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HOW HARD IS SOFT EU COMPANY LAW?

Raluca Papadima[1]

Abstract

This article analyzes the soft law applicable to companies within the European Union (EU) in order to extract tendencies, including by comparing US and EU soft law instruments. It concludes that soft law is like wine: many enjoy it, and it gets better as it ages. Soft law is a very popular and successful girl nowadays, for legitimate reasons, but one that brings about a series of concerns as well. After an overview of the main soft law instruments related to corporate governance and financial markets, and their sources, this article extracts a number of trends.

First, the mitosis of soft law: soft law instruments continue to multiply, but, unlike in biology, they also diversify, including because of market demand. That is true for company law in Europe in general, especially as it pertains to public companies, and is particularly obvious in a number of sectors, such as financial markets, banking and insurance. The inflation of soft law that we presently witness distorts the traditional hierarchy of sources of law by adding to the typical legal instruments and further blurs what used to be a traditional distinction between civil law countries (which comprise most of the EU after the exit of the United Kingdom) and common law countries such as the US: who makes the law. Moreover, soft law raises specific problems of democratic legitimacy, predictability, and respect for fundamental rights which courts are only now starting to tackle. That is because EU authorities, under the cover of the soft law, often assume a law-making role, such that the "soft" law that they produce is similar in effect, albeit not in name,

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to hard law. By recourse to techniques such as "comply or explain" or "name and shame", the instruments emanating from EU authorities are not so "soft" in reality.

Second, soft law converges, within the EU, and provokes worldwide convergence of the (hard) legal framework applicable to companies, especially public companies. Third, soft law has a predilection to metamorphosis. Like a caterpillar at the end of its life, or like wine that has aged, soft law that has proven its value is often turned into, or bottled as, hard law. This regrettable tendency exists both at the EU level and at the national level among the EU Member States, and can be observed particularly in the areas of corporate governance and regulation of market infrastructures. Overall, this article concludes that, by their effects in practice and their process of convergence, soft law instruments have effectively become alarmingly close to hard law.

Introduction

1. Soft law is like wine. Nobody makes you drink it, but many people enjoy it (perhaps for that very reason), and it gets better as it ages. Soft law is a very popular girl nowadays, but not everybody loves popular girls, and they do tend to create drama and sometimes color outside the lines. In the European Union (EU), the use of soft law instruments is increasing, to the point of rampant inflation, particularly in areas that govern the activities of business entities and even more particularly those business entities that are public companies. As such, soft law raises specific problems of democratic legitimacy, predictability, and respect for fundamental rights which courts are only now starting to tackle.

2. Moreover, popular girls eventually grow up. So does soft law. It starts as voluntary, part of self-regulation, and it grows to indirectly have a binding effect by the use of well-known techniques such as "comply or explain" or "name and shame" but also a number of more insidious methods. When it is ripe, the harvest follows. The best grapes of soft law, those that have proven their

efficiency and achieved broad acceptance, are then bottled as hard law. This article will document and exemplify several instances of conversion of soft law into hard law, as well as a number of other tendencies regarding soft law, at the EU level and at the national level of EU Member States, as well as, for comparative purposes, in the United States and worldwide.

3. Who is this popular girl? Given the extreme diversity in nomenclature, the easiest identification method is a negative definition. Soft law is everything that is not hard law. In the EU world, hard law comes from institutions and authorities of the EU and of EU Member States. It necessarily has a public origin. In contrast, the parents of our soft law girl can be either public or private.

4. *Soft law of public origin* emanates from EU and national institutions and authorities. The hard law of EU institutions consists of directives and regulations. EU directives are instruments for the harmonization of the legislation of the EU Member States that require implementing national legislation. In contrast, regulations are directly applicable in the EU Member States. Consequently, soft law consists of all EU instruments that are neither directives nor regulations, such as recommendations, resolutions, green papers, action plans, communications, etc. These instruments are neither directly applicable nor binding.

5. The subsidiarity principle, set forth in Article 5 of the Treaty on the European Union (TEU),[2] gave more legitimacy to EU interventions concerning public companies. That is because public companies generally have cross-border activities while the activities of private companies are generally confined to only one EU Member State. Pursuant to the subsidiarity principle, the EU institutions have intervened in company law matters mainly by means of directives, as opposed to

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[2] Consolidated Version of Treaty on European Union art. 5, Feb. 7, 1992, 1992 O.J. (C 202/1) 13 *et seq.* [hereinafter The Maastricht Treaty].

regulations. Article 50 of the Treaty on the Functioning of the European Union (TFUE)[3] was the most used legal basis for EU interventions in company law. It provides, in relevant part:

> 1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.
>
> 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: [...]
>
> (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union; [...]

6. EU hard law interventions in company law addressed, in chronological order, the following areas: (i) publicity, validity of social commitments, cases of company nullity, incorporation of companies, share capital, distributions to shareholders, repurchases of shares by the company and changes in capital for all joint-stock companies, (ii) the combination of companies by way of merger and division, (iii) preparation and audit of accounts, (iv) European companies, as a supranational corporate form, and (v) public takeover bids. In contrast, EU institutions used soft

[3] Treaty on Functioning of the European Union, art. 50, May 9, 2008, 2008 O.J. (C 202/1), 47 *et seq.* [hereinafter TFEU].

law in the field of corporate governance[4] and audit[5] through a series of recommendations and green papers of the European Commission and resolutions of the European Parliament. Some of these hard or soft law instruments apply to all companies, some only cover joint-stock companies (the European equivalent of the American "corporation"), and others cover only and specifically public companies. Public companies are governed not only by company law but also by financial markets law. EU institutions have generally privileged recourse to regulations, rather than directives, with respect to financial markets law (the European equivalent of the American "securities regulation").

7. With regard to soft law that emanates from EU or national authorities, there is an important difference in regime and persuasiveness depending on who is the issuing authority. If the issuing authority is a EU authority, the direct recipients are generally the national authorities of the EU Member States. In contrast, if the issuing authority is a national authority, the recipients are private entities (companies or regulated professions). These two categories of recipients understandably respond quite differently to regulation coming from above, even (or even more so) when it comes in the form of soft law.

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[4] *See, e.g.*, Recommendation 2004/913/CE of the Commission of 14 Dec. 2004 Fostering an Appropriate Regime for the Remuneration of Directors of Listed Companies, 2004 O.J. (L 385) 55-59; Recommendation 2005/162/CE of the Commission of 15 Feb. 2005 on the Role of Non-executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, 2005 O.J. (L 52) 51-63; Recommendation 2009/384/EC of the Commission of 30 Apr. 2009 on Remuneration Policies in the Financial Services Sector, 2009 O.J. (L 120) 22-27; *Green Paper - Corporate governance in financial institutions and remuneration policies*, COM (2010) 284 final (Jun. 2, 2010), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010DC0284&from=EN; *Green Paper - The EU corporate governance framework*, COM(2011) 164 final (Apr. 5, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0164&from=EN; Resolution on a corporate governance framework for European companies, P7 TA(2012)0118 (Mar. 29, 2012), https://www.europarl.europa.eu/doceo/document/TA-7-2012-0118_EN.html.

[5] *See, e.g.*, *Green Paper, Audit Policy: Lessons from the Crisis*, COM(2010) 561 final (Oct. 13, 2010), https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2010)0561_/com_com(2010)0561_en.pdf; Recommendation 2001/256/CE of the Commission of Nov. 15, 2000, on quality assurance for the statutory audit in the European Union: minimum requirements, 2001 OJ (L 91), 91-97, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001H0256&from=FR; Recommendation 2008/362/CE of May 6, 2008 of the Commission on external quality assurance for statutory auditors and audit firms auditing public interest entities 2008 OJ (L 120), 20-24, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008H0362&from=FR.

8. *Soft law of private origin* is represented by a variety of codes drawn up by associations and private entities. They can be subdivided into two categories: (1) corporate governance codes intended for (public) companies and (2) codes of conduct intended for various professionals.

9. Starting with the first category, some corporate governance codes are international (for example, the Corporate Governance Principles of the G20 and the Organisation for Economic Co-operation and Development (OECD)[6] or the Basel Committee's Corporate Governance Principles for Banks[7]) but most are national (each EU Member State has at least one such code). These codes typically target public companies, although some specifically target private (unlisted) companies and some apply to all types of companies. While there is no European Corporate Governance Code (yet), a European Model Company Act was finalized recently, which claims to have been inspired by its American counterpart, the Model Business Corporations Law (MBCA). Model laws, such as the MBCA, have been very successfully used in the United States, as a particular form of soft law. Upon adoption by the states, this soft law becomes hard law, but, for the states that do not adopt it, the MBCA remains soft law. It is the same with the emblematic Delaware General Corporation Law (DGCL) in the United States, which is hard law in Delaware, but, at the same time, a very persuasive form of soft law everywhere else, in the sense that Delaware court decisions are widely cited and followed even when Delaware law is not the applicable law. Finally, the United States also has a corporate governance code, represented by the ALI Principles of Corporate Governance,[8] another form of soft law.

[6] OECD (2015), *G20/OECD Principles of Corporate Governance*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264236882-en.

[7] Basel Committee on Banking Supervision, *Corporate Governance Principles for Banks* (July 8, 2015), https://www.bis.org/bcbs/publ/d328.htm.

[8] PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (AM. L. INST. 1994).

10. In addition to corporate governance codes, a variety of instruments that address corporate social responsibility (CSR) have been adopted. These CSR instruments target particularly large multinational enterprises, which are often public companies with worldwide operations. They are, by their nature, adopted at the international level. Examples include the ISO 26000 standard,[9] the OECD Guidelines for Multinational Enterprises,[10] and the UN Global Compact.[11]

11. The second category includes soft law consisting of a variety of codes of conduct, principles, best practices, standards, etc., intended for various professionals. This category of soft law (also) particularly targets public companies. These instruments generally have a supranational or transnational nature. Examples include the banking and insurance sectors (through a multitude of

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[9] In 2010, the International Organization for Standardization (ISO) released a set of voluntary standards meant to help companies implement CSR. Unlike other ISO standards, ISO 26000 provides guidance rather than requirements because the nature of CSR is more qualitative than quantitative, and, for this reason, ISO 26000 cannot be certified to. Instead, ISO 26000 clarifies what is CSR and helps organizations translate CSR principles into practical actions. The standard is aimed at all types of organizations, regardless of their activity, size or location. *See ISO: 26000:2010, Guidance on social responsibility,* INTERNATIONAL ORGANIZATION OF STANDARDIZATION, (Nov. 2010), https://www.iso.org/standard/42546.html.

[10] In 2010, the governments of the OECD and non-OECD countries adhering to the OECD Declaration on International Investment and Multinational Enterprises (1976) and related Decision started work on updating the previous version of the guidelines to reflect changes in the landscape for international investment and multinational enterprises since the previous review in 2000. The changes agreed aimed to ensure the continued role of the guidelines as a leading international instrument for the promotion of responsible business conduct. The updated Guidelines and the related Decision were adopted by the adhering governments in 2011. The OECD Guidelines for Multinational Enterprises (2011) are recommendations jointly addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. The Guidelines' recommendations express the shared values of the governments of countries from which a large share of foreign investment originates, and which are home to many of the largest multinational enterprises in the world. *See* OECD (2011), *OECD Guidelines for Multinational Enterprises,* OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en.

[11] The UN Global Compact is a voluntary initiative based on commitments by CEOs of multinational enterprises to adopt and implement sustainable and socially responsible policies. Multinational enterprises who voluntarily committed to the UN Global Compact must operate in ways that, at a minimum, meet fundamental responsibilities in the areas of human rights, labor, environment, and anti-corruption set forth in the Ten Principles of the UN Global Compact. The Ten Principles of the UN Global Compact are derived from: the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. *See The Ten Principles of the UN Global Impact,* UNITED NATIONS GLOBAL IMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles

best practices), market infrastructures (for example, Principles for financial market infrastructures[12] at the international level, and Code of Conduct for Clearing and Settlement[13] at the European level), proxy voting advisors (for example, the Best Practice Principles for Providers of Shareholder Voting Research & Analysis[14]), credit rating agencies (for example, the IOSCO Code of conduct fundamentals for credit rating agencies[15]), and institutional investors (for example, the UK Stewardship Code[16]).

12. I will examine in more detail two major areas where soft law instruments are used extensively: corporate governance (Part I) and financial markets (Part II). In doing so, I will start from, and focus on, the European framework, while comparatively flagging similarities and discrepancies between the EU and the United States in each of the two areas of study. Based on these observations, I will then tentatively extract a number of trends regarding the use of soft law instruments and conclude that, in reality, soft law is not so fluffy, including because instruments sometimes labeled "soft law" are closer, in their effects, to hard law (Part III).

I. Soft Law in Corporate Governance

[12] Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, *Principles for financial market infrastructures* (Apr. 2012), https://www.bis.org/cpmi/publ/d101a.pdf.

[13] Federation of European Securities Exchanges (FESE), the European Association of Central Counterparty Clearing Houses (EACH) and the European Central Securities Depositories Association (ECSDA), *Code of Conduct for Clearing and Settlement* (Nov. 7, 2006), https://www.six-group.com/swiss-sptc/dam/downloads/swiss-sptc/documents/sptc-doku-code-of-conduct-en.pdf.

[14] The Review Committee - Best Practices Principles Group, *Best Practice Principles for Providers of Shareholder Voting Research & Analysis* (July 2019), https://bppgrp.info/wp-content/uploads/2019/07/2019-Best-Practice-Principles-for-Shareholder-Voting-Research-Analysis.pdf.

