Олимпиада НИУ ВШЭ для студентов и выпускников – 2018 г.

Направление: «Юриспруденция»

Профиль: «Корпоративный юрист» КОД - 2100

Время выполнения задания - 180 мин.

1. **Прочитайте статью и сделайте ее критический анализ, написав эссе на русском языке.**

Luca Enriques (*).**A Harmonized European Company Law: Are We There Already?**

(*) Allen & Overy Professor of Corporate Law, University of Oxford, and ECGI Research Fellow.

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

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

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

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

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

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

[1] Actually, the possible meanings are six, because 'harmonization' can equally refer to a process and to the outcome of the same process. See e.g. EJ Lohse, 'The Meaning of Harmonization in the Context of European Union Law: A Process in Need of Definition' in M Andenas and C Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Elgar 2011) 313. In the following, unless otherwise made clear, the term harmonization will be used to refer to the outcome.

3. the etymological one: harmonization can refer to 'fitting together'[2] of Member States' company laws, in the form of a smooth interaction both between the various company law regimes and between company law 'users' from different Member States.

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

II. IS EU COMPANY LAW *LITERALLY* HARMONIZED?

A both functional and literal interpretation of the concept of harmonization can be drawn from Article 50(2)(g), which provides the legal basis for much of the company law harmonization measures that have been enacted so far. Harmonization in this sense shares a trait with the concept of beauty: in the same way as beauty is something that by definition elicits positive perceptions, so may everyone settle with the general idea that *required* safeguards for the protection of the interests of members and others should be coordinated *to the necessary extent* with a view to making such safeguards *equivalent* (not necessarily uniform) throughout the Union. But if one moves from this abstract idea of harmonization to precise harmonization measures, the concept becomes elusive and we enter the reign of subjectivity: beauty, after all, is in the eye of the beholder.

It is therefore impossible to answer the question of whether European company law is harmonized in the literal, Article 50(2)(g), sense: that depends on necessarily subjective evaluations of what the *necessary* extent of the coordination should be,[4] what measures do work across jurisdictions as effective 'safeguards' for the protection of the interests of members and others, who the 'others' are that company law should include in its purview,[5] when it is justified to introduce safeguards protecting a given category of stakeholders, especially when that comes at the cost of prejudicing the interests of other stakeholders, and what it means for such safeguards to be equivalent: for example, is it necessarily about convergence of form or is convergence of function enough?[6]

Reasonable minds will thus differ on what needs to be done at the EU level to 'harmonize' company laws according to this highly ambitious meaning of the word and, of course, on the question of whether enough has already been done to achieve this kind of company law harmonization within the EU.

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

The prevailing, anti-literal and extensive interpretation of the term harmonization refers to making the company laws across the EU *uniform*.[7] In this meaning, harmony can only be

---

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

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

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

[5] ibid.

[6] See generally RJ Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 American Journal of Comparative Law 329.

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

achieved by getting rid of differences, a tedious proposition indeed from a musical or, more generally, an aesthetic perspective. Yet, this anti-literal use of our word, as anticipated, is very frequent among EU law scholars, including those who focus on company law.[8]

Note, incidentally, that uniform rules can also be 'beautiful': they can also serve the function described in Article 50(2)(g), that is, to provide 'adequate safeguards etc'. However, in corporate law it is seldom the case that the need for uniformity (standardization) trumps substance, that is, that a rule's benefits stem from the fact per se of applying across jurisdictions. Accounting law is one of the very few areas where this can frequently be the case. But few other corporate law rules do display similar features.[9]

The question of whether EU company law is already harmonized, if one reads it as asking whether EU company law has reached uniformity, is very easy to answer. To be sure, assessing uniformity is like measuring the perimeter of a territory: in the latter case, the larger the scale, the smaller the perimeter; in the former case, the more one looks into the details, the lower the degree of uniformity. Yet, no one in his or her right mind would seriously answer this question in the positive. The most one can say is that there has been approximation in *some* areas, that is, that harmonization has been partial at best.[10]

Both bottom-up and top-down harmonization has indeed taken place in the last five decades on various issues; and if one were to judge merely from the quantity of measures adopted in the last ten years alone, it would be hard to dispute that the lawmaking in this area has become intense.[11] In addition, following *Centros* and *Überseering*,[12] bottom-up harmonization of company law rules addressing legal forms that are typically used by start-ups has been a remarkable development in the same period. But a closer look allows for the conclusion that, weighed for relevance, harmonization has achieved little in terms of uniformity.

