'social norms', routines and practices that, due to their complex, context-driven nature, are not easily fitted into a legal rights regime as applied by a contract adjudicating judge.¹³⁰ This 'discovery of social norms by law & economics' scholars¹³¹, however, has left some stones unturned. Namely, the economist bias in the identification of social norms that underlie parties' behaviour leads to a narrow view on the nature and scope of such norms. By contrast, it would seem more promising to take the inquiry into the social foundations of contract law, as Durkheim already early on circumscribed his investigative agenda¹³², further. A decisive step into this direction would be to reflect on the connections between the 'social norms' that govern business partners' behaviour now¹³³ and then.¹³⁴ For one, such a drawing of connections would allow us to appreciate on the evolutionary character of the legal form. As the studies by Macaulay and others that eventually found their way into the famous Materials on 'Contract Law in Context' at Wisconsin¹³⁵ show, the discovery of informal agreements, routines and attitudes among 'contracting' parties was not understood as undermining or substituting law. Instead, the importance of these studies has to be seen in their authors' insistence that these findings must be taken to transform and, eventually, improve law. Instead of juxtaposing law and social norms, the 'relational contract' and 'law in context' scholars emphasized the intertwined nature of both. The current assessments of social norms that govern business people's behaviour are at great distance from these earlier findings.¹³⁶

As relational contract law sought to integrate the constantly changing and evolving nature of social relations into the legal form in order to understand law as relational (or, "social"¹³⁷), we are currently faced with the question how law adapts to or, more appropriately, how law formulates legal responses in a fast evolving, functionally differentiated, complex environment. There is another opportunity not yet grasped by contemporary 'social norms' scholars in the law

University Press, 2000); and by S. Deakin, 'Evolution for our Time: A Theory of Legal Memetics', (2002) *ESRC Centre for Business Research, University of Cambridge Working Paper No. 242* (also published in *55 Current Legal Problems 2002*, pp.1-42) at www.cbr.cam.ac.uk/pdf/WP242.pdf

¹³⁰ E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000), 156; R. E. Scott, 'The Death of Contract Law', (2004) 54 *UTLJ* 369-390; R. E. Scott, '*Hoffmann v. Red Owl Stores* and the Myth of Precontractual Reliance', (2007) 68 *Ohio St. L. J.* 1

¹³¹ R. C. Ellickson, 'Law and Economics Discovers Social Norms', (1998) 27 *J. Leg. Stud.* 537-565

¹³² E. Durkheim, *The Division of Labor in Society* [1893; transl. by W.D. Halls] (Free Press, 1984)

¹³³ R. E. Scott/G. G. Triantis, 'Anticipating Litigation in Contract Design', (2006) 115 *Yale L. J.* 814-879

¹³⁴ S. Macaulay, 'Non-contractual Relations in Business: A Preliminary Study', (1963) 28 *American Sociological Review* 55-67; S. Macaulay, 'Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts and Credit Cards', (1966) 19 *Vand. L. J.* 1051

¹³⁵ See, e.g., R. W. Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law', (1985) *Wisconsin Law Review* 565-579

¹³⁶ For a more extensive discussion, see P. Zumbansen, 'The Law of Society: Governance Through Contract', (2007) 14 *Ind. J. Glob. Leg. Stud.* 191-233 [available at <http://ssrn.com/abstract=988610>]

¹³⁷ R. Wiethölter, *Rechtswissenschaft* (Fischer, 1968), 168

and economics camp. This concerns the rediscovery of studies in 'legal pluralism' and 'legal anthropology' from the 1970s and 1980s. Such an exercise is promising in at least two respects. For one, the legal pluralists and anthropologists contributed greatly to a better understanding of the semi-autonomous nature of legal fields: as pioneered in her 1976 article¹³⁸, Sally Moore's analysis of law being constituted in part by social norms, routines, customs and practices and in part by hard legal regulation, the notion of law as a semi-autonomous field proved of vital importance in opening our eyes for the intricate relations between the regulator and concrete, local, intimate social spaces.¹³⁹ Striving for alternatives to the at times heavy-handed social engineering by the legal machinery, scholars called for extra-legal activism¹⁴⁰ and delegalization.¹⁴¹