[15] *See* The Board of the International Organization of Securities Commissions, *Code of Conduct Fundamentals for Credit Rating Agencies - Final Report* (Mar. 2015), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD482.pdf.

[16] Financial Reporting Council, *The UK Stewardship Code* (2020), https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf.

13. Corporate governance is classically defined as the system of management and control of companies,[17] and as a set of relationships between the company's management, its board of directors, its shareholders, and possibly its other stakeholders.[18] It determines how companies are managed and controlled. An effective corporate governance framework is essential, as well-run companies are likely to be both more competitive and more sustainable in the long run.

14. In the EU, the corporate governance framework, traditionally applicable only to public companies, is made up of a set of binding legislative provisions and non-binding measures. Soft law plays an important role and comes into play especially in areas where the differences between the EU Member States or between the interested parties are very deep.[19] It takes the form of recommendations, action plans and green papers at the European level, and corporate governance codes at the national level.[20] There are a multitude of corporate governance codes in the EU, at

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[17] COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, REPORTS OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, 15 (1992).

[18] OECD, *supra* note 6, at 9 ("Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined").

[19] *See* Douglas M. Branson, *Fundamental Themes in Business Law Education: Teaching Comparative Corporate Governance. The Significance of 'Soft Law' and International Institutions*, 34 GA. L. REV. 669 (2000); Anne Outin-Adam & Edmond Schlumberger, *Soft Law et droit des sociétés*, in ANSA (ed.), MÉLANGES EN L'HONNEUR ET Á LA MEMOIRE DE PHILLIPPE BISSARA, Paris 288 (2013); Gerard Hertig & Joseph A. McCahery, *Optional Rather than Mandatory EU Company Law: Framework and Specific Proposals,* 3 EUR. COMPANY & FIN. L. REV. 341 (2006).

[20] *See, e.g.*, Germany: German Government Commission, *German Corporate Governance Code* (2020), https://www.dcgk.de/en/code//foreword.html; Netherlands : Corporate Governance Code Monitoring Committee, Dutch Corporate Governance Code (2016), https://www.mccg.nl/?page=4738; Romania: Bursa de Valori București, *Codul de Guvernanță Corporativă* (2015), https://www.bvb.ro/info/Rapoarte/Diverse/RO_Cod%20Guvernanta%20Corporativa_WEB_revised.pdf; United Kingdom: Financial Reporting Council, *The UK Corporate Governance Code* (2018), https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code; Finland: Securities Market Association, *Finnish Corporate Governance Code* (2020), https://ecgi.global/sites/default/files/codes/documents/corporate-governance-code-2020.pdf; France: AFEP & MEDEF, *Code de gouvernement d'entreprise des sociétés cotées* (2020), https://afep.com/wp-content/uploads/2020/01/Code-Afep_Medef-r%C3%A9vision-janvier-2020_-002.pdf. In France, in addition to the main corporate governance code (AFEP-MEDEF) for public companies, a second corporate governance code (Middlenext) exists for mid-sized public companies (https://www.middlenext.com/), similar to the distinction in the United States between large public companies (typically listed on NYSE and subject to its regulations, including as to corporate governance) and mid-sized public companies (typically listed on NASDAQ).

least one per Member State.[21] These codes are most often applied according to the "comply or explain" principle, which means that a company that decides to derogate from a rule contained in the code must indicate both the existence of the derogation and the reasons therefore.[22]

15. Corporate governance issues have traditionally been regulated at the national level, through these corporate governance codes and not through legislative provisions. Since the 2000s, EU interventions have started. The EU corporate governance framework, which is still timid and aimed generally at public companies, is now scattered throughout a series of texts.

16. The first EU interventions were in the form of soft law. The European Commission first adopted two recommendations concerning directors of public companies headquartered in, or listed on a regulated market established in, a EU Member State: one in 2004 concerning the remuneration of directors,[23] and another in 2005 concerning the role of non-executive directors and board committees.[24] In 2009, a third recommendation was adopted, on the issue of remuneration in the financial services sector,[25] at the same time that the two previous recommendations were revised. In addition to these instruments, the European Commission organized several consultations on corporate governance and published two Green Papers: on corporate governance of financial

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[21] CHRISTIN MALLIN, CORPORATE GOVERNANCE, 26 (Oxford University Press, 6th ed. 2016).

[22] Alain Pietrancosta & Jean-Baptiste Poulle, *Le principe appliquer ou expliquer*, 4 REV. TRIM. DE DROIT BANCAIRE ET FINANCIER 19 (2009); *See also* Jean-Baptiste Poulle, *L'apparition du principe "se conformer ou expliquer" en droit français*, 1 REV. TRIM. DE DROIT BANCAIRE ET FINANCIER 41 (2008); *See also* Bjorn Fasterling & Jean-Christophe Duhamel, *Le comply or explain. La transparence conformiste en droit des sociétés*, 2 REV. INT'L DE DROIT ECONOMIQUE, 130 (2009); *See also* Véronique Magnier, *Le principe se conformer ou s'expliquer, une consécration en trompe-l'œil?*, 23 LA SEMAINE JURIDIQUE ED. ENTREPRISE 3 (2008).

[23] Recommendation 2004/913/CE of the Commission, *supra* note 4 (further amended in 2009, by Recommendation 2009/384/EC of 30 Apr. 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies, 2009 OJ (L 120), 28-31).

[24] Recommendation 2005/162/CE of the Commission, *supra* note 4 (further amended in 2009, by Recommendation 2009/384/EC of 30 Apr. 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies, 2009 OJ (L 120), 28-31).

[25] Recommendation 2009/384/EC of the Commission, *supra* note 4.

institutions (2010)[26] and on corporate governance in general (2011).[27] In 2012, the European Commission carried out another consultation, and subsequently published its Action Plan on European company law and corporate governance.[28]

17. Only a few provisions relevant to corporate governance were found in directives (for example, in the Annual Accounts Directive of 1978 and the Consolidated Accounts Directive of 1983, which were repealed and replaced by the new Accounting Directive adopted in 2013[29] and the Transparency Directive adopted in 2004).[30] Subsequently, the EU institutions began to favor interventions through directives, generally of minimal harmonization, but nevertheless with binding effect. The Shareholder Rights Directive was adopted in 2007[31] and, ten years later, was significantly reinforced through the Shareholder Engagement Directive of 2017.[32]

18. The central objective of the Shareholder Rights Directive was to ensure that non-resident shareholders and shareholders residing in the EU Member State of the company's registered office benefit from equal treatment, as a means of reducing administrative burdens. The measures contained in the Shareholder Engagement Directive have significantly changed the regulations applicable to public companies in most EU Member States. The Shareholder Engagement

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[26] *Green Paper - Corporate Governance in Financial Institutions and Remuneration Policies*, *supra* note 4.

[27] *Green Paper - Corporate Governance in Financial Institutions and Remuneration Policies*, *supra* note 4.

[28] *Commission Proposal For European Company Law And Corporate Governance - A Modern Legal Framework For More Engaged Shareholders And Sustainable Companies*, COM (2012) 740 Final (Dec. 12, 2012).

[29] Directive 2006/43/EC, of the European Parliament and of the Council of 17 May 2006 on Statutory Audits of Annual Accounts and Consolidated Accounts, Amending Directives 78/660/EEC and 83/349/EEC and Repealing Directive 84/253/EEC, 2006 O.J. (L 157) 87-107 (this directive was subsequently amended multiple times).

[30] Directive 2004/109/EC, of the European Parliament and of the Council of 15 Dec. 2004 on the Harmonization of Transparency Requirements in Relation to Information About Issuers Whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC, 2005 O.J. (L 390) 38-57.

[31] 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 O.J. (L 184) 17-24.

[32] Directive 2017/828, of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as Regards the Encouragement of Long-Term Shareholder Engagement, 2017 O.J. (L 132), 1-25.

Directive contains measures relating to the identification of shareholders, the facilitation of the exercise of shareholders' rights, the transmission of information to shareholders, executive compensation and transactions with related parties, as well as provisions pertaining to institutional investors, asset managers, and proxy voting advisors, of whom increased engagement and transparency are required.

19. The use of directives by the EU institutions no longer makes it possible to regulate these issues through soft law instruments. From this point of view, EU law is effectively "hardening", and, as an indirect but necessary consequence, national law is too. I would have preferred that certain matters now covered by the Shareholder Engagement Directive remained within the bounds of soft law (for example, executive compensation and transactions with related parties).[33] More generally, I believe that any future developments in the field of corporate governance should be the result of the interplay between market forces and self-regulation, rather than legislative intervention, whether EU or national. That is because, unlike any legislation that might be adopted, corporate governance codes have a series of unique advantages.

20. First, they adapt to the diversity of corporate situations. Hard law necessarily subjects situations that may be extremely different to the same standard. This "one size fits all" approach has often, and rightly, been criticized.[34] In contrast, soft law allows the realities of each company to be taken into account, including based on the "comply or explain" approach. It also offers flexibility that hard law does not allow, as it can be more easily revised to account for relevant developments. Corporate governance codes are often revised in practice, and many implemented periodic

[33] *See also* Michael Klausner, *A U.S. View of the European Model Company Act*, 2 ECFR 363, 364 (2016) ("For publicly listed companies, there are pressures to standardize governance and financial arrangements . . . [but] the heterogeneity of first, the vast scope of their businesses, and the constant changing business environment makes broad legal standards more suitable than detailed legal rules in a company law statute").

[34] Jennifer G. Hill, *Public Beginnings, Private Ends - Should Corporate Law Privilege the Interest of Shareholders*, in Fiona Macmillan (ed.), 9 AUSTL J. OF CORP. LAW, 21 (2000).

evaluation and updating procedures. In contrast, changes to corporate laws take time and, if no political willingness exists, such change might not happen at all. This is true both at the EU level and at the national level.

21. Very few legislators can make revisions to their hard laws at the speed of which revisions to the corporate governance codes are made.[35] One such legislator is Delaware, in the United States, which I discuss in more detail below. Delaware uses a yearly[36] "rigorous amendment process"[37] of its corporate laws. This specific amendment is directly addressed in the constitution of the State of Delaware.[38] In practice, amendments are often passed unanimously, which reflects the fact that there is political consensus that amendments to the corporate laws will not be subject to partisan controversy.[39] The rationale for this situation is that, while Delaware is the second smallest

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[35] As an example, as of October 2021, the following versions of the corporate governance codes were in effect in the following EU Member States (*supra* note 20): Germany (2020), Netherlands (2016), Romania (2015), United Kingdom (2018), Finland (2020), France (2020). As of October 2017, the following versions of the corporate governance codes were in effect in the following EU Member States: Germany (2013), Netherlands (2016), Romania (2015), United Kingdom (2016), Finland (2016), France (2016). It can be easily observed that, during a period of four years, 4 of the 6 codes surveyed (66.66%) were revised. The relevant time period includes the adoption of the EU Shareholder Engagement Directive in 2017, which undoubtedly contributed to the updates of the codes surveyed. That, in turn, supports my observation that soft law hardens.

[36] Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1754, (2006).

[37] Alex Right, *Shareholders on Shaky Ground: Section 271's Remaining Loophole*, 108 NW. U. L. REV. 1451, 1457 (2014) (noting that "the rigorous amendment process [is] undertaken by the Council of the Corporation Law Section of the Delaware State Bar Association. The Council acts on behalf of the Delaware General Assembly, and all proposed amendments to the DGCL are subject to a vote by the General Assembly. The Council carefully shapes the DGCL with the understanding that any amendments or modifications to the statute should improve Delaware's hospitable corporate environment. The focus on a favorable state for incorporation, in turn, fosters recognition among judges that jurisprudential consistency (i.e., by applying the DGCL uniformly and predictably) is crucial to attracting tax-paying businesses."); *see also* Hamermesh, *supra* note 36, at 1755-59, 1772 (2006); *See generally* Randy J. Holland, *Delaware Corporation Law: Judiciary, Executive, Legislature, Practitioners*, 72 BUS. L. 943 (2017); *See generally* S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976).

[38] The Constitution of the State of Delaware provides for a supermajority of the legislature for amendments to Delaware's corporate laws. Del. Const. art. IX, §1. That supermajority requirement, specifying that amendments to the corporate laws require a two-thirds vote of both the state Senate and the House of Representatives, "has been touted as a source of stability of the Delaware corporate law." Hamermesh, *supra* note 36, at 1753.

[39] Hamermesh, *supra* note 36, at 1753 ("In truth, the supermajority legislative vote requirement is more symbolic than real, since voting on amendments to the DGCL is almost invariably unanimous. Plainly, then, the Delaware General Assembly has not perceived the content of the DGCL as an appropriate subject for partisan controversy.").

American state, by population and surface, it is home to approximately 1.6 million legal entities, including many public companies, "incorporated disproportionately in Delaware"[40] (93% of all American initially publicly traded companies and nearly 68% of Fortune 500 companies).[41] The business entities incorporated in Delaware generate about 25% of the state's general fund through corporate income taxes and franchise fees.[42] These elements distinguish Delaware from any other American or European state.[43] Other national legislatures lack the ability to follow suit, including on the point of being able to implement legislative amendments on a yearly basis. Soft law can achieve these rapid modifications, either formally or by practical adaptation given the flexibility afforded by the instruments and the "comply or explain" principle.

22. Moreover, while hard law in principle has a limited geographical scope, soft law breaks free from territorial borders and reflects the globalization of the economy and the emergence of transnational rules. Finally, while hard law encourages a formal approach based on textual compliance, soft law favors the appropriation of recommendations by stakeholders and therefore participates in a process of accountability and of progressive and continuous improvement of practices.