A. Top-down harmonization

Ten years ago, I asked the very similar question of what impact the EU company law harmonization programme had had on European company law and corporate governance. My answer was that the progress towards uniformity had been modest and the outcome overall

---

('harmonization involves replacing the multiple and divergent national rules on a particular subject with a single EU rule').

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

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

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

[11] See text following note 15.

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

trivial: with the exception of a few sparse rules, accounting law (to some degree) and securities law, EU company law rules could all be classified as optional, market-mimicking, unimportant, or avoidable.[13] One may question whether the analysis back then had been complete and/or convincing.[14] Nowadays, however, the same analysis would need no additional qualifications, were it to include also the measures taken since 2005.

While some new measures have indeed been enacted in the last ten years, not much has changed: despite the number and volume of green papers, action plans, reflection groups' reports and advisory groups' studies,[15] the catch of the last ten years has been decisively scant. Sure, no less than 95 new directives and regulations in the area of company law broadly defined. But 58 of them are implementing measures of the IFRS regulation, 7 are in the area of financial information, 18 are part of issuer securities regulation and 9 are 'housekeeping'

---

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

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

[15] See the European Corporate Governance Forum website where nine statements are available (<http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm>); European Commission, 'Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union-Summary Report' (2006) <http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf>; Sherman and Sterling, ISS and ECGI, 'Report on the Proportionality Principle in the European Union' (2006) <http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf>;European Commission, 'Study on Administrative Costs of the EU Company Law Acquis - Final Report' (2007) <http://ec.europa.eu/internal_market/company/docs/simplification/final_report_company_law_administrative_costs_en.pdf>; European Business Test Panel (EBTP), 'European Survey on European Private Company' (2007) <http://ec.europa.eu/yourvoice/ebtp/docs/epc_report_en.pdf>; European Commission, 'Communication from the Commission on a Simplified Business Environment for Companies in the Areas of Company Law, Accounting and Auditing' COM(2007) 394 final (2007) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0394&from=EN>; RiskMetrics Group, 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (2009) <http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf>; Mazars, 'Transparency Directive Assessment Report - Prepared for the European Commission Internal Market and Services DG Final Report' (2009) <http://ec.europa.eu/finance/securities/docs/transparency/report-application_en.pdf>; European Commission, 'Green Paper - The EU Corporate Governance Framework' (2011) <http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf>; Directorate General for the Internal Market and Services, 'Consultation on the Future of European Company Law' (2012) <http://europa.eu/rapid/press-release_MEMO-12-119_en.htm?locale=en>; Marccus Partners, 'The Takeover Bids Directive Assessment Report' (2012) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>; European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Application of Directive 2004/25/EC on Takeover Bids' COM(2012) 347 final (2012) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf>; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan: European Company Law and Corporate Governance - A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies' COM/2012/0740 final (2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0740&from=en>; K Gerner-Beuerle, Paech and EP Schuster, 'Study on Directors' Duties and Liability' (2013) <http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf>.

measures, amending or recasting previously enacted company law directives with a view to simplify them.[16]

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

The Shareholder Rights Directive[17] has undeniably had an impact on some of the Member States companies' internal governance: attendance at shareholder meetings significantly increased, for instance, at Belgian and Italian companies after measures implementing it came into force.[18] While doing nothing to remove the obstacles to cross-border voting,[19] the Directive importantly mandated the record date, thereby ruling out the deposit of shares as a requirement for voting, whether mandatory or optional, at various Member States' companies meetings.