Such a growing understanding of the tensions between 'lifeworld and system' (Habermas), 'the raw and the cooked' (Lévi-Strauss), or 'core and periphery' (Sousa-Santos) would soon become instrumental in the critical assessment of the role of legal regulation in a highly pluralistic society during the middle of the 20th century, which until then had remained very much within the intellectual and conceptual confines of Max Weber's distinction between substantive and formal rationalities of law. In his astute analysis of law's evolution from substantive to formal rationality along with the emergence of the bureaucratic rule of law, Weber identified on the one hand the stabilizing role of law for the conduct of commercial (and other) affairs, while, on the other, recognizing the potentially harmful effects of the ever-recurring anti-formal tendencies on the body and practice of law.¹⁴² Weber's sensibility to the contestations, the anti-rational, material challenges to the allegedly formal edifice of law turned out to be foretelling of the ensuing evolution of legal regulation well into the highly sophisticated regulatory architectures of Western welfare states¹⁴³, plagued by a purposive and intentional regulatory overdrive.¹⁴⁴ It comes as no surprise, then, that the reflection on the place of law in a canon of voices of social

¹³⁸ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746

¹³⁹ For a discussion and elaboration, see only J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55

¹⁴⁰ For a brief historical account, see O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', (2007) 120 *Harv. L. Rev.* 937-988.

¹⁴¹ M. Galanter, 'Justice in many rooms: Courts, Private Ordering and Indigenous Law', (1981) 19 *J. Leg. Pluralism* 1-47

¹⁴² M. Weber, *Rechtssoziologie. Aus dem Manuskript herausgegeben und eingeleitet von Johannes Winckelmann*, 2.A. (Hermann Luchterhand, 1967), § 8: (*Die formalen Qualitäten des modernen Rechts*)

¹⁴³ G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239-285, 253: "Substantive rationality emerges in the processes of increasing state regulation. It is commonly associated with the growth of the welfare state and state intervention in market structures [...] The justification of substantive law is to be found in the perceived need for collective regulation of economic and social activities to compensate for inadequacies of the market."

¹⁴⁴ Id., at 254: "Substantive Law is realized through purposive programs and implemented through regulations, standards, and principles."

ordering that lawyers and social theorists in North America were concerned with¹⁴⁵, was somewhat echoed by the critique of ‘instrumental’ and ‘regulatory’ law in an overly zealous Welfare State apparatus in Western Europe.¹⁴⁶

On both sides of the Atlantic, the responses to the financially and normatively exhausted Welfare State¹⁴⁷ soon split into progressive¹⁴⁸ and conservative¹⁴⁹ camps, and this context is worth bearing in mind when assessing today’s academic and political proposals in the wake of the financial crisis. In the context of the late 1970s and early 1980s, that saw a far-reaching crumbling of social-democratic policy and a growing scepticism with Keynesian economics, a fairly ambitious theoretical proposal was made that aimed at the resituating of law into a more accentuated model of society: in this model, which did not lend itself to a straight-forward ideological appropriation, society is composed of intersecting, but separated communications that are each constituted by a distinct terminology (“code”). Law was to be understood as one of these social systems – along with ‘economy’, ‘politics’, ‘religion’, or ‘art’.¹⁵⁰ On the basis of this position, Gunter Teubner introduced the concept of ‘reflexive law’, a form of law that would be characterized by a crucial exposure to its surrounding systems, while it remained ‘operationally’ closed. Due to its ‘cognitive’ openness, however, law must constantly receive impulses, ‘irritations’ and, relying on its autopoietic nature, formulate legal responses, i.e. continue its systematic operation. In the face of the weakening welfare state and the growing frustration with ineffective, undemocratic, and over-generalizing and paternalizing regulatory laws, the concept of reflexive law was offered to explain the particular challenge and form of legal regulation in a complex world. Its not uncontested¹⁵¹ core consisted of understanding law as being taken out of a learned institutional context made up of official institutions authoritatively creating state-originating laws and, instead, to be forced to reassert itself in highly diversified complex environments.¹⁵² This radicalization of law’s functional orientation constitutes a new stage in the

¹⁴⁵ See, e.g., P. Selznick, *Law, society, and industrial justice* (Yale University Press, 1969).