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[40] Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 168 (2015).

[41] DELAWARE DIVISION OF CORPORATIONS, 2020 ANNUAL REPORT STATISTICS (2020), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf.

[42] Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 680 (2005) (noting also that "for us, a small state, it is vital that we remain the leader in corporation law. That leadership produces thousands of Delaware jobs and nearly a quarter of our state's budget revenues. For that reason, our state will not tilt its corporation law to favor a corporation that happens to have its headquarters here.").

[43] Another distinguishing factor is that, unlike other national legislatures, Delaware has a specialized court for business law disputes, the Court of Chancery, which can resolve issues in record time as compared to other courts. A key component of the Court of Chancery's quick yields revolves around its proficiency in, and focus on, business law. Moreover, given the number of business entities incorporated in Delaware but headquartered elsewhere, the court does not face the same pressures as other national legislatures in having to protect the local industry and its jobs, nor does it face pressures by large employers to modify the laws of a specific industry due to fears that a company may relocate; *see also* Klausner, *supra* note 33, at 365-66 (explaining that the existence of a specialized court has a direct impact on how corporate laws are written, specifically whether they use broad standards or specific rules).

23. The EU institutions try to avoid the trap of the "one size fits all" approach through the adoption of provisions meant to achieve "minimum harmonization." However, this type of intervention, which leaves a range of choices to the EU Member States in areas characterized by deep divergence, only deepens those disparities rather than lead to convergence. If the EU institutions believe that an accelerated convergence is necessary in this area, which is characterized by deep historical and structural discrepancies, a preferable path to legislation would be to encourage the efforts to adopt a European Corporate Governance Code which, so far, have stalled (Section A). Due to lack of political will, it was only possible to have a European Model Company Act, similar to the American Model Business Corporations Act (Section B).

A. Failure of a European Corporate Governance Code

24. Directive 2006/46/EC[44] on accounting requires all EU public companies, since 2006, to produce a corporate governance statement in their annual report to shareholders. However, so far, a European Corporate Governance Code could not be adopted. The main reason for this failure lies not only

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[44] *See* Directive 2006/46/EC, of the European Parliament and of the Council of 14 June 2006 Amending Directives 78/660/EEC on the Annual Accounts of Certain Types of Companies; Directive 83/349/EEC On Consolidated Accounts; Directive 86/635/EEC on the Annual Accounts and Consolidated Accounts of Banks and Other Financial Institutions; Directive 91/674/EEC on the Annual Accounts and Consolidated Accounts of Insurance Undertakings, 2006 O.J. (L 224), 1-7, at recital 10 ("Companies whose securities are admitted to trading on a regulated market and which have their registered office in the Community should be obliged to disclose an annual corporate governance statement as a specific and clearly identifiable section of the annual report. That statement should at least provide shareholders with easily accessible key information about the corporate governance practices applied, including a description of the main features of any existing risk management systems and internal controls in relation to the financial reporting process. The corporate governance statement should make clear whether the company applies any provisions on corporate governance other than those provided for in national law, regardless of whether those provisions are directly laid down in a corporate governance code to which the company is subject or in any corporate governance code which the company may have decided to apply. Furthermore, where relevant, companies may also provide an analysis of environmental and social aspects necessary for an understanding of the company's development, performance and position. There is no need to impose the requirement of a separate corporate governance statement on undertakings drawing up a consolidated annual report. However, the information concerning the group's risk management system and internal control system should be presented.").

in the differences between the EU Member States, but also in a lack of organization of employers at the European level, as compared to the national level where organizations of national employers have been extremely active with respect to the development and evolution of national company law, particularly in corporate governance, by proposing and demanding national legislative reforms. In contrast, the organizations that exist at the European level (Businesseurope, CEEP, UEAPME, European Round Table of Industrialists, etc.) find it more difficult to make the employers' voice heard, because the employers' interests are very heterogeneous, and are not uniformly affected by the European construction.[45]

25. Another reason why it has not (yet) been possible to adopt a European Corporate Governance Code is that "the EU still faces significant challenges in ensuring that corporate governance initiatives, such as gender diversity and "say on pay," are well accepted."[46] Other obstacles are the existence of a wide variety of legal forms of organization of business activities, board structures and composition, and practices among European companies, as well as significant differences in investor ownership patterns and engagement practices among shareholders in Europe, as well as in the levels of shareholder activity. Despite these obstacles, I believe that the efforts towards the adoption a European Corporate Governance Code should (and will) be renewed.

26. These obstacles are not present in a federal country such as the United States, even if corporate law is left to the state legislators (with the significant exception of federal securities regulation[47]).

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[45] HÉLÉNE MICHEL, REPRÉSENTER LE PATRONAT EUROPÉEN: FORMES D'ORGANISATION PATRONALE ET MODES D'ACTION EUROPÉENNE 25 (Peter Lang ed., 2013).

[46] ECODA & INTERNATIONAL FINANCE CORPORATION, A GUIDE TO CORPORATE GOVERNANCE PRACTICES IN THE EUROPEAN UNION, xi (2015), https://www.ifc.org/wps/wcm/connect/506d49a2-3763-4fe4-a783-5d58e37b8906/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES&CVID=kNmxTtG.

[47] Jacobs, *supra* note 40, at 142.

This is why the United States has a corporate governance code, represented by the Principles of Corporate Governance published by the American Law Institute (ALI).[48]

27. ALI is a research organization, founded in 1923, comprised of prominent judges, attorneys, and legal scholars whose objective is to clarify and modernize American common law. ALI pursued its mandate through the creation of "restatements" of basic legal subjects, such as Agency, Contracts, Conflict of Laws, Property or Torts, that provide a unifying interpretation of what the law is by synthesizing clear legal rules from the larger body of common law.[49] In addition to the Restatements (which primarily address the courts and are used as authoritative guides for both legal briefs and judicial opinions), ALI later developed a series of Principles, addressed primarily to administrative agencies and private actors, focused on best practices for various public and private institutions, and covering a variety of topics such as Corporate Governance, Transnational Civil Procedure, or Compliance and Enforcement for Organizations.[50]

28. The process leading to the adoption of the ALI Principles of Corporate Governance was not easy. It was described as a "often bitter fourteen-year battle within the American Law Institute ... over its efforts to articulate a set of rules about American corporate law. This epic struggle ended on May 13, 1992, when the ALI formally approved the Principles of Corporate Governance at its annual meeting in Washington."[51] The very need for such a project was questioned almost

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[48] PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (AM. L. INST. 1994), *supra*, note 8.

[49] Jeswald W. Salacuse, *Corporate Governance, Culture and Convergence: Corporations American Style or With a European Touch?*, 9 LAW & BUS. REV. AM. 33 (2003); Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L. J. 145 (2007).

[50] *See* https://www.ali.org/about-ali/ and https://www.ali.org/publications/.

[51] Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1212 (1993) (footnote omitted). *See also* Marjorie Fine Knowles & Colin Flannery, *The ALI Principles of Corporate Governance Compared with Georgia Law*, 47 MERCER L. REV. 1 (1995); William J. Carney, *The ALI's Corporate Governance Project: The Death of Property Rights?*, 61 GEO. WASH. L. REV. 898 (1993).

continuously, from its formal initiation in 1978 to its publication in final form in 1994.[52] The criticism of the work over the years, as successive tentative drafts were published, came from a variety of sources, ranging from the Business Roundtable (a nonprofit lobbyist association based in Washington, whose members are CEOs of major American companies) to legal scholars.[53] While ALI's Restatements had become influential as reflections of existing law, the more suggestive nature of the ALI Principles of Corporate Governance (the "ALI Principles") was initially met with some skepticism. Primarily, opponents suggested that they reflected corporate interests and that they were too intrusive into business practices.

29. The ALI Principles consist of introductory notes, rules of law in black-letter format, corporate practice recommendations, and comments. They cover the following main topics: (i) objective, conduct, and structure of the business corporation, (ii) the duty of care and fair dealing, (iii) the role of directors and shareholders in transactions in control and tender offers, and (iv) remedies. They explained and restated much of the corporate law as it existed, but they also proposed reforms where the drafters considered that the existing law was less than ideal.[54]

30. The ALI Principles illustrate well a reality that has also been documented at the level of European company law: over time, like wine, high quality soft law ferments, ages, and turns into hard law. To take just one example, the Supreme Courts of at least two American states (Oregon and Maine[55]), have abandoned their common law doctrine on "corporate opportunity" and embraced

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[52] Klausner, *supra* note 33, at 363.

[53] Macey, *supra* note 51; Kathryn N. Fine, Project, *The Corporate Governance Debate and the ALI Proposals: Reform or Restatement?*, 40 VAND L. REV. 693, 695 (1987); Joel Seligman, *A Sheep in Wolfs Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 328 (1987).

[54] Klausner, *supra* note 33, at 363.

[55] *Klinicki v. Lundgren*, 298 Or. 662, 695 P.2d 906 (Or. 1985); *Northeast Harbor Golf Club, Inc. v. Harris*, 661 A.2d 1146 (Me. 1995).

instead the test set forth in the ALI Principles, as "an opportunity to bring some clarity to a murky area of the law".[56] More specifically, the Supreme Court of Maine stated:

> In an attempt to protect the duty of loyalty while at the same time providing long-needed clarity and guidance for corporate decisionmakers, the American Law Institute has offered the most recently developed version of the corporate opportunity doctrine. … The [Supreme Court of Oregon in] *Klinicki* … viewed the ALI test as an opportunity to bring some clarity to a murky area of the law. … We agree, and today we follow the ALI test. The disclosure-oriented approach provides a clear procedure whereby a corporate officer may insulate herself through prompt and complete disclosure from the possibility of a legal challenge. The requirement of disclosure recognizes the paramount importance of the corporate fiduciary's duty of loyalty. At the same time it protects the fiduciary's ability pursuant to the proper procedure to pursue her own business ventures free from the possibility of a lawsuit. The importance of disclosure is familiar to the law of corporations in Maine. … Similarly, the parties did not have the opportunity to develop the record in this case with knowledge of the applicable legal standard. In these circumstances, fairness requires that we remand the case ….[57]

31. The force of this "soft" law instrument is therefore so well established that, in 2019, ALI began the process of converting the ALI Principles into a Restatement, with the goal of creating a more persuasive and uniform authority on corporate law.[58] Although still "soft" law, conversion from Principles to a Restatement will effectively "harden" them.

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[56] *Northeast Harbor Golf Club*, *supra* note 55, at 1152.

[57] *Id.* at 1151-52.

[58] *See* https://www.ali.org/projects/show/corporate-governance/.

32. In my view, the success of the ALI Principles rests on four pillars. First, they are limited to corporations, to the exclusion of other business entities. This "less is more" approach allows for better tailored solutions. Moreover, the ALI Principles contain tailored provisions for large publicly held corporations, smaller publicly held corporations, and corporations that do not fit in the first two categories (private companies). Second, they are flexible. In the sections dealing with the structure of the corporation, the ALI Principles recognize the need both for flexibility in the structure of the management of a corporation, and for a system to insure accountability to shareholders. To do this, varying approaches were used in the formulation of the provisions that comprise the ALI Principles. Some provisions are based on the rules that a well-instructed court would likely embrace, others are recommendations intended for voluntary adoption, and others are recommendations intended for use as a statutory provision. Third, the ALI Principles are periodically reviewed and updated (three times per year). Fourth, they are accompanied by "in-depth, conceptually rich but also practically useful commentary … directed to both legislatures and courts."[59] The quality of the commentary accompanying a particular soft law instrument can make the difference between success and failure.

33. These four pillars (limited scope of application, flexibility, periodical review, and commentary) could represent the starting point for any renewed efforts at the EU level with respect to a European Corporate Governance Code. I would suggest only one conceptual departure from the American counterpart which is, at least at first, to only focus on public companies, to the exclusion of private companies. The European Commission had considered the corporate governance of private (unlisted) companies in its Green Paper of 2011.[60] I believe that it is not for the European

[59] Klausner, *supra* note 33, at 368.

[60] European Commission, *Green Paper - The EU corporate governance framework*, *supra* note 4, at 4-5 ("[G]ood corporate governance may also matter to shareholders in unlisted companies. While certain corporate governance issues are already addressed by company law provisions on private companies, many areas are not covered.

institutions to develop specific rules on corporate governance for private companies. That is because public companies, which have many private subsidiaries, would become significantly less competitive if all the companies in the group were subject to rules in this area, and there is already an unfortunate trend towards national legislators applying rules designed for public companies (or rules for which the justification lies in the specificities of public companies) to all national joint-stock companies, and even sometimes to national limited liability companies. Moreover, in contrast to public companies, where the incentive for governance comes from external pressure, governance of private companies is generally stimulated from within. The objectives are to foster continuity (over generations), growth (opening towards external funding and new shareholders) and professionalism (checks and balances, focus on the interest of the company).

34. Therefore, if the European institutions are to intervene, only the development of general principles and the promotion of the development and application of voluntary codes for private companies would be desirable. Such codes have already been drafted, and initiatives have been taken, by professional bodies at the European or national level. Here, I am particularly thinking of the ecoDa and Buysse codes. The European Confederation of Directors Associations (ecoDa) is a Belgian not-for-profit association, which represents approximately 55,000 board directors from across the EU, coming from both large public companies and small private companies.[61] The first ecoDA Corporate Governance Guidance and Principles for Unlisted Companies in Europe was published

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Corporate governance guidelines for unlisted companies may need to be encouraged: proper and efficient governance is valuable also for unlisted companies, especially taking into account the economic importance of certain very large unlisted companies. … However, principles designed for listed companies cannot be simply transposed to unlisted companies, as the challenges they face are very different. Some voluntary codes have already been drafted and initiatives taken by professional bodies at European or national level. So the question is whether any EU action is needed on corporate governance in unlisted companies.").