The second important piece of (enabling) legislation is the Cross-Border Merger Directive.[20] While it would be hard to qualify cross-border mergers as a core area of company law, from a dynamic perspective, the Cross-Border Merger Directive makes regulatory arbitrage easier[21] and, therefore, potentially enhances bottom-up harmonization. A well-known example of a company that engaged at the same time in a cross-border merger and in regulatory arbitrage is Fiat's combination with U.S. company Chrysler to create Fiat Chrysler Automobiles ('FCA') in 2014: the choice was made to incorporate the resulting company in the Netherlands, one of reasons for that choice being that Fiat's controlling shareholders could take advantage of the absence of a ban on 'loyalty shares' in Dutch company law (unlike in Fiat's incorporation state, Italy, until then) and hence reinforce their grip on the company.[22]

---

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

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

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

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

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

21 See below n 46-8.

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

Finally, the new provisions requiring companies to provide non-financial disclosures[23] are, at least on paper, an important innovation in the area of companies' disclosures. They *may* arguably have an impact not only on disclosures but, because of their implications, on companies' behaviour. Yet, because the rules will apply only to annual accounts published after 1 January 2018, it is far too early to tell whether in practice companies are indeed going to provide substantial new contents in the newly required disclosures.[24] And commentators have raised doubts about whether the new disclosures will go much beyond a box-ticking exercise.[25]

These proven or possible exceptions aside, the core areas that were identified as still the exclusive domain of national company laws ten years ago, such as the internal organization of the company, directors' duties, conflicts of interest between dominant and minority shareholders, shareholder remedies and so on, largely remain so, with the exception of mostly procedural aspects relating to shareholder voting rights.[26]

B. Bottom-up harmonization

The post-*Centros* phenomenon of start-up cost-based regulatory arbitrage has arguably led to more uniformity among Member States' company laws,[27] prompting some states to react by changing their laws affecting the costs of setting up new companies.[28]

---

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

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

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

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

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

[28] M Gelter, 'Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press forthcoming). To be sure, not in all countries was the repeal of minimum capital provisions and other measures of the same kind a response to regulatory arbitrage (which, incidentally, in its main manifestation as the choice of UK private limited companies to do business in continental Europe, proved short-lived even in countries experiencing it in relevant numbers: WG Ringe, 'Corporate Mobility in the European Union–a Flash in the Pan? An Empirical study on the Success of Lawmaking and Regulatory Competition' (2013) 10 European Company and Financial Law Rev 230. For instance, in Italy, where UK-formed pseudo-foreign companies never gained any traction (M Becht, L Enriques and V Korom, '*Centros* and the Cost of Branching' (2009) 9 Journal of Corporate Law Studies 174, one reason for that being the high cost of having the company registered in the companies register: ibid, 174), they were rather attempts at gaining a better ranking in the highly influential *Doing Business Report*.

IV. AND *CAN* THEY BE UNIFORM?

After almost 50 years since the first action was taken in the area of top-down company law harmonization, divergence is thus still there and the programme has failed to reach its (admittedly ambitious) goal of making company laws across the EU uniform. There are many reasons for this failure,[29] but two stand out and are so substantial as to warrant the prediction that no meaningful progress will ever be made in the direction of a uniform EU company law via top-down harmonization.

A. Interest group resistance

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

A good recent illustration of this is provided by the recent attempt by the European Commission to impose a single set of EU rules on related party transactions ('RPTs') for listed companies: the original proposal was watered down significantly under the pressure of a number of Member States, not necessarily by making it laxer,[30] but for sure uniformity-wise.

More precisely, the European Commission's proposal identified larger RPTs by using a quantitative threshold and required that they be subject to both disclosure and approval by a majority of the shareholders other than the related party.[31]

The Council text waters down (uniformity-wise) these provisions in its own version of the draft Directive.[32] The dilution does not affect disclosure itself, but the criteria to

---

See E Brodi, 'Svolgere attività d'impresa senza capitale di rischio: brevi note sulla nuova fisionomia della società a responsabilità limitata', (2014) Analisi giuridica dell'economia 206.

[29] See also Armour and Ringe (n 16) 129, for an additional explanation based upon the varieties of capitalism literature's view of the role of corporate law within the set of complementary institutions that shape a country's corporate governance framework.