¹⁴⁶ R. Voigt (eds.), *Verrechtlichung* (Athenäum, 1980); K.-H. Ladeur, "'Abwägung" - ein neues Rechtsparadigma? Von der Einheit der Rechtsordnung zur Pluralität der Rechtsdiskurse', (1983) 69 *ARSP* 463-483; G. Teubner, 'Regulatory Law: Chronicle of a Death Foretold', (1992) 1 *Social & Legal Studies* 451

¹⁴⁷ J. Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]', in J. Habermas (eds.), *The New Conservatism. Cultural Criticism and the Historians' Debate [ed. and transl. by Shierry Weber Nicholsen]* (MIT Press, 1989)

¹⁴⁸ H. Rottleuthner, 'The Limits of Law: The Myth of a Regulatory Crisis', (1989) 17 *Int'l J. Sociol. L.* 273

¹⁴⁹ F. A. Hayek, *The Mirage of Social Justice [Law, Legislation and Liberty. A new statement of the liberal principles of justice and political economy, vol. 2]* (The University of Chicago Press, 1976)

¹⁵⁰ N. Luhmann, *Rechtssoziologie (1980), 3. Aufl.* (Westdeutscher Verlag, 1987); N. Luhmann, 'Law as a Social System', (1989) 83 *Nw. U. L. Rev.* 136-150; N. Luhmann, *Law as a Social System (K.Ziegert transl., F.Kastner, D.Schiff, R.Nobles, R.Ziegert eds.)* (Oxford University Press, 2004)

¹⁵¹ E. Blankenburg, 'The Poverty of Evolutionism: a critique of Teubner's case for 'reflexive law'', (1984) 18 *Law & Society Rev.* 273-289; I. Maus, 'Perspektiven "reflexiven Rechts" im Kontext gegenwärtiger Deregulierungstendenzen', (1986) 19 *KJ* 390-405; N. Luhmann, 'Einige Probleme mit "reflexivem Recht"', (1985) 6 *Zeitschrift für Rechtssoziologie* 1-18

¹⁵² G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239-285

assessment of law's institutional form, as it has been learned over time. Whereas law is still today most often associated with the state, already the legal sociological work at the turn of the century¹⁵³ as well as the legal pluralist work since the 1960s and 1970s (Moore, Griffiths, Galanter, Merry, Sousa Santos) should long have undermined this stubbornly held belief in the law-state nexus.

It is against this background that the particular challenges facing ECGR can best be illustrated, by studying them through the lens of transnational law and, more specifically, through the emerging prism of *transnational legal pluralism*. The connection of observations of the transformation of public and private international law towards 'transnational law'¹⁵⁴ and the legal-sociological and anthropological work on legal pluralism offers important insights into a better understanding of current trajectories of functionally determined regulatory areas. ECGR is a powerful illustration of such a functional field, determined both by its semi-autonomous nature with regard to its tension between law/norms and politics/market. The latter are powerfully evident in ECGR, which emerges through the co-evolution of the different functional dynamics, which drive corporate organisation. At the same time, the fast-emerging forms of new corporate organisation such as private equity vehicles and hedge funds seem to defy an organisation-oriented assessment of the firm in favour of a differently positioned analysis of contemporary corporate forms. As the 'end-of-history' thesis in comparative corporate governance scholarship and the Berle-Means paradigm of corporate organisation and its related governance issues are revisited and recontextualised¹⁵⁵, the dramatic threat of a mortgage-loan meltdown since the spring of 2008 points to the need of a comprehensive reassessment of the corporate governance approach for an understanding of the financial structures of the corporate form and the contested aspiration of financial markets regulation.¹⁵⁶

¹⁵³ E. Ehrlich, *Fundamental Principles of the Sociology of Law* (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (Russell & Russell, 1962); G. Gurvitch, *Sociology of Law* (orig. published in French as *Problèmes de la sociologie du droit*) (Routledge and Kegan Paul, 1947)

¹⁵⁴ P. C. Jessup, *Transnational Law* (Yale University Press, 1956)

¹⁵⁵ See W. W. Bratton/M. L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, available at <http://ssrn.com/abstract=1021273> 2007); D. Tsuk, 'From Pluralism to Individualism: Berle and Means and 20th Century American Legal Thought', (2005) 30 *Law & Soc. Inquiry* 179-225.