[61] ecoDa, *Corporate Governance Guidance and Principles for Unlisted Companies in Europe* (2021), https://ecoda.eu/wp-content/uploads/2019/08/ecoDa-Corporate-Governance-Guidance-and-Principles-for-unlisted-companies-in-Europe-1.pdf, at 3.

in 2010,[62] in direct response "to a concern of the European Commission, which was considering whether its own action in that field would make sense. Eventually, the Commission preferred to rely on voluntary initiatives, and, particularly, on the initiative taken by ecoDa."[63] I salute the "no action" approach taken by the European Commission, and hope that it will continue.

35. The ecoDa code has proven to be a useful instrument for private companies as shown by its translation in many languages of EU Member States. Like other soft law instruments, the ecoDa code knew to adapt (fast) to evolving realities. For example, the code was recently amended in 2021, including in order to take into account the Covid crisis.[64] Moreover, the code displays the same distinguishing feature of soft law instruments, as opposed to hard law instruments, which is "a phased approach to governance (rather than one-size-fits-all), tailored to the development phases of the company."[65] The same features are present in the Buysse code (Corporate Governance. Recommendations for non-listed enterprises).[66] The first version of the Buysse code was adopted in 2005, and has since been revised twice, in 2014 and 2017.

36. The objective of the ecoDa and Buysse codes were to provide a practical framework for owners and managers of small and large private companies to achieve growth while limiting potential liability. Because these instruments have been successful, I see no reason for EU intervention in this area. Consequently, any future work on a European Corporate Governance Code should focus

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[62] ecoDa, *Corporate Governance Guidance and Principles for Unlisted Companies in Europe* (2010), https://ecgi.global/code/ecoda-corporate-governance-guidance-and-principles-unlisted-companies-europe.

[63] ecoDa, *Corporate Governance Guidance and Principles for Unlisted Companies in Europe* (2021), at 4.

[64] *Id.*

[65] *Id.* See also Institute of Directors and ecoDa, *Corporate Governance Guidance and Principles for Unlisted Companies in the UK* (2010), https://www.iod.com/Portals/0/PDFs/Campaigns%20and%20Reports/Corporate%20Governance/Governance%20code%20for%20unlisted%20companies.pdf.

[66] Code Buysse III, *Corporate Governance. Recommendations for non-listed enterprises* (2017), http://www.codebuysse.com/downloads/CodeBuysseIII_FR.pdf.

only on public companies and impact only the business forms that allow public company status (joint-stock companies and only a few other business forms).

B. Modest Success of the European Model Company Act as Compared to the Model Business Corporations Act in the United States

37. The European Model Company Act (EMCA) was published in 2017,[67] ten years after the start of the work, in 2007, on this project.[68] The EMCA is the fruit of the efforts of a group of researchers, and therefore does not have a legislative, European, or national sanction.[69] As such, the political challenges that made the adoption of a European Corporate Governance Code impossible so far did not exist. The EMCA is the result of a commission created by Professors Paul Krüger Andersen and Theodor Baums in 2007. The drafting commission consisted of prominent company law scholars from 22 EU Member States. As such, the drafting commission was independent from business organizations, from the governments of the EU Member States, and from the European Commission, the project being financed exclusively through academic funding. However, the European Commission expressed support for the project, and representatives of the European Commission were invited to attend meetings of the drafting commission.[70]

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[67] For the text of the EMCA, *see* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348 (hereafter, "EMCA").

[68] *See* http://law.au.dk/en/research/projects/european-model-company-act-emca/news/.

[69] *See* Paul Krüger Andersen, *The European Model Company Act (EMCA). A new way forward*, in Ulf Bernitz and Wolf-Georg Ringe (eds.), COMPANY LAW AND ECONOMIC PROTECTIONISM. NEW CHALLENGES TO EUROPEAN INTEGRATION, Oxford University Press, Oxford (2010), at 303 *et seq.*; Theodor Baums & Paul Krüger Andersen, *The European Model Company Law Act Project*, in Michel Tison, Hans De Wulf, Christoph Van der Elst & Reinhard Steennot (eds.), PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION, ESSAYS IN HONOUR OF E. WYMEERSCH, Cambridge University Press, Cambridge (2009), at 5 *et seq.*; Evelyne Beatrix, *The European Model Company Act. How to choose an efficient regulatory approach ?*, 4 INT'L J. OF PRIVATE LAW 156, *passim* (2011).

[70] EMCA, *supra* note 67, at 1-2.

38. The expressly stated objective of the EMCA is the harmonization or convergence of European company law. The EMCA emphasized the need to diversify the mechanisms used to achieve that purpose. It also specifically referenced the inspiration provided by its American counterpart, the Model Business Corporation Act (MBCA):

> While harmonization or convergence of European Company Law can be achieved by a toolbox of measures, until now the tools have been confined largely to Regulations, Directives, Recommendations and Corporate Governance Codes. It is submitted that there is a need to provide new measures to develop future European company law and that a European Model Act (EMCA) would be a useful tool for European integration in this area. The objective of the EMCA project thus is to establish, on a solid scientific foundation, a new way forward in European company law inspired by the US Model Business Corporation Act (MBCA).[71]

39. The EMCA came with a number of additional unique features.[72] First, what differentiates the EMCA from other tools used to advance European company law is its design as a "free-standing general company statute that can be enacted by Member States either substantially in its entirety or by the adoption of selected provisions."[73] Consequently, the intention was not to resolve fundamental and historical divergences between EU Member States but rather encourage further harmonization and convergence (as opposed to uniformity) by allowing the EU Member States to adopt only the provisions they desired. In this sense, the intention was to make the EMCA "flexible enough to be adapted to the unique needs of each country."[74] Second, a deliberate decision was

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[71] EMCA, *supra* note 67, at 1.

[72] Klausner, *supra* note 33, at 363-64.

[73] EMCA, *supra* note 67, at 1.

[74] *Id.* at 16.

made that "[k]ey provisions of the EMCA consist of broad standards as opposed to specific rules."[75] That was because it was decided that flexibility should prevail so that specific rules would only apply if imposed by EU directives. Third, the EMCA is a largely enabling statute with relatively few mandatory provisions. These features of the EMCA generally parallel American corporate law, with its three main components (MBCA, DGCL and ALI Principles).

40. As of today, the EMCA has not seen widespread adoption across EU Member States. That was to be expected because a structural change of national company laws requires complex choices and processes, and takes time. Another possible reason is the overly general content of the EMCA. In attempting to create a universal model, the EMCA became too diluted to have much practical use to the complex legal frameworks that are already in place.[76] The scope of application of EMCA is "limited liability companies,"[77] which includes, in American terminology, corporations and LLCs, and, in European terminology, a variety of business entities at the national level.[78]

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[75] *Id.* at 17.

[76] Marco Ventoruzzo, *The New European Model Company Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 14, 2015), https://corpgov.law.harvard.edu/2015/10/14/the-new-european-model-company-act/; NICOLA DE LUCA, EUROPEAN COMPANY LAW 28-29 (2d ed. 2021); JANET DINE ET AL., COMPANY LAW IN THE NEW EUROPE 147 (2007); Klaus J. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiates on Corporate Law and Corporate Governance*, 12 N.Y.U. J.L. & BUS. 139, 210 (2015). ("[P]ushing through a European Model Companies Act may have few advantages compared to large national codifications such as the UK Companies Act of 2006 (1300 articles, 700 pages), the German Aktiengesetz (410 paragraphs with 70 reforms since 1965), and French corporate law with its many special corporate forms. Yet, for Member States without a well-developed and codified corporate law, for transition economies and for countries outside the EU, such model laws can be very useful.").

[77] EMCA, *supra* note 67, at 21, par. 1.

[78] For example, there are six types of commercial companies in France: *société en nom collectif* (SNC), *société à responsabilité limitée* (SARL), *société par actions simplifiée* (SAS), *société en commandite simple* (SCS), *société en commandite par actions* (SCA) and *société anonyme* (SA). Under French law, there is an additional type of company that has legal personality, called a "civil (law) company" (*société civile*). As another example, in Romania, there are five types of commercial companies (corresponding to all but one of the French forms): *societatea în nume colectiv* (the equivalent of the French SNC), *societatea cu răspundere limitată* (the equivalent of the French SARL), *societatea în comandită simplă* (the equivalent of the French SCS), *societatea în comandită pe acțiuni* (the equivalent of the French SCA) and *societatea pe acțiuni* (the equivalent of the French SA). In Germany, there are five main types of companies: *Offene Handelsgesellschaft* (OHG, the equivalent of the French SNC), *Gesellschaft mit beschränkter Haftung* (GmbH, the equivalent of the French SARL) and its simplified version, *Unternehmergesellschaft (UG) haftungsbeschränkt (GmbH UG)*, *Kommanditgesellschaft* (KG, the equivalent of the French SCS) and its variation, the *GmbH & Co. KG*, *Kommanditgesellschaft auf Aktien* (KgaA, the equivalent of the

41. Other deficiencies that can be noted is the lack of a standing committee that would remain in place to write commentary designated to facilitate the adoption and application of the EMCA as cases arise and as economic circumstances, business practices and capital markets change.[79] It was also suggested that the EMCA (and, more generally, European company law) lacks the backing of a powerful court specialized to hear company law disputes, akin to the Delaware Chancery Court in the United States.[80] Despite these shortcomings, the EMCA is cited more and more often (especially its provisions on groups of companies) and suggestions to adopt parts of the EMCA by national legislators (especially in smaller EU countries, such as Lithuania) have started to emerge.[81]

42. There are major differences between the EMCA and its American counterpart, the MBCA. The MBCA was drafted in 1950 by the Committee on Business Corporations of the American Bar

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French SCA) and *Aktiengesellchaft* (AG, the equivalent of the French SA). In the United Kingdom, the two main types of companies are the private limited company (Ltd, the equivalent of the French SARL and of the American LLC) and the public limited company (plc, the equivalent of the French SA and of the American corporation). Similarly, in the Netherlands, there are two main types of companies, which are the *Besloten Vennootschap* (BV, the equivalent of the French SARL and of the American LLC) and the Naamloze Vennootschap (NV, the equivalent of the French SA and of the American corporation). This overview illustrates the extreme diversity at the national level among European countries regarding the business forms available to prospective business owners. In addition to these national variations, specific EU forms of companies have been created, such as the European Company (*Societas Europaea*). See Raluca Papadima, DROIT EUROPÉEN ET COMPARÉ DES SOCIÉTÉS ET DES AFFAIRES, Hamangiu (2018), at 1-20.

[79] Klausner, *supra* note 33, at 368.

[80] Ronald J. Gilson, *A Model Company Act and a Model Company Court*, STAN. L. & ECON. OLIN, WORKING PAPER (2016); *see also* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 2491 (2005); MADS ANDENAS & FRANK WOOLRIDGE, EUROPEAN COMPARATIVE COMPANY LAW 33-34 (Cambridge Univ. Press, 2009); Luca Enriques, *EC Company Laws and the Fears of a European Delaware*, 15 EUR. BUS. L. REV. 1259, 1260 (2004); Luca Enriques, *A Harmonized European Company Law: Are We There Already?*, 66 INT'L & COMP. L. Q. 763, 777 (2017).

[81] *See, e.g.*, Marco Lamandini et al., *The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law*, 23 COLUM. J. EUR. L. 199, 230 (2017); Edvinas Bakanauskas, *Protection of Minority Shareholders' Rights in Group Companies: Lithuania and EU Company Law Perspectives*, in Vilnius University, 8TH INTERNATIONAL CONFERENCE OF PHD STUDENTS AND YOUNG RESEARCHERS, 7-16 (2020), Int'l Network of Dr. Stud. in L., *The Future Decade of the EU Law*, (2020) http://lawphd.net/wp-content/uploads/2021/01/The-Future-Decade-of-the-EU-Law-Final.pdf.

Association (ABA), currently known as the Corporate Laws Committee.[82] The primary objective was to address variations in the law applicable to corporations among the American states.

43. Notably, the MBCA only applies to corporations and not to any other American business forms, such as LLCs and partnerships. Laws governing LLCs (more popular now than corporations[83]) vary greatly from state to state in the United States, despite the existence of a Uniform Limited Liability Company Act[84] drafted by the National Conference of Commissioners on Uniform State Laws (issued in 1996, revised in 2016, and further amended in 2013), which has not been widely adopted.[85] With respect to partnerships, the level of harmonization is somewhere in between corporations and LLCs. More specifically, for general partnerships, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Partnership Act as early as 1914.[86] In 1994, a new version was promulgated, known as the Revised Uniform Partnership Act, which has been amended several times since then, and is followed by most American states.[87] Similarly, for limited partnerships, a Uniform Limited Partnership Act was promulgated first in 1916 and then again in 1976 (as the Revised Uniform Limited Partnership Act), followed by additional

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[82] Jeffrey M. Gorris, Lawrence A. Hamermesh & Leo E. Strine, *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 L. & CONTEMP. PROBLEMS 107, 109-110 (2011) *See also* https://www.americanbar.org/groups/business_law/committees/corplaws/.

[83] Delaware Division of Corporations, *supra* note 41.

[84] REVISED UNIF. LTD. LIABILITY COMPANY ACT (2006), known as "RULLCA".