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

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

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

identify larger RPTs and the company's internal approval process. The Council text grants Member States much wider discretion on how to define material related party transactions and when to grant exemptions from the rule. In addition, according to the same text, RPTs have to be 'approved by the general meeting *or* by the administrative or supervisory body of the company *according to procedures which prevent a related party from taking advantage of its position and provide adequate protection for the interests of shareholders who are not related party, including minority shareholders'*, with the only condition that the director or the shareholder on the other side of the transaction will have to be excluded from voting.

It is only slightly unfair to summarize the Council's text on RPTs as requiring Member States to provide at least for *some* disclosure and *some* kind of approval procedure for *some* related party transactions. That contrasts quite sharply with the idea of uniformity. What is worse, incidentally, is that it may provide a precious opportunity for dominant shareholders to successfully lobby against the more stringent rules on related party transactions currently in place in individual Member States.[33] The previous experience with the Takeover Bids Directive's optional board neutrality rule, is sufficiently telling in this respect: as Paul Davies and his co-authors have shown, some of the Member States moved from a board neutrality rule to one allowing board defences against takeovers when they implemented the Takeover Bids Directive:[34] that is, the market for corporate control within those countries moved exactly in the opposite direction than the Directive had envisaged.

One may wonder whether things may change after Brexit. That could well be the case, if any evidence existed either of interest group resistance to harmonizing measures coming predominantly from the UK or of UK interest groups having opposing interests to those prevailing in continental Europe, so that, with the former out of the way, the latter could successfully coalesce to push for a given uniform legislative outcome. Yet, resistance to harmonizing measures is definitely not a British-only tradition, as the generalized opposition at the Council level against many of the proposals put forth by the European Commission in the field of shareholder rights exemplifies. And while one may expect pro-institutional investors, and therefore pro-shareholder pressures, to come more from the UK than from elsewhere, given its comparatively large asset management and insurance industry, continental European dominant shareholders and insiders appear historically to have had little appetite for advocating for an increase in harmonized rules. Rather, they have opposed EU legislation.[35] It would be surprising if that will no longer be the case in the future.

B. The insurmountable divergence in legal ground rules

Assume that it were indeed possible to reach an agreement on harmonization measures that made the body of EU company law overall uniform. Would uniformity in the law on the books translate into uniformity in the law in action? There are many reasons for being doubtful about it in an environment characterized in each Member State by scant litigation in

[33] Enriques (n 30) 31.

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

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

corporate law matters or, at most, by highly focused litigation, such as Germany's focus on suits challenging the validity of shareholder meeting resolutions.[36]

Where formal private enforcement plays a secondary role, how corporate law is complied with (and therefore, for all practical purposes, interpreted) will crucially depend on who provides legal advice to corporations and under what market conditions. Differences in the various professions' role in company law advice will easily lead to differences in interpretation. For instance, whether public notaries (a category of professional broadly protected from competition) rather than law firms or corporate secretaries (who operate in a market with lower barriers to entry) play a key role in ensuring compliance with corporate law is bound to have an impact on how rules are interpreted and evolve over time: *ceteris paribus*, the former may be more inclined to provide solutions that are less deferential to contractual freedom than the latter.

It goes without saying that such players and the courts that are called to decide upon corporate law issues will be aware of the principle of harmonious interpretation as enshrined in the WCJ case law.[37] But differences in legal ground rules, or meta-rules,[38] across EU jurisdictions will likely act as a covert but steady centrifugal force. While the differences within continental European countries in legal ground rules may not be as stark as between them and those of countries with a common law tradition, civil law countries have each their own idiosyncrasies. In addition, the indirect effect doctrine requires a national court to do anything in its power ('*está obligado a hacer todo lo posible*') to achieve the result laid down by EU legislation.[39] But, whether for explicit rules on statutory interpretation or for one country's own meta-rules, the discretion to do anything in its power will vary and possibly lead to different results.

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

Finally, if uniformity itself becomes the goal to achieve by way of harmonized rules, individual Member States' legal professionals and courts will find the principle of harmonious interpretation itself of little assistance in interpreting company law provisions: the only way to obtain uniformity will be to refer the question to the ECJ; and yet, only the study of comparative company law will allow practitioners to envisage the need for ECJ's intervention on the interpretation of a given company law provision. While that sounds intuitively good

---

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

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

[38] See eg, respectively, P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 57; K Pistor, 'Legal Ground Rules in Coordinated and Liberal Market Economies' in Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford University Press 2005) 249.