¹⁵⁶ Marcel Kahan/Edward B. Rock, 'Hedge Fund Activism in the Enforcement of Bondholder Rights', *NYU Law and Economics Research Paper No. 08-02*, available at: <http://ssrn.com/abstract=1093387>; see already Sanford Jacoby, 'Finance and Labor: Perspectives on Risk, Inequality, and Democracy', (2008), available at <http://ssrn.com/abstract=1020843>

B. CORPORATE GOVERNANCE AS TRANSNATIONAL LEGAL PLURALISM

Today's corporate governance regulation, which is transnational and hybrid in nature, is a product of the above alluded-to fundamental transformations of regulatory instruments and institutions. As corporate law is being shaped by a complex mix of public, private, state- and non-state-based norms, principles and rules, generated, disseminated and monitored by a diverse set of actors¹⁵⁷ and experts¹⁵⁸, a closer look at corporate governance serves two purposes: one is the way in which the analysis of contemporary corporate governance regulation can help us assess the emerging, new framework within which corporate governance rules are evolving. Secondly, the way in which we begin to understand the emerging regulatory framework as an illustration of contemporary rule-making, we can appreciate the legal pluralist deconstruction of formal and informal legal orders in a new light. Building, on the one hand, on early legal-sociological work by Ehrlich ('living law') and Gurvitch ('social law'), this inquiry revisits the core question of any sociology of law, namely 'to investigate the correlations between law and other spheres of culture.'¹⁵⁹ Expanding the spectrum, on the other, with a view to legal pluralist work by scholars such as Moore¹⁶⁰, Galanter¹⁶¹, Macaulay¹⁶², Sousa Santos¹⁶³ or Teubner¹⁶⁴, contemporary assessments of 'hybrid legal spaces'¹⁶⁵ that are not sufficiently captured with

¹⁵⁷ See, for example, the overview at www.ecgi.org, and www.transnationalcorporategovernance.net.

¹⁵⁸ J. Köndgen, 'Privatisierung des Rechts. Private Governance zwischen Deregulierung und Rekonstitutionalisierung', (2006) 206 *AcP* 477-525; T. M. J. Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht. Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens zur Etablierung von Standards', (2008) *Zeitschrift für Europäisches Privatrecht* 480-505, 485; P. Zumbansen, 'The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation', (2002b) *Juridikum* 136-145

¹⁵⁹ E. Ehrlich, *Fundamental Principles of the Sociology of Law* (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (Russell & Russell, 1962), 486-506 "The Study of the living law"; G. Gurvitch, *Sociology of Law* (orig. published in French as *Problèmes de la sociologie du droit*) (Routledge and Kegan Paul, 1947); M. Rheinstein, 'Review: Two Recent Books on Sociology of Law [reviewing Timasheff's 'Introduction' and Gurvitch's 'Elements']', (1941) 51 *Ethics* 220-231, 221-2

¹⁶⁰ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746

¹⁶¹ M. Galanter, 'Justice in many rooms: Courts, Private Ordering and Indigenous Law', (1981) 19 *J. Leg. Pluralism* 1-47

¹⁶² S. Macaulay, 'Private Government', in L. Lipson and S. Wheeler (eds.), *Law and the Social Sciences* (Russell Sage, 1986)

¹⁶³ B. d. Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', (1987) 14 *J. Law & Soc'y.* 279

¹⁶⁴ G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', (1992) 13 *Cardozo L. Rev.* 1443-1462; G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Constitutionalism and Transnational Governance* (Hart Publishing, 2004)

¹⁶⁵ P. Schiff Berman, 'Global Legal Pluralism', (2007) 80 *S. Cal. L. Rev.* 1155-1237, 1155

references to local or national contexts, might help us understand better the distinctly *transnational* emergence of regulatory regimes. The transnational lens allows us to study such regimes not as entirely detached from national political and legal orders, but as emerging out of and reaching beyond them. The transnational dimension of new actors and newly emerging forms of norms radicalizes their semi-autonomous nature in the following way: regulatory spaces are marked by a dynamic and often problematically instrumentalized tension between formal and informal norm-making processes. The much lamented, regulatory failure of traditional, state-based legal-political intervention into multinational corporations today has long been serving as an illustration of the need to develop either distinctly 'post-national', institutionalized governance forms or self-regulatory, soft instruments of voluntary binding.¹⁶⁶ Mirroring the complex, hard-to-navigate landscape of border-crossing corporate activity, the proposed conceptual approaches are greatly varied. Instead of emerging as a set of coherent regulation theories, they range from 'global jurisdiction'¹⁶⁷, 'torture as tort' and transnational civil human rights litigation¹⁶⁸, as well as from scandalization movements including global shaming¹⁶⁹, to soft law instruments, self-binding norms, codes of conduct and best practices¹⁷⁰, altogether suggesting an irreversible trend away from 'government' to 'governance'.¹⁷¹