[85] Larry E. Ribstein, *An Analysis of The Revised Uniform Limited Liability Company Act*, 3 VA LAW & BUS. REV. 35, 35-36 (2008). *See also* Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and ULLCA*, 66 U. COLO. L. REV. 947 (1995); William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715 (1998); Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. L. 515 (2007).

[86] UNIF. P'SHIP ACT (1914), 6 Pt. I U.L.A. 275 (2001), known as "UPA".

[87] [REVISED] UNIF. P'SHIP ACT (1994), 6 Pt. I U.L.A. 1 (2001). Though the official name of the general partnership statute approved by NCCUSL in 1994 is the "Uniform Partnership Act," it is commonly referred to as the "Revised Uniform Partnership Act" or the acronym "RUPA" to distinguish it from the original 1914 UPA. Some states still base their national laws on UPA, while a majority of American states have enacted RUPA and its amendments. See Joseph K. Leahy, *An LLC Is The Key: The False Dichotomy Between Inadvertent Partnerships and The Freedom of Contract*, 52 TEX. TECH L. REV. 243, 249 n.22 (2020) ("To date, thirty-nine states and the District of Columbia have adopted some version of RUPA").

amendments.[88] Although some harmonization was achieved through these uniform laws, the additional step of their adoption by the respective states resulted in less uniformity than that existing for corporations. Moreover, most of the provisions governing LLCs and partnerships have a default nature, and few are mandatory, in the sense that the statutes are less important than the owners' agreement, with respect to which practice carries much weight and keeps things evolving. This illustrates an intermediate, but very powerful, source of company law, which is neither hard law nor soft law, but rather "practitioners' law".

44. Similarly, for the MBCA to be legally enforceable, it had to be adopted individually by each state via the relevant state legislature.[89] However, the MBCA contains more mandatory provisions than the LLC and partnership statutes, and the owners' agreement plays a lesser role in corporations. Although initial adoption was slow, the flexible nature of the MBCA, allowing states to modify individual provisions, and its regular revisions, have ultimately made the MBCA attractive to state legislatures. In 2002, 24 states had adopted the MBCA. As of 2021, 32 states, as well as Washington, D.C., have adopted the MBCA, either in part or in whole.[90]

45. Universal adoption of the MBCA in the United States remains doubtful, due to the presence of another influential body of corporate law: Delaware General Corporate Law (DGCL). Although the DGCL is "hard" state law in Delaware, it has become influential as a point of reference for other states and, as such, represents soft law in other American states, even those that have based

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[88] UNIF. LTD. P'SHIP ACT (1916), 6A U.L.A. 312 (1995), known as "UPLA" and REVISED UNIF. LTD. P'SHIP ACT (1976, amended 1985), 6A U.L.A. 125 (2003), known as "RULPA".

[89] A number of similar "uniform" laws exists in other areas in the United States, such as the Uniform Commercial Code ("UCC"). *See* AM. LAW INST. & UNIF. LAW COMM'N, U.C.C. (1977).

[90] The list of states that have adopted the MBCA is publicly available on the website of the MBCA: *Corporate Laws Committee,* AM. BAR ASS'N (Nov. 25, 2021), https://www.americanbar.org/groups/business_law/committees/corplaws./; *see also 2016 Revision to Model Business Corporation Act Makes Its Debu*t, AM. BAR ASS'N (Dec. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/12/10_mbca/.

their laws on the MBCA. That is because, in part, the MBCA does not address all matters on which there is abundant caselaw in Delaware under the DGCL.

46. Despite the conflict between the DGCL and the MBCA, the two powerhouses of corporate law often look to each other during their regular revisions. As three prominent Delaware scholars concluded, "the MBCA and Delaware are good partners in a longstanding symbiotic relationship."[91] The MBCA may never be universally adopted in the United States, but its role is, and will continue to be, influential not only in American corporate law,[92] but also in European company law.

II. Soft Law in Financial Markets

47. The economic and financial crisis of 2008-2009, and the recession that followed, led the EU to create new authorities and reform its regulations,[93] just as the financial crisis and the Great Depression of the 1930s led the United States to create a financial market regulator in 1934, the Securities Exchange Commission (SEC), and to profoundly reform its banking and stock market regulations. In 2010, the EU created three European Supervisory Authorities: the European Securities and Markets Authority (ESMA) in Paris for the financial markets sector, the European Banking Authority in London for the banking sector, and the European Insurance and

[91] Gorris *et al.*, *Delaware Corporate Law and the Model Business Corporation Act: A study in Symbiosis*, *supra* note 82, 118 (2011).

[92] See Megan Wischmeier Shaner, *Privately Ordered Fiduciaries*, 28 GEO. MASON L. REV. 345 (2020); E. Norman Veasey, *The Model Business Corporation Act at Sixty: On Corporate Codification: A Historical Peek at the Model Business Corporation Act and the American Law Institute Principles Through the Delaware Lens*, 74 L. & CONTEMP. PROBLEMS 95 (2011).

[93] Pierre-Henri Conac & Vincent Caillat, *De CESR à l'ESMA (Le Rubicon est franchi)*, 6 BULLETIN JOLY BOURSE 500 (Nov. 2010), para. 1. *See also* Mario Giovanoli, *The International Financial Architecture and its Reform after the Global Crisis*, *in* INTERNATIONAL MONETARY AND FINANCIAL LAW. THE GLOBAL CRISIS 3 (Mario Giovanoli & Diego Devos eds.), Oxford University Press (2010).

Occupational Pensions Authority in Frankfurt for insurance and pensions.[94] These authorities replaced the previous committees comprised of the national supervisory authorities in each of the sectors concerned. In 2013, the supervision of banks, previously exercised by the competent national authorities, was transferred to the European Central Bank (ECB) through the creation of the Single Supervisory Mechanism (SSM) as part of the European Banking Union project (launched in 2012). In 2015, the Capital Markets Union (CMU) project was launched. These reforms greatly contributed to institutional and substantive convergence in the EU.

48. *Institutional convergence* follows from the powers conferred on supervisory authorities in several areas, including direct and indirect supervision, and from their mission to promote supervisory convergence. The powers of the European Supervisory Authorities are increasing, particularly in relation to national authorities.[95] These are generally the power to issue individual decisions (for example, in case of emergency or violation of EU law) and the power of direct supervision (for example, direct supervision by ESMA of credit rating agencies, trade repositories, etc.). They also have specific powers in various areas (for example, with respect to financial market infrastructures, repression of market abuse and prospectuses). In addition, one of the express tasks of the three European Supervisory Authorities is to "actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture".[96]

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[94] For ESMA, *see* Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, 2010 OJ (L 331), 84-119, https://www.legislation.gov.uk/eur/2010/1095/introduction?view=plain [hereinafter, as subsequently amended, ESMA Regulation]. For the consolidated (unofficial) version of the ESMA Regulation, as of Jan. 1, 2020, *see* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010R1095-20200101.

[95] Frank Martin Laprade, *Réforme des abus de marché. L'ESMA plus forte que l'AMF?*, 1404 OPTION FINANCE 47, 47 (2017).

[96] Recital 40 of the ESMA Regulation provides: "The Authority should actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture." Art. 1(5)(c) of the ESMA Regulation provides that ESMA will contribute to "strengthening international supervisory coordination." Art. 29 of the ESMA Regulation (titled "Common supervisory culture") provides:

49. Since their creation in 2010, their mission to promote supervisory convergence has been increasingly highlighted. In a 2017 consultation on the European Supervisory Authorities,[97] the Commission particularly noted the need for greater supervisory convergence in order to promote the CMU, the integration of the European internal market for financial services and to safeguard financial stability, notably in the context of the withdrawal of the United Kingdom following Brexit. The responses to this consultation showed strong support for the supervisory convergence task in general[98] and for an enhanced role in the supervision of non-EU entities.[99]

50. *Substantive convergence* results from the normative role of the EU authorities. The European Commission, following the recommendations of a special committee had put in place a four-tier

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> 1. The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union. The Authority shall carry out, at a minimum, the following activities:
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> (a) providing opinions to competent authorities;
>
> (b) promoting an effective bilateral and multilateral exchange of information between competent authorities, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation;
>
> (c) contributing to developing high-quality and uniform supervisory standards, including reporting standards, and international accounting standards in accordance with Article 1(3);
>
> (d) reviewing the application of the relevant regulatory and implementing technical standards adopted by the Commission, and of the guidelines and recommendations issued by the Authority and proposing amendments where appropriate; and
>
> (e) establishing sectoral and cross-sectoral training programmes, facilitating personnel exchanges and encouraging competent authorities to intensify the use of secondment schemes and other tools.
>
> 2. The Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.

[97] European Commission, *Feedback statement on the public consultation on the operations of the European Supervisory Authorities,* 5, 9 COM (2017), https://ec.europa.eu/info/consultations/public-consultation-operations-european-supervisory-authorities_en. *See also* the consultation document, https://ec.europa.eu/info/consultations/finance-2017-esas-operations_en. The question of supervisory convergence was also addressed in a separate consultation on the CMU, which also took place in 2017. *See* European Commission, *Feedback Statement for the Public Consultation on the Capital Markets Union Mid-Term Review* SWD (2017) 225 final, https://ec.europa.eu/info/finance-consultations-2017-cmu-mid-term-review_en.

[98] *Feedback statement on the public consultation on the operations of the European Supervisory Authorities* (2017), *supra* note 97, at 5.

[99] *Id.* at 9.

framework (known as the "Lamfalussy process"[100]) for the development of EU law in the financial services sector,[101] which was later extended to the banking, insurance and retirement sectors. The process was based on cooperation between the national regulators within "supervisory committees" composed of high-level representatives of the national regulators. Subsequently, this framework was revised,[102] particularly with the establishment of the three European Supervisory Authorities which replaced the pre-existing committees.

51. As revised, the Lamfalussy process, with its four levels, continues to apply.[103] At the first level, directives or, more often since 2012, regulations, set out the general principles. At the second level, the European Commission adopts delegated and implementing acts, usually on the basis of projects submitted by the relevant authority. At the third level is cooperation between the authorities concerned and the implementation of EU law (from the first two levels). The objectives are the definition of coherent guidelines for the development of administrative rules at national level, the development of common interpretative recommendations and common standards, the comparison and revision of regulatory practices to ensure effective application of EU law (from the first two levels) and the identification of best practices, and the reciprocal evaluation of EU Member States' administrative rules and regulatory practices.[104] Finally, at the fourth level, the European Commission monitors of the application of EU law by the EU Member States.

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[100] *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, at 4 (Feb. 15, 2001), https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf.

[101] Blanche Sousi, *L'approche Lamfalussy. Une méthode douce pour "détricoter" l'harmonisation financière européenne?*, REC. DALLOZ 3322 (2002).

[102] *Review of the Lamfalussy process. Strengthening supervisory convergence*, 2-3 COM(2007) 727 final (Nov. 20, 2007), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0727:FIN:EN:PDF.

[103] Regis Vabres, *Le système européen de supervision. État des lieux et perspectives*, 1 REV. DE DROIT BANCAIRE ET FINANCIER 27 (Jan. 2010); Hala Rumeau-Maillot, *L'Europe et la régulation des services financiers. Entre principes et réalités*, 4 REV. DE DROIT BANCAIRE ET FINANCIER 61 (July 2011).

[104] Committee of Wise Men on the Regulation of European Securities Markets, *supra* note 100, at 9, 48-50.

52. It is immediately apparent that the use of soft law instruments is expressly contemplated at the third level of the Lamfalussy process. The three European Supervisory Authorities have made abundant use of such instruments, which has been criticized.[105] I use ESMA to illustrate the techniques used and the ensuing problems (Section A). I then also document similar tendencies by another EU authority, the ECB (Section B).

A. ESMA's Soft Law

53. ESMA intervenes not only in matters covered by European financial markets law but also on issues relating to traditional company law as it pertains to public companies, including particularly the areas of corporate governance, preparation of accounts, and audit. A similar role is undertaken, in the United States, by the SEC, a specialized federal institution, to the point that scholars fear(ed) the "federalization of all state corporation law."[106] Both ESMA and the SEC therefore intervene to coordinate financial markets law and company law as they apply to public companies.

54. One of the objectives expressly targeted with the creation of ESMA in 2010 was to promote the convergence of financial supervision (institutional convergence) as well as the convergence of financial regulation (substantive convergence).[107] Regarding institutional convergence, ESMA has been provided with specific means to create "a common Union supervisory culture and consistent

[105] *Feedback statement on the public consultation on the operations of the European Supervisory Authorities* (2017), *supra* note 97, at 7-8.

[106] Jacobs, *supra* note 40, at 143. *See also William L. Cary, Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); Arthur Fleischer, Jr., *"Federal Corporation Law": An Assessment*, 78 HARV. L. REV. 1146 (1965).

[107] Francesco Martucci, *Régulation financière dans l'Union européenne. Les instruments de convergence*, 4 REV. DE DROIT BANCAIRE ET FINANCIER 66 (July 2011).

supervisory practices, as well as [to ensure] uniform procedures and consistent approaches"[108] across the EU, including by developing "new practical instruments and convergence tools to promote common supervisory approaches and practices."[109] With regard to the convergence of financial regulation, the creation of ESMA has increased the influence of EU law in the field of financial markets. A distinction must be made between ESMA's role in the development of technical standards that have infra-legislative value (at the second level of the Lamfalussy process), and its role in developing soft law instruments of an infra-regulatory nature (at the third level of the Lamfalussy process).