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

from the perspective of comparative legal scholars, it is unlikely to increase the demand for their services to a point that will ensure uniformity in EU company law in action.

V. DO THEY ALREADY FIT TOGETHER?

There is one meaning of the word harmonization that warrants a positive answer to the question of whether EU company laws are harmonized, and that's the etymological one. Admittedly, the 'fitting together' of EU company laws is not what we usually talk about when we talk about company law harmonization;[40] yet, this meaning has itself a legal basis in the Treaty, and precisely in Articles 26 and 49 thereof:[41] if the aim of the harmonization programme generally is to ensure the functioning of the internal market and the right of establishment, then what is necessary and arguably sufficient for that purpose is that national Member States' company laws fit together. To achieve that goal, both negative harmonization and positive harmonization are needed: on the one hand, unjustified legal obstacles to free movement of companies in the various markets should be removed. In addition, rules must be put in place to make sure, firstly, that national company laws work together smoothly and, secondly, that its users do not face high company-law related transaction costs when they engage in cross-border trading.

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

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

A. Mutual Recognition

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

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

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

imposing minimum capital requirements, ie a legal doctrine that European company law itself has traditionally appeared to hold as important.[42]

Of course, there are plenty of grey areas: company law rules applying to foreign companies as such are still consistent with the Treaty if they pass the *Gebhard* test. Yet, it is astonishing to note that after *Inspire Art* (a test case like *Centros* itself) no additional case has been brought to the court to test the legitimacy of company law rules applying to pseudo-foreign entities.[43] No matter how low litigation levels are within the EU, this would appear to imply that Member States do not try or manage to impose and/or enforce meaningful domestic corporate law rules to pseudo-foreign companies.

B. Freedom of Reincorporation

When it comes to free movement of companies, there is no doubt that an existing company can achieve the outcome of reincorporating under the laws of a different Member State, subject, it goes without saying, to the latter's own company and private international law rules.[44]

The absence of any positive harmonization instrument making it possible for companies to transfer their legal seat or, which is the same, to engage in a cross-border conversion, is in fact no serious obstacle to reincorporations.[45] At least two EU-wide legal

---

[42] See Art 6, Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of Members and others, are required by Member States of companies within the meaning of the second paragraph of Art 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2012] OJ L 315/74.

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

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

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

mechanisms exist to move from one jurisdiction to another:[46] companies may set up a *Societas Europaea* ('SE') in the country of destination or engage in a cross-border merger with a company established there. In either case, a reverse merger with a shell company especially set up in the destination jurisdiction will let the company reincorporate there, in the case of a cross-border merger with no further impact on its operations stemming from the move itself.[47] Of course, the procedures a company has to go through in order to create an SE or to execute a cross-border merger are cumbersome and costly and could well be simplified.[48] Yet, the tools are there and they do not seem to impose insurmountable obstacles to well-motivated (and reasonably large and/or well-resourced) market participants.[49] The transaction costs of such a move appear in fact to be small, also in light of the US experience: there, businesses engage in regulatory arbitrage either at the incorporation stage (when, on this side of the Atlantic, *Centros* allows for cheap and almost unfettered choice) or, later on, when a significant transaction, such as an IPO or a genuine cross-border merger (think, again, of FCA[50]), is to be executed that usually entails costs much higher than those arising from cross-border merger rules themselves.[51] Even more importantly, tax obstacles in the form of exit taxes have at least been made surmountable via negative and positive harmonization in recent years.[52]

Organization Law Rev 615; O Mörsdorf, 'The Legal Mobility of Companies Within the European Union Through Cross-Border Conversion' (2012) 49 CML Rev 652.

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

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

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

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

[50] See text preceding n 22.