As transnational governance regimes, then, fields such as corporate governance, labour law¹⁷², capital market law, contract law in general and consumer protection law in particular¹⁷³ are increasingly marked by the existence of opt-out clauses and self-regulation mechanisms rather than being defined by enforceable hard-law rules. No longer, it would seem, would the legal

¹⁶⁶ A. Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct', (2001) 8 *Ind. J. Glob. Leg. Stud.* 401-447; H. W. Arthurs, 'Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture', (2001) 22 *Berkeley Journal of Employment and Labor Law* 271-294

¹⁶⁷ P. S. Berman, 'Towards A Cosmopolitan Vision Of Conflict Of Laws: Redefining Governmental Interests In A Global Era', (2005) 153 *U. Pa. L. Rev.* 1819-1882

¹⁶⁸ C. Scott, 'Introduction to Torture as Tort: *From Sudan to Canada to Somalia*', in C. Scott (eds.), *Torture as Tort* (Hart Publishing, 2001); C. Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms', in C. Scott (eds.), *Torture as Tort* (Hart Publishing, 2001)

¹⁶⁹ A. Fischer-Lescano, 'Globalverfassung, Verfassung der Weltgesellschaft', (2002) 88 *Archiv für Rechts- und Sozialphilosophie [ARSP]* 349-378

¹⁷⁰ O. Perez, *Ecological Sensitivity and Global Legal Pluralism* (Hart Publishing, 2004)

¹⁷¹ In that sense, 'governance' studies become more and more important in their cross-disciplinary inquiry into changing forms of political and legal regulation: see, for example, the research program of the University of Bremen's Collaborative Research Centre "Transformations of the State", at <http://www.sfb597.uni-bremen.de/>

¹⁷² A. Supiot, *Au-delà de l'emploi. Transformation du travail et devenir du droit du travail en Europe. Rapport pour la Commission européenne.* (Flammarion, 1999); R. O'Brian, 'The difficult birth of a global labour movement', (2000) 7 *Rev. Int'l Pol. Econ.* 514-523; C. M. O'Brien, 'Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law', (2008) 9 *German Law Journal* 1007-1042

¹⁷³ G.-P. Calliess, 'Reflexive Transnational Law. The Privatisation of Civil Law and the Civilisation of Private Law', (2002) 23 *Zeitschrift für Rechtssoziologie* 185-216; G.-P. Calliess, *Grenzüberschreitende Verbraucherverträge. Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarkt* (Mohr Siebeck, 2006)

pluralist depiction of regulatory spheres as ‘semi-autonomous fields’¹⁷⁴ be able to provide a sufficient starting point for a more comprehensive critique of the existing machinery of justice¹⁷⁵: today, the original legal pluralist sword might appear too dull to cut through the distinctly post-national constellation of regulatory regimes. The opposite is true: legal pluralism can forcefully build on its learned lessons in the aftermath times of the decaying Welfare state and ‘legal centralism’. While not being able to directly translate the insights gained in those contexts onto the transnational sphere, they can nevertheless assist in depicting the multifaceted nature of transnational governance. This becomes particularly evident in a context, where in the context of an evolving political governance system such as in Europe, claims about ‘private autonomy’ and ‘market freedom’ are advanced that seem to echo many of the previous contestations of market intervention and judicial activism within the nation state.¹⁷⁶ Our renewed interest in different meanings of embedded markets is of crucial importance at a time, where the financialist paradigm seems to have outrun itself and where, in our search for a new basis and framework for public policy¹⁷⁷ in a highly interconnected transnational regulatory, post Welfare-state era, we cannot simply return to ‘More State, less market’ formulas.

¹⁷⁴ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746; J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55; S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869-901

¹⁷⁵ J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55

¹⁷⁶ R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', (1923) 38 *Political Science Quarterly* 470-494; E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000)

¹⁷⁷ A. Ebner, *Governance and Public Policy: Polanyi's Theory of Public Policy: Embeddedness, Commodification and the Institutional Dynamism of the Welfare State* (Staatswissenschaftliche Fakultät, 2008)