55. *(a) Technical standards*. Technical standards do not involve any strategic decisions or policy choices.[110] They are subdivided into two categories: regulatory technical standards (RTS) and implementing technical standards (ITS).[111] The content of RTS is delimited by the legislative acts on which they are based, while the content of ITS merely determines the conditions for the application of those acts.[112] Any projects of technical standards may be called into question by the European Commission, the Council of the European Union or the European Parliament. If there is no consensus or no political will on a particular subject, ESMA's prerogatives are restricted, but, as soon as a majority exists and sets a way forward, ESMA does not hesitate to use all its normative prerogatives. Moreover, ESMA is authorized to take action against a national authority which, in the exercise of its powers, allegedly infringed EU law (including technical standards). This infringement may be the result of an incorrect transposition of EU legislation, a difference in

[108] ESMA Regulation, *supra* note 94 at Art. 29(1).

[109] *Id.* at Art. 29(2).

[110] *Id.* at Art. 10(1) and art. 15(1). *See also* TFUE Art. 290 and Art. 291.

[111] ESMA Regulation, *supra* note 94 at Art. 8(2)(a) and Art. 8(2)(b).

[112] *Id.* at Art. 10(1) and Art. 15(1).

interpretation, the technical inability of the EU Member State in question to apply the text or simply the fact that a EU Member State does not want to implement the legislation. The procedure is intended to place the competent national authority under considerable pressure.

56. More specifically, at the request of one or more national authorities, the European Parliament, the Council of the European Union, the European Commission or the Financial Sector Stakeholder Group, or on its own initiative, ESMA may investigate the alleged breach or non-application of European law. The national authority is required to communicate to ESMA without delay all the information it deems necessary for its investigation. ESMA may issue a recommendation to the national authority concerned, setting out the measures to be taken to comply with European law. The national authority must reply within ten days and inform ESMA of the measures taken or intended to be taken. If the national authority does not comply one month after receipt of ESMA's recommendation, the European Commission may issue a formal opinion requiring that authority to take the necessary measures. Within ten days of receipt, the national authority must inform the European Commission and ESMA of the measures taken or those it intends to take to comply with the opinion. If it does not comply, ESMA may, where appropriate, adopt an individual decision. ESMA's annual report indicates the authorities and actors who have not complied with the formal opinions issued or the decisions rendered.[113]

57. *(b) Soft law instruments.* At the third level of the Lamfalussy process, ESMA is responsible for issuing harmonizing interpretative recommendations and establishing harmonized standards for

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[113] *Id.* at Art. 17(8) (providing that "In the report referred to in Article 43(5), the Authority shall set out which competent authorities and financial market participants have not complied with the formal opinions or decisions referred to in paragraphs 4 and 6 of this Article."). *See also* ESMA Regulation, *supra* note 94 at Art. 43(5) (providing that "The Board of Supervisors shall adopt, on the basis of a proposal by the Management Board, the annual report on the activities of the Authority, including on the performance of the Chairperson's duties, and shall transmit that report to the European Parliament, to the Council, to the Commission, to the Court of Auditors and to the European Economic and Social Committee by 15 June each year. The report shall be made public.")

areas not covered by EU legislation at the first two levels. This mission is accompanied by a power to guide very vigorously the action of the competent national authorities by requiring justifications ("comply or explain" technique) and by designating the "bad pupils" ("name and shame" technique). I illustrate in more detail the use of these two techniques below.

58. ESMA is authorized to "issue guidelines addressed to all competent authorities or all financial market participants and issue recommendations to one or more competent authorities or to one or more financial market participants" for the purpose of "establishing consistent, efficient and effective supervisory practices within the [European System of Financial Supervision]," and "ensuring the common, uniform and consistent application of Union law."[114] These instruments may only be adopted in areas not covered by technical standards. Although formally in the domain of "soft law", the ESMA Regulation provides that "[t]he competent authorities and financial institutions *shall make every effort to comply* with those guidelines and recommendations."[115]

59. For guidelines and recommendations addressed to national authorities, the relevant authorities must indicate whether they comply with them or intend to comply with them and, if not, must inform ESMA, giving reasons for their decision, within two months of the issuance of the relevant instrument. The guidelines and recommendations destined for financial market participants may also require the targeted participants to report, in a precise and detailed manner, whether or not they are complied with.[116] Therefore, like most soft law instruments (corporate governance codes, codes of conduct, etc.), the soft law produced by ESMA applies on the basis of a "comply or explain" approach.[117] There is however a fundamental difference, which is that the codes are

[114] *Id.* at Art. 16(1).

[115] *Id.* at Art. 16(3) (emphasis added).

[116] *Id.*

[117] Augustin Boujeka, *Vers un modèle de régulation des marchés financiers dans l'Union européenne?*, REC. DALLOZ 1355 (2012).

adopted voluntarily by their addressees and the "comply or explain" rule refers only to the parts of these codes from which it is derogated, whereas ESMA's guidelines and recommendations are in principle binding on their recipients, who may, however, decide not to follow them but, in such a case, must explain why they have made that decision. In this sense, the effects of ESMA's guidelines and recommendations go well beyond the traditional understanding of the legal force of soft law instruments.

60. The "name and shame" technique is not new. The Financial Action Task Force (FATF), also known by its French name, Groupe d'action financière (GAFI), had used it with great success in its periodic reports on the implementation by States of its guidelines on money-laundering and combating terrorism. ESMA's use of the "name and shame" approach goes even further in distinguishing ESMA's instruments from the traditional understanding of soft law. That is because a national authority that does not respect a guideline or recommendation will automatically be punished, in the sense that: (i) ESMA publishes the fact that a national authority does not comply or does not intend to comply with a guideline or recommendation and may also decide to publish the reasons invoked (the competent authority being notified, in advance, of this publication),[118] and (ii) ESMA informs the European Parliament, the Council of the European Union and the European Commission, through its annual report, of the guidelines and recommendations issued, indicating which authorities have not complied with them, and sets out the means that ESMA intends to use in order to ensure that the relevant authority follows them in the future.[119] No similar provisions exist when the addressees of ESMA's "soft law" are financial market participants.

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[118] ESMA Regulation, *supra* note 94 at Art. 16(3).

[119] *Id.* at Art. 16(4).

61. While ESMA's work in developing technical standards received generally positive feedback,[120] its infra-legislative and infra-regulatory soft law has been criticized:

> The vast majority of respondents identify weaknesses in the definition and application of [European Supervisory Authorities'] tasks and powers on guidelines and recommendations. Recommendations include the introduction of scrutiny of guidelines and recommendations by legislators, adopting guidelines only when strictly necessary, increased openness and transparency by consulting stakeholders or conducting impact analyses (especially for costs of compliance). Many respondents, especially from industry, explicitly welcome other tools such as common interpretation of rules, Questions & Answers, supervisory briefings and supervisory handbooks. Some call for them to be made more effective, e.g. by publicly consulting on them, publishing the results or setting a deadline for [European Supervisory Authorities] to respond. However, some industry representatives feel guidelines and Questions & Answers are used too extensively by [European Supervisory Authorities]. Some feel tools are used too extensively and need consultations / endorsement by EU institutions.[121]

62. On one hand, respondents expressed concern about the inflation of soft law instruments and suggested a review or approval of the guidelines and recommendations by legislators, and he adoption of such instruments only to the extent necessary. Critics also requested increased transparency in the development process of soft law instruments, through the organization of public consultations, gathering stakeholder feedback and preparation of impact assessments

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[120] *Feedback statement on the public consultation on the operations of the European Supervisory Authorities* (2017), *supra* note 97, at 20.

[121] *Id.* at 7-8.

(particularly with respect to compliance costs).[122] On the other hand, many respondents, particularly financial market participants, suggested to broaden the range of soft law instruments, by having recourse to common interpretations, questions and answers, supervisory briefings and supervisory handbooks.[123] This illustrates the existence of a general demand for soft law, explained by the fact that soft law makes it possible to provide rapid answers to the questions of the actors concerned and leaves room for discussion within the framework of derogation mechanisms. Similarly, across the ocean, the SEC developed, outside of any express authorization, its own soft law instruments, most notably the "interpretive releases" and the "no-action letters".[124]

63. Although I share the concerns regarding ESMA's utilization of soft law instruments, ESMA has been (including for this very reason) a very important factor of convergence in matters falling within its field of competence, with an express mission to reduce regulatory arbitrage. By establishing ESMA, the EU laid the foundations for a financial markets regulator with real powers, close to those held by its American counterpart, the SEC. For its part, ESMA has shown a desire to have the ability to enact uniform, not merely harmonized, EU law.

64. In doing so, ESMA has contributed to the hardening of soft law, continuing a general pattern in this regard. To take an example, in a public consultation conducted in 2012-2013, ESMA only asked the proxy voting advisors' industry to develop a code of conduct, having found no evidence

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[122] *Id.*

[123] *Id.* With respect to the distinction between soft law instruments of the supervisory authorities with "fixed structure" and "free structure" (the latter being used significantly more often), *see* Filippo Annunziata, *Interpréter ou "légiférer"? Un nouvel enjeu pour les autorités de contrôle des marchés financiers*, REV. DES SOCIETES 675 (1995), par. 5 (Fr.).

[124] *Id.* at par. 4; *see also* SEC, Division of Corporate Finance de la SEC, *Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice*, Sec. & Exch. Comm'n (Oct. 28, 1980), https://www.sec.gov/rules/interp/33-6253.pdf; 17 C.F.R § 200.81 (Publication of interpretative, no-action and certain exemption letters and other written communications) (imposing a transparency requirement for all such instruments); New York City Employees' Ret. Sys. v. SEC, 45 F.3d 7, 12 (2nd Cir. 1995) (noting that "even when affirmed by the SEC, staff no-action letters are interpretive because they do not bind the SEC, the parties, or the courts … In effect, they bind no one").

of a failure. The industry complied and the largest proxy voting advisors operating in the EU adopted a code of conduct in 2014[125] to which ESMA gave a positive opinion.[126] However, the EU institutions intervened in order to establish a "comply or explain" type of application of the code of conduct and impose additional transparency obligations on proxy voting advisors, through the Shareholder Engagement Directive. This directive had the same impact, although less problematic and more justified, with regard to institutional investors, who had also begun to organize themselves through self-regulation manifested in the adoption of codes of conduct ("stewardship codes"), such as those of EFAMA,[127] Euromedion,[128] ICGN,[129] or the UK Stewardship Code.[130] The same phenomenon can be documented regarding the code of conduct on post-trade activities

[125] Best Practices Principles Group, *Best Practice Principles for Providers of Shareholder Voting Research & Analysis*, THE BPP GROUP (2014), https://bppgrp.info/wp-content/uploads/2014/03/BPP-ShareholderVoting-Research-2014.pdf. This instrument was subsequently revised in 2019, *see supra* note 14.

[126] ESMA, *Final Report. Feedback statement on the consultation regarding the role of the proxy advisory industry* (Feb. 19, 2013), https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-84.pdf; *see also* ESMA Press Release, *ESMA Publishes Report on Proxy Advisors' Best Practice Principles* (Dec. 18, 2015), https://www.esma.europa.eu/esma-publishes-report-proxy-advisors%E2%80%99-best-practice-principles ("Overall, ESMA finds that the industry is moving in the right direction but sees room for improvement in some areas. […] ESMA's key findings are: the Principles generally meet ESMA's expectations; as a result, there is more transparency, so issuers and investors can better understand how proxy advisors operate; and the industry group behind the Principles would benefit from better governance and further clarity over what monitoring it performs. The Principles were published by a group of proxy advisors in March 2014 in response to ESMA's 2013 recommendation to develop a code of conduct to improve investors' and issuers' understanding of what they can expect from proxy advisors. ESMA's recommendation was based on its finding that while there was no clear evidence of market failure in relation to proxy advisors' interaction with investors and issuers, stakeholders raised a number of concerns regarding the independence of proxy advisors and the accuracy and reliability of their advice. ESMA encourages the industry group to address in the coming months the areas it has identified for improvement in its Report.").

[127] *EFAMA Code for external governance: Principles for the exercise of ownership rights in investee companies*, EFAMA (2011), https://www.efama.org/sites/default/files/publications/11-4035%20EFAMA%20ECG_final_6%20April%202011%20v2.pdf.

[128] *Best Practices for Engaged Share-Ownership Intended for Euromedion Participants*, EUROMEDION CORP. GOVERNANCE F. (2011), https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/best_practices-engaged-share-ownership.pdf.

[129] *Statement of Principle for Institutional Investor Responsibilities*, ICGN (2013), https://www.icgn.org/sites/default/files/ICGN%20Institutional%20Investor%20Responsibilities_0.pdf.

[130] *The UK Stewardship Code*, FIN. REPORTING COUNCIL (2020), https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf.

of 2006 (relating to clearing and settlement),[131] which eventually gave way to binding and directly applicable provisions, contained in the EMIR Regulation of 2012[132] and the DCT Regulation of 2014.[133]

B. ECB's Soft Law

65. The European System of Central Banks (ESCB), at the heart of which the ECB is located, has been described as a "federal"[134] system because, while monetary policy is defined by the ECB, its implementation is carried out in a decentralized and harmonized manner by the national central banks participating in the ESCB, under the supervision of the ECB.

66. The ECB mostly operates through regulations and decisions, to the extent necessary for the performance of its tasks,[135] and is empowered to impose fines and periodic penalty payments on

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[131] *Code of Conduct for Clearing and Settlement*, FESE, EACH, ECSDA (Nov. 7, 2006), https://www.six-group.com/swiss-sptc/dam/downloads/swiss-sptc/documents/sptc-doku-code-of-conduct-en.pdf.

[132] Regulation 648/2012 of the European Parliament and of the Council of July 4, 2012 on OTC derivatives, central counterparties and trade repositories, 2012 O.J. (L 201) 1-59 (EU). This instrument was subsequently amended.