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

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

C. Organizational Arbitrage

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

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

D. Familiarity

Finally, it would seem that, also thanks to positive harmonization (and chiefly to the First Company Law Directive's rules on companies' invalidity and authority,[53] despite the latter's incompleteness and optionality[54]), businesses are nowadays finding it straightforward to trade cross-border with entities qualified as companies by other jurisdictions. Whether this is more thanks to positive harmonization or to improvements in information and communication technologies and the sheer increase in cross-border trade within the EU, which itself facilitates verification of information, would be an interesting question to explore, but not a relevant one for the purposes of the present section.

VI. CONCLUSION

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

In a less ambitious meaning, thus, the long quest for a harmonized European company law has been successful. More, of course, can be done to make diverse national company laws fit even better together, such as by simplifying the tools for mid-stream reincorporations, namely the rules on cross-border mergers. It goes without saying that attempts to make European company laws more uniform and more 'beautiful' will never stop. But it is comforting to think that, if they fail, much has already been achieved in the field of company law that is instrumental to the Treaty's goal of market integration.

---

[53] See Art 10-13 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of Members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L 258/11.

[54] Enriques (n 13) 30.

2. Решите задачу. Оцените по каждому пункту правомерность доводов Ответчика (п.п. 1-6) и довода Истца по поводу ходатайства о снижении размера ответственности, а также сделайте общий вывод о возможности удовлетворения требований Истца с учетом того, что факт неисполнения обязательства по оплате Ответчиком не оспаривается.

В договоре, заключенном между коммерческими организациями, было предусмотрено, что в случае несвоевременной оплаты должник несет ответственность в виде неустойки в размере 0,03 процента от суммы долга за каждый день просрочки и процентов за пользование чужими денежными средствами в соответствии с законодательством. При этом в договоре было установлено, что данную ответственность должник несет только при наличии вины. Других условий в договоре не было.

Должник свои обязательства по оплате не исполнил. В связи с этим Кредитор (Истец) предъявил в арбитражный суд иск о взыскании, помимо основного долга:

- неустойки, предусмотренной законом для данного вида обязательств и являющейся большей по размеру, чем договорная (предусмотренную договором неустойку Истец предъявлять ко взысканию не стал);
- процентов за пользование чужими денежными средствами, исчисленных на основании ст. 395 Гражданского кодекса РФ исходя из ключевой ставки Банка России, действующей в соответствующие периоды;
- законных процентов на основании ст. 317.1 Гражданского кодекса РФ, исчисленных исходя из ключевой ставки Банка России, действующей в соответствующие периоды.

При этом Истец просил взыскать все эти суммы на момент фактического исполнения обязательства.

Должник (Ответчик) в части, не касающейся основного долга, иск не признал по следующим основаниям:

1) неоплата основного долга произошла по не зависящим от него причинам, в результате которых у него сложилось тяжелое финансовое положение. Согласно договору он несет ответственность только при наличии вины. Истец не привел каких-либо доказательств его вины в неисполнении обязательства по оплате;

2) Истец не вправе взыскивать неустойку, поскольку не доказал наличие у него каких-либо связанных с неисполнением обязательств убытков;

3) Истец не вправе был предъявлять требование об уплате законной неустойки, поскольку должен действовать приоритет договорной неустойки, которая меньше по размеру, чем законная;

4) проценты за пользование чужими денежными средствами не полежат взысканию, поскольку это нарушает общеправовой принцип: «одно нарушение – одна ответственность»;

5) Истец не вправе взыскивать законные проценты на основании ст. 317.1 Гражданского кодекса РФ, поскольку это также нарушает общеправовой принцип: «одно нарушение – одна ответственность»;

6) неустойка и проценты как длящиеся санкции не могут взыскиваться на момент исполнения обязательств, поскольку эта дата еще не известна и определить точный размер этих санкций невозможно.

Кроме того, Ответчик заявил ходатайство о снижении размера ответственности в силу несоразмерности его размера последствиям нарушения обязательства по причине отсутствия у Истца убытков.

Истец по поводу ходатайства Ответчика о снижении размера ответственности заявил, что Ответчик тем самым признает иск, а также возразил по поводу снижения размера ответственности, поскольку Ответчик не доказал наличие у Истца необоснованной выгоды.