[133] Regulation 909/2014 of the European Parliament and of the Council of July 23, 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) 236/2012, 2014 O.J. (L 257) 1-72 (EU). This instrument was subsequently amended.

[134] Thierry Bonneau, *L'union bancaire européenne. Propos introductifs*, 4 REV. DE DROIT BANCAIRE ET FINANCIER 63, at par. 4 (July 2014); *See also* Philippe Gudin, *Les positions allemandes sur l'Union bancaire*, 771 REV. BANQUE 26, 27 (Apr. 2014).

[135] TFUE art. 132, stating:

> 1. In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCB and of the ECB:
>
> - make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129(4),
>
> - take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB,
>
> - make recommendations and deliver opinions.

the addresses for non-compliance with its regulations and decisions. The ECB also uses often soft law instruments, consisting of recommendations and opinions. These soft law instruments are published regularly, which brings them closer in force and effect to hard law instruments. Moreover, similarly to ESMA, the ECB's soft law instruments do not hesitate to go beyond what the texts allow. We will illustrate this statement with an example.

67. Under Article 127(2) of the TFUE, one of ECB's tasks is to "promote the proper functioning of payment systems".[136] Article 22 of the Statute of the ESCB and of the ECB states: "The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries."[137]

68. In the early 2000s, the ECB created a policy pursuant to which clearing and payment chambers (CCPs) offsetting transactions denominated in euros beyond a materiality threshold had to be

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> 2. The European Central Bank may decide to publish its decisions, recommendations and opinions.
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> 3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129(4), the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

[136] TFUE art. 127, stating:

> 1. The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.
>
> 2. The basic tasks to be carried out through the ESCB shall be:
>
> - to define and implement the monetary policy of the Union,
>
> - to conduct foreign-exchange operations consistent with the provisions of Article 219,
>
> - to hold and manage the official foreign reserves of the Member States,
>
> - to promote the smooth operation of payment systems. …

[137] Consolidated version of the Treaty on European Union, Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank, 2016 O.J. (C 202) 230-250, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/PRO/04.

located in the Eurozone. That policy was premised on the assumption that only the establishment of these CCPs in the Eurozone would allow the Eurosystem to properly carry out its supervisory tasks with respect to these market infrastructures which are necessary for the stability of the monetary area. The location policy was then expressed in the "Eurosystem Supervisory Framework," an informative soft law instrument published by the ECB in 2011,[138] which was challenged by the United Kingdom before the General Court of the EU, with respect to the requirement that CCPs had to be located in the Eurozone, given that the United Kingdom was not a member of the Eurozone.

69. The General Court of the EU, without judging the legitimacy of the location policy *per se*, held that "the ECB does not have the competence necessary to regulate the activity of securities clearing systems, so that, in so far as the Policy Framework imposes on CCPs involved in the clearing of securities a requirement to be located within the euro area, it must be annulled for lack of competence."[139] The General Court of the EU found that the ECB's right to adopt regulations with a view to ensuring the efficiency and soundness of clearing systems was "limited to payment clearing systems alone" and did not extend to securities clearing systems.[140] The General Court of the EU took note of the existence of very close links between payment systems and securities clearing systems and the possibility that disruptions affecting securities clearing infrastructures could affect payment systems and undermine their proper functioning, but considered that the existence of such links was not sufficient to justify the recognition of implicit powers of the ECB

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[138] *Eurosystem Oversight Policy Framework*, EUROPEAN CENT. BANK. (Jul. 2011), https://www.ecb.europa.eu/pub/pdf/other/eurosystemoversightpolicyframework2011en.pdf.

[139] Case T-496/11, U.K. of Gr. Brit. and N. Ir. v. Eu. Cent. Bank, ECLI:EU:T:2015:133, ¶ 110 (Mar. 4, 2015).

[140] *See id.* at ¶ 100.

to regulate securities clearing systems[141] and, therefore, of the activity of CCPs when they operate in that context.

70. This decision must be approved because no authority should be allowed to enact, under the guise of soft law, a rule that it is not empowered to make. The rule of law is binding on all. Although authorities may be responsible for drawing up or implementing rules of law, they cannot go beyond what the texts allow.[142] It is perhaps for these reasons that, rather than appealing the decision of the General Court of the EU to the Court of Justice of the European Union, the ECB decided to accept it and went on to establish a cooperation agreement with the Bank of England for the supervision of British CCPs.[143]

III. Soft Law's Trends

71. The preceding developments illustrate a number of trends regarding the use of soft law instruments in company law and financial markets law. These trends, which I discuss in more detail below, are likely equally true in other areas of law (for example, notably, antitrust and tax).

72. One tendency is that soft law instruments continue to multiply and diversify, thereby upsetting the traditional pyramid of legal sources and further blurring what used to be a classical distinction between civil law countries and common law countries (Section A). Another tendency is the convergence of soft law. Moreover, soft law not only converges itself, but, in turn, provokes further

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[141] *Id.* at ¶¶ 106-07.

[142] Francesco Martucci, *La BCE dans l'Union de droit. Le Tribunal annule le cadre de surveillance des systèmes de paiement, de compensation et de règlement*, 1 REV. DES AFF. EU. [AF. EU.]213 (2015) (Fr.); Thierry Bonneau, RÉGULATION BANCAIRE ET FINANCIÈRE EUROPÉNNE ET INTERNATIONALE, 206, Bruylant, Bruxelles, 5th ed. (2016) (Fr.).

[143] ECB, *supra* note 138, at 10.

convergence of the legal framework applicable to companies that operate in the EU and even worldwide convergence, especially with respect to public companies (Section B). Lastly, many instances of metamorphosis of soft law into hard law can be documented, which accompany a general phenomenon of hardening of company law in the EU and elsewhere (Section C).

A. Soft Law's Mitosis

73. In biology, cell division is referred to as mitosis, the process of making new body cells. During mitosis, a cell duplicates its contents, including its chromosomes, and splits to form two identical daughter cells. Similarly, soft law instruments continue to multiply, but, unlike mitosis, they also diversify, including because of market demand. That true is true for company law in Europe in general, especially as it pertains to public companies, and is particularly obvious in a number of sectors, such as financial markets, banking and insurance. As we have seen, the nomenclature of these instruments of soft law does not cease to evolve either: orientations, recommendations, green papers, instructions, positions, guidelines, practical guides, questions/answers, statements of good practices, codes of conduct, stewardship codes, policies, frameworks, etc.

74. This inflation of new legal instruments distorts the traditional hierarchy of sources of law by adding to the typical legal instruments (EU directives, EU regulations, national laws, national regulations).[144] Given the abundance of soft law instruments, some national authorities undertook the task of trying to classify them in order to better reflect their place within the hierarchy of sources of law.[145] Soft law also has a significant impact on a classical distinction between civil law

[144] Outin-Adam & Schlumberger, *supra* note 19, at 287-89.

[145] *See Principes d'organisation et de publication de la doctrine de l'AMF*, AMF (Oct. 25, 2020) (Fr.), https://www.amf-france.org/fr/reglementation/doctrine/principes-de-doctrine (publication from French supervisory authority for financial markets outlining which outlines classification framework); *See also Politique de*

countries (which comprise most of the EU after Brexit) and common law countries (such as the United Kingdom and the United States): who makes the law. That is because soft law that comes from supervisory authorities, especially that which is the product of EU authorities (as opposed to national authorities), is not so soft in reality. These authorities, under the cover of the soft law, effectively assume a law-making role. For this reason, the "soft" law that they produce is similar in effect, albeit not in name, to hard law.

75. At the EU level, we have seen that, although theoretically non-binding, soft law instruments emanating from the European Supervisory Authorities are often applied a "comply or explain" basis or accompanied by a "name and shame" feature and, therefore, constitute a powerful and very effective means of exerting pressure on their recipients. We have further documented an example of how the ECB had tried to broaden its statutory supervisory powers through the use of a soft law instrument, the "Eurosystem Supervisory Framework".

76. At the national level in the EU, there are also many instances where supervisory authorities have attempted to empower themselves through the use of soft law instruments.[146] Professor Filippo Annunziata, after analyzing a number of soft law instruments used by supervisory authorities in France and Italy, noted the following common characteristics: "a technique that tends to promote uniformity in the interpretation of law, the growing tendency to give interpretations the value of precedents, the tendency to go beyond the limits of the purely interpretative function and to use

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transparence de l'Autorité de contrôle prudential, ACP (Jul. 7, 2011) (Fr.), https://acpr.banque-france.fr/sites/default/files/media/2017/08/21/2011-politique-de-transparence-de-l-acp.pdf (additional publication from similar French regulatory authority outlining use of soft law instruments).

[146] *See* Hervé Synvet, *L'arrêt Fairvesta et la doctrine de l'AMF en matière d'opérations financières*, 12 BULLETIN JOLY BOURSE 493 (2016) (Fr.) (providing general examples in France); *See also* Hervé Synvet, *Le droit financier: un droit des forts*, 3 BULLETIN JOLY BOURSE 127 (2014) (Fr.) (giving the example of the position of the AMF relating to bonds with warrants to subscribe (or acquire) redeemable shares); *See also* Hervé Synvet, *Le "soft law" en matière bancaire et financière - Conclusion*, 1 REV. DE DROIT BANCAIRE ET FINANCIER 11 (2012) (Fr.) (giving the example of the recommendations of the ACP and the AMF concerning the best practices of life insurance companies with their customers).

interpretation to create and develop new rules."[147] Professor Hervé Synvet noted that, despite their number and diversity, the instruments that make up the soft law from the supervisory authorities use two main techniques of persuasion. The first technique is for the authority to say that the rule is only set forth as a mere recommendation, and emphasize the absence of a sanctioning mechanism for failing to follow it. The second technique is for the authority to say that the rule is merely an interpretation of a binding law or regulation, which does not add to the binding rule.[148]

77. The second technique, to use soft law instruments to interpret binding laws or regulations (often in a "creative" manner), has the effect of inducing compliance with the soft law instrument in question by the recipients. This phenomenon was qualified as "interpretative case law"[149] of supervisory authorities, which exists in a grey zone between the interpretative role of judges and the normative (law-making) role of legislatures in civil law countries. As such, the soft law that comes from supervisory authorities further erases a traditional difference between civil law countries and common law countries.[150] In the latter, pursuant to the doctrine of precedent, judges assume a law-making role where no statutory laws or regulations control. By using soft law for interpretative purposes, these EU and national supervisory authorities have assumed a quasi-judicial role, akin to that of common law judges.

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[147] Annunziata, *Interpréter ou "légiférer"?*, *supra* note 123, at 5.3.

[148] Synvet, *Le "soft law" en matière bancaire et financière - Conclusion*, *supra* note 146, at 8-10.

[149] Annunziata, *Interpréter ou "légiférer"?*, *supra* note 123, at 5.3.

[150] Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 14141415 AM. J. COMPAR. L. 419, *passim* (1966); *See also* BASIL S. MARKESINIS, THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Oxford: Clarendon Press, 1994) (editor); Mathias Siems, *Legal Origins. Reconciling Law and Finance and Comparative Law*, 52 MCGILL L. J. 55, *passim* (2007); Ugo Mattei & Luca G. Pes, *Civil Law and Common Law. Toward Convergence?*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS, 267 *et seq.* (Gregory A. Caldeira, Daniel Kelemen, & Keith E. Whittington eds.) (2008).

78. In my view, for this reason, the soft law emanating from EU and national supervisory authorities raises specific problems of democratic legitimacy, predictability and respect for fundamental rights.[151] There is a specific risk of infringement of the right to an independent and impartial judge.[152] Soft law from the supervisory authorities has not been subject to judicial review of legality for a very long time, although things are changing.[153] In addition, soft law presents a problem of stability and consistency, the result of a compromise between conflicting requirements. On the one hand, a supervisory authority might have a legitimate interest in forcing itself, more or less rigorously, to follow its own precedents. This gives stability and continuity to its soft law instruments and contributes to increasing their weight and prestige. On the other hand, it inevitably implies less flexibility and makes it more difficult for the authority to deviate from its precedents, thereby eliminating one of the traditional advantages of soft law. The multiplication of the soft law instruments emanating from supervisory authorities only multiplies these problems.

[151] Synvet, *Le "soft law" en matière bancaire et financière - Conclusion*, *supra* note 146, at 18-21.

[152] *See*, *e.g.*, Cour d'appel [CA] [Regional court of appeal] Paris, 1e ch., March 7, 2020, RG 1999/15862, Coulon (Fr.) (annulling a sanction pronounced by the college of the COB against the audit firm KPMG, the court having considered that the procedure followed by the college of the COB did not comply with the European Convention on Human Rights in that the college of the COB could not both regulate and sanction). *See also* Dubus S.A. v. France, App. No. 5242/04, Eur. Ct. H.R. 20 (2009) (regarding the process before the French Banking Commission).

[153] Judicial review of soft law is increasing. At the national level, *see*, *e.g.*, CE Ass., Mar. 21, 2016, 368082, Rec. Lebon 6-8 (requesting the cancellation of excessive power of press releases published by the AMF and the refusal to rectify them, as well as compensation for the resulting damage). At the European level, *see*, *e.g.*, Case T-496/11, U.K. of Gr. Brit. and N. Ir. v. Eu. Cent. Bank, ECLI:EU:T:2015:133, ¶ 52 (Mar. 4, 2015); *but see*, *e.g.*, Case C-16/16 P, Belgium v. Eur. Comm., ECLI:EU:C:2018:79 ¶¶ 25-27, 29-32 (Feb. 20, 2018) (declaring inadmissible an action seeking annulment of a Commission Recommendation under TFEU Art. 263 because "any act not producing binding legal effects, such as … mere recommendations … falls outside the scope of the judicial review provided for in Article 263 TFEU," but noting that "in exceptional cases, the impossibility of bringing an action for annulment against a recommendation does not apply if the contested act … does not constitute a genuine recommendation … [because it] produces binding legal effects" and, "[i]n order to determine whether the contested act produces binding legal effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act"). TFEU Art. 263(1) provides: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council [of the European Union], of the [European] Commission and of the European Central Bank, *other than recommendations and opinions*, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties." (emphasis added).

79. Although soft law seems to be a market demand nowadays, driven mostly by the private entities who are the main recipients, not everyone is happy with the current inflation, especially given the problems of legitimacy and predictability that it raises. Criticism rightfully exists. For example, the current inflation of soft law in general was met by professionals with "mixed reactions" because these professionals "were used to a simpler hierarchy of sources and fear having to deal with a new flow of norms or standards."[154] With respect to the law soft emanating from European Supervisory Authorities, we have seen that the abundant use of such instruments (particularly by ESMA) was criticized, including for being too frequently used, as well as for lack of transparency in the elaboration process and lack of review or approval by legislators (EU institutions).

B. Soft Law's Convergence

80. Soft law converges. To start again from biology, convergence is defined as "the independent evolution of similar traits in distantly related organisms due to adaptation to similar environments or a similar way of life."[155] In geometry, convergence is the process of approaching a certain limit, as represented by two straight lines going towards a unique point situated at a certain distance. As applied to laws, that hypothetical limit or unique meeting point is where there would be uniformity.[156] As such, convergence is necessarily observed prior to reaching that point.

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[154] Outin-Adam & Schlumberger, *supra* note 19, at 289.

[155] C. Tristan Stayton, *What Does Convergent Evolution Mean? The Interpretation of Convergence and its Implications in the Search for Limits to Evolution*, 5(6) INTERFACE FOCUS, 2 (2015), doi: 10.1098/rsfs.2015.0039 (citing Scott Freeman *et al.*, BIOLOGICAL SCIENCE, G.8 (5th ed. 2014)).

[156] Guy Canivet, *La convergence des systèmes juridiques du point de vue du droit privé français*, 55 REV. INT'L DE DROIT COMPARÉ 1, 7 (2003) (Fr.).

81. Looking comparatively at soft law in the EU and the United States permitted to identify several instances where soft law has had a similar evolution and adaptation, despite being separated by an ocean and despite the environments being seemingly different, and to observe that the convergence of soft law provoked further worldwide convergence of the (hard) legal framework applicable to companies, especially with respect to public companies.

82. The adoption of a particular instrument of soft law by one country, or one sector, can lead and has led to the adoption of similar instruments by other countries or other sectors. As an example, the corporate governance codes for public companies (adopted by various national private entities) have reached a spontaneous level of convergence simply because certain national drafters used the work product of other countries as their starting point. The French, British and Swedish corporate governance code have been very influential, in the absence of a European Code of Corporate Governance, having served as the starting point for the elaboration of national codes in other countries or having been voluntarily adopted by foreign companies as a means of providing comfort to their investors and shareholders. The adoption of the EMCA will, in time, contribute to further convergence as did the MBCA in the United States.

83. Soft law has represented and will continue to represent a very important source of convergence of the law governing public companies, not only between the EU Member States, but also between the EU and other parts of the world, such as the United States. As a mere example of worldwide convergence in corporate laws around the world, both the United States and a number of EU countries now statutorily recognize the public benefit corporation, which had initially started as a form of self-regulation (or, rather, self-identification).[157] This new corporate form is a hybrid

[157] Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112(3) COLUM. L. REV. 578 (2012); *See also* Sven Fischer, Sebastian J. Goerg, & Hanjo Hamman, *Cui bono, Benefit Corporation? An Experiment Inspired by Social Enterprise Legislation in Germany and the U.S.*, 11(1) REV. L & ECON. 79 (2015); *See also* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation*

between the traditional corporation in the United States (joint-stock company in the EU) and the "non-profit corporation" in the United States (the "*association*" in civil law countries such as most EU countries). A majority of American states now have the concept of the "public benefit corporation" (or "B corporation") in their statutory laws governing corporations. For example, in Delaware, the concept received statutory recognition in 2013 and is now reflected in Section 362 of the DGCL.[158] In France, the concept received statutory recognition in 2019.[159]

Law, 4 HARV. BUS. L. REV. 345 (2014); *See also* Mitch Nass, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39(4) J. OF CORP. L. 875 (2014); *See also* D Brakman Reiser, *Benefit Corporations: A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591 (2011).

[158] Del. Code Ann. tit. 8, § 362 (West):

> (a) A "public benefit corporation" is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall:
>
> (1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title one or more specific public benefits to be promoted by the corporation; and
>
> (2) State within its heading that it is a public benefit corporation.
>
> (b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.
>
> (c) The name of the public benefit corporation may contain the words "public benefit corporation," or the abbreviation "P.B.C.," or the designation "PBC," which shall be deemed to satisfy the requirements of § 102(a)(1)(i) of this title. If the name does not contain such language, the corporation shall, prior to issuing unissued shares of stock or disposing of treasury shares, provide notice to any person to whom such stock is issued or who acquires such treasury shares that it is a public benefit corporation; …

[159] French Commercial Code, Art. L 210-10 (author's translation):

> A company can publicly state its status as a mission company (mission company: one whose objectives in the social, societal, and environmental fields are aligned with its overall purpose) when the following conditions are met:
>
> 1° Its statutes specify their reason or mission for existing within the meaning of Article 1835 of the Civil Code;
>
> 2° Its statutes specify one or more social and environmental objectives that the company has in its mission to pursue in the context of its operations and activities;

84. It is remarkable how many similarities exist between the American and the French public benefit company (called "*société à mission*" pursuant to French terminology). For example, in both countries, this new legal business form is a standard company ("*société*" in French) whose representatives must use at least some corporate resources to promote the stated public benefit, as opposed to maximizing profits and value for the owners. This feature distinguishes a public benefit company from a non-profit company. The latter must use all of its profits to forward a specific public purpose. Moreover, to become a public benefit company in either country, the relevant filings with the state authorities must publicly declare that it is such an entity and state a specific public benefit. Its representatives must report to the owners periodically the activities undertaken in furtherance of the stated public benefit. No outsiders other than the owners may enforce the stated public benefit.[160] Lastly, both in the United States and in France, these entities are taxed like

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> 3° Its statutes specify the modalities of how the company will execute the mission mentioned in 2°. These procedures provide that a mission committee, separate from the corporate bodies provided for in this book and must include at least one employee, is exclusively responsible for this monitoring and annually submits a report that is attached to the management report, mentioned in Article L. 232-1 of this Code, at the meeting responsible for approving the accounts of the company. The committee shall carry out any audit it deems appropriate and shall be provided with any document necessary to monitor the performance of the mission.
>
> 4° The execution of the social and environmental objectives mentioned in 2° is subject to verification by an independent third-party body, according to modalities and publicity defined by decree in the Council of State. This verification gives rise to an opinion attached to the report mentioned in 3°;
>
> 5° The company declares its status as a company with a mission to the clerk of the commercial court, which then publishes it, subject to the conformity of its statutes with the conditions mentioned in 1° to 3°, in the trade and companies register, under conditions specified by decree in the Council of State.

[160] Additionally, private independent entities, such as B Lab in the United States, may (in the United States) and must (in France) provide a certification of the public benefit (mission). In the United States, the B Lab seal is not a legal requirement, but its certification has been at the origin of this new business form. The statutory recognition of this new business form has actually reduced the number of public benefit corporations in the United States. That is because, in general, with regulation, statutory forms become less appealing. The same phenomenon was seen with respect to public companies, with the delisting of many public companies when the number of regulations specifically targeting them exceeded a manageable threshold.

regular companies from a formal point of view but, from an informal point of view, there are a number of financial benefits indirectly associated with being a public benefit corporation.

85. The role of soft law as a driver of convergence is particularly true with respect to corporate governance codes and, consequently, with respect to public companies. Although corporate governance codes are typically voluntary as to their adoption by public companies, once adopted, they apply on a "comply or explain" basis, which leads to convergence by encouraging voluntary compliance. The same is true, as we have seen, for other instruments of soft law that apply on a "name and shame" basis. Their impact on the convergence of public company law is also explained by the fact that public authorities have started referring, in their own instruments, to these corporate governance codes (which have a private source), to demand their respect and/or to interpret them in a certain manner.[161]

86. The international soft law of corporate social responsibility (CSR) has also acted as an important factor of convergence, particularly for public multinational companies and their many subsidiaries. Although voluntary adherence to a CSR code or standard might be, for some companies, a mere publicity stunt, voluntary codes and standards of conduct in the area of CSR were drafted with input and guidance from multinational companies and, in this sense, they are a type of industry self-regulation. Many multinational companies realized that as their power and influence increase so do the attempts to subject them to international standards.

87. Such companies faced the following choices: on one hand, they could adopt a negative, evasive attitude about social obligations, creating more mistrust that might intensify the desire to regulate them, or, on the other hand, they could adopt a cooperative and assertive attitude and be

[161] *See* Hervé Synvet, *Le droit financier: un droit des forts*, 3 BULLETIN JOLY BOURSE 125 (2014) (Fr.) (exemplifying how the AMF imposes compliance by French public companies with the French Code of Corporate Governance AFEP/MEDEF through and during the process of prospectus review).

participants in shaping rules to govern their conduct. As we have seen in other areas (for example, the corporate governance codes for unlisted companies[162]), an industry that is the subject of competent self-regulation might head off efforts to impose regulation by legislatures. In other words, if multinational companies do a good job of regulating their own behavior through rules that they themselves adopt, they might be better off (and their bottom lines might hurt less) than if regulation from outside the industry is imposed by governments in the form of restrictive laws.

C. Soft Law's Metamorphosis

88. To return once again to biology, the latest fashion trend displayed by our popular girl, soft law, that I address in this article is its predilection to metamorphosis. Like a caterpillar at the end of its life, or like wine that has aged, soft law that has proven its value is often turned into, or bottled as, hard law. This tendency exists both at the EU level and at the national level, and can be observed particularly in the areas of corporate governance and regulation of market infrastructures.

89. I analyzed a fairly recent example with the Shareholder Engagement Directive of 2017, which replaced soft law provisions contained in several recommendations of the European Commission, in national corporate governance codes, and in codes of conduct. I then provided examples of how self-regulating codes regarding clearing and settlement and proxy voting advisors, respectively, gave way to binding instruments at the EU level. This is regrettable, because the specific benefits of soft law are lost when hardening happens (flexibility as opposed to "one size fits all", ease of modification to account for new circumstances or practices, compliance, etc.).

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[162] ecoDa, *Corporate Governance Guidance and Principles for Unlisted Companies in Europe* (2021), *supra* note 61; Code Buysse III, *Corporate Governance. Recommendations for non-listed enterprises* (2017), *supra* note 66.

90. This transformation of soft law into hard law also exists sometimes at the national level alone, with the same regrettable consequences. For example, in France, there was no vote on the policy regarding the remuneration of directors or on the report regarding the individual remunerations of directors, a strengthening of the corporate governance code having been preferred given that the subject was sensitive. Consequently, the French Corporate Governance Code provided for a vote on the individual remuneration of directors of public companies (advisory before 2016 and binding since 2016),[163] while the French Commercial Code only provided for voting rights on certain specific points linked to the remuneration of directors.[164]

91. This regime was amended by a (hard) law in December 2016 which provided that shareholders will vote on the remuneration of directors.[165] From this point of view, French hard law displaced soft law, in anticipation of the future EU requirements in this respect, which came in 2017, with the Shareholder Engagement Directive.

92. Needless to say, I would have preferred if the matter remained regulated by the corporate governance code. That is because these codes apply on a voluntary basis, often reinforced by a "comply or explain" approach, being therefore at the crossroads of self-regulation and regulated disclosure. Recourse to such instruments of soft law should therefore be privileged because they prevent an overabundance of regulatory texts that hinders the economic efficiency of companies and hampers their operations. Moreover, they allow the rules to be adapted to the particularities of

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[163] CORPORATE GOVERNANCE CODE OF LISTED CORPORATIONS, AFEP/MEDEF, Art. 26.2 (2016), https://www.se.com/ww/en/Images/afep-medef-code-revision-january-2020-en_tcm564-134746.pdf.

[164] French Commercial Code, Art. L. 225-37-2 (2016) and Art. L. 225-82-2 (2016).

[165] Hervé Le Nabasque, *Le Say on Pay contraignant*, 9 BULLETIN JOLY SOC'Y 461 (2016) (Fr.); Hervé Le Nabasque, *Le champ d'application du nouveau say on pay (loi Sapin 2 du 9 décembre 2016 et décret du 16 mars 2017)*, 4 BULLETIN JOLY SOC'Y 263 (2017) (Fr.); Benoit Lecourt, *Vote des actionnaires sur les rémunérations des dirigeants de sociétés cotées : Conformité du droit français aux futures exigences européennes ?*, REV. SOC'Y 118 (2017) (Fr.); Bénédicte François, *Loi Sapin 2. Adoption d'un say on pay contraignant*, REV. SOC'Y 50 (2017) (Fr.).

each company and to the evolution of the environment. Lastly, by their effects in practice and their process of convergence, soft instruments are effectively alarmingly close to hard law.