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The Structure of European Company Law: From Crisis to Boom

Stefan Grundmann*

Abstract

The two constitutional principles of subsidiarity and integration in the European Union clearly force the system to be one of jurisdictional competition. The text books still do not start from the assumption that diversity, and the tools for making it compatible with integration, are just as important an element of European company law as harmonisation. This paper argues that they should. This would then lead them to discuss in which areas there should be such competition, to identify the conditions for functioning competition and to try to suggest

* Prof. Dr Dr Stefan Grundmann, LL.M., Humboldt-Universität, Berlin.

where and how to enhance it. Diversity clearly requires information. Therefore, the second core element of the structure of European company law consists of disclosure rules. These rules are indeed clearly dominant in European company law, be it in accounting law, the law of capital markets or in traditional EU Company Law Directives. On this basis, other important features – pairs of concepts – can also be explained: (1) the fact that European company law focuses on limited liability companies and sometimes exclusively on PLCs; (2) the fact that European company law is so extroverted, that is to say, the regulation of the third-party relationship is so dominant, that shareholders' rights are really regulated only insofar as the proportionate share is 'constitutionally' guaranteed; and (3) the fact that capital markets must clearly be seen as an integral part of European company law and may not be disregarded in any description.

Keywords: jurisdictional competition, disclosure, information model, integration, *Überseering*, capital markets, accounting law, institutional investors, entrepreneurial investors, third-party relationship, exit and voice, firm and market.

1. Introduction

Europe is omnipresent but not always successful, at least in the short term. While teaching company law in Rome at the end of 2003, I saw Berlusconi on all channels, disappointed with the summit. The EU Constitution took some time and perhaps still will. This paper deals with a constitution based on enterprise in Europe and the structure of European company law. It is certainly a constitution in the sense of constitutional economics (see n. 21 *infra*). Europe has probably been a reality for so long and to such an extent for very few people or institutions as much as it has for (limited liability) companies.

The subject of this paper will be divided into three parts.[1] Unity and diversity are a reality of European company law. A good distribution of unity and diversity is therefore a core issue and perhaps even the main starting point (see Sec-

[1] This contribution is based on my inaugural lecture given at the Friedrich-Alexander-Universität Erlangen-Nuremberg on 19 December 2003, a pre-Christmas afternoon. It was dedicated to my three children who were present. Therefore, each of the three main parts of the lecture was introduced by an excerpt from *The Magic Flute*, which is one of their, and particularly Aischa-Rebecca's, favourite operas, interpreted on this occasion by my remarkable colleague Max-Emanuel Geis. The dragon of European company law is diversity, still feared by most authors. This is the beginning of the opera. Pamina when caught and asked what she will tell Zarastro, her 'master', answers like a true heroine, 'the truth, the truth, and be it a crime'. At this precise moment, the second core element, the realm of light, makes its first appearance, after the Queen of Darkness. Information (sunlight) is indeed all important in European company law. Finally the fight

tion 3). Diversity cannot be appreciated without information. In fact, European company law is mainly a law of information and disclosure (see Section 4). Finally, some core components – which come in pairs of extremes – tell us a lot about European company law and can be clearly explained as being consistent within a system of unity, diversity and information (see Section 5). Summarising the development of the last decades, and in particular the last five years, one certainly cannot say that European company law is in crisis. It is in – and perhaps even beyond – boom (see Section 6). We begin with a short summary of the legal measures (see Section 2).

2. Survey of the legal measures

The body of law under discussion – European company law – comprises nine Company Law Directives (one through twelve, but not counting the Fifth, Ninth and Tenth Directives) and five Capital Market Law Directives, as well as related directives/regulations on corporate taxation (mainly guaranteeing that structural changes are treated in a tax-neutral way) and insolvency.[2]

The Company Law Directives deal with the disclosure of the company's legal and financial situation (mainly in the companies register), unrestricted power of representation and restricted grounds for nullity (First Directive); the raising of capital, its protection, changes of capital and the principle of equal treatment (Second Directive); mergers and divisions and the safeguards applying to such structural changes (Third and Sixth Directives); accounting law, also in groups

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with the monsters of water and fire – where the magic flute comes into play – introduces the most important pairs of concepts to be found in European company law, which can all be explained on the basis of unity, diversity and information.

[2] For this body of law, see V. Edwards, *EC Company Law* (Oxford, Oxford University Press 1999); S. Grundmann, *European Company Law* (2004, forthcoming); E. Werlauff, *EC Company Law – The Common Denominator for Business Undertakings in 12 States* (Copenhagen, Jurist- og Okomforbundets Forlag 1993); J. Wouters, 'European Company Law: Quo vadis?', 37 *CMLR* (2000) p. 257. In other languages, see M. Lutter, *Europäisches Unternehmensrecht – Grundlagen, Stand und Entwicklung nebst Texten und Materialien zur Rechtsangleichung*, 4th edn. (Berlin, De Gruyter 1996); M. Habersack, *Europäisches Gesellschaftsrecht – Einführung für Studium und Praxis*, 2nd edn. (Munich, Beck 2003); M. Menjucq, *Droit international et européen des sociétés* (Paris, Montchrestien 2001); G.C. Schwarz, *Europäisches Gesellschaftsrecht – ein Handbuch für Wissenschaft und Praxis* (Baden-Baden, Nomos 2000). The planned Thirteenth Directive has now been adopted (without numbering) as Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, *OJ* 2004 L 142/12. In addition, there is now a new proposal for the Tenth Directive: Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital, COM (2003) 703. For works on European capital market law, see references at n. 40 *infra*. Only the works by Lutter and Grundmann cover all the fields mentioned; the others (except for Edwards, who al least includes capital market law) only cover the Company Law Directives in a narrow sense.

of companies, and auditing (Fourth, Seventh and Eighth Directives); the single-member (private) limited liability company and the cross-border establishment of branches (Eleventh and Twelfth Directives). All these directives apply to all limited liability companies, except for the Second, Third and Sixth Directives, which only apply to PLCs (for an explanation, see Section 5.2). European company law is thus mainly about limited liability companies; partnerships play only a marginal role.[3]

The Capital Market Law Directives deal with (1) the prospectus which has to be issued whenever securities are admitted to regulated markets, or whenever they are publicly offered in other markets (not regulated), its contents, publication and mutual recognition; (2) the admission requirements for official listing on a stock exchange and the ongoing duties arising therefrom (mainly transparency of major blockholdings, *ad hoc* disclosure and interim reports), which are increasingly extended to situations in which securities are admitted to regulated markets (i.e. a larger segment also comprising official listing); (3) secondary market problems, that is to say, problems related not to the issue or first admission of securities but to trading, namely the duties of intermediaries, which consist mainly of advising individual investors (Investment Services Directive), and some basic prohibitions applying to all players and enhancing the confidence of the public at large in capital markets (Market Abuse Directive). There is also a Takeover Directive, which is mainly about the duty to make a bid to all shareholders of the target company (i.e. to treat them equally) and a strict regime for defensive measures.

3. Unity and diversity

3.1 **Unity as a goal**

European company law is thought by many important authors to be the area of the law which is most intensively harmonised.[4] Leaving aside antitrust law, which because of the importance of the so-called competition order (cf., mainly the Freiburg school with Eucken and Böhm et al.) was the only area of substantive law introduced directly into the EC Treaty in 1958, this description may

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[3] EC accounting law applies to partnerships which do not have a natural person, even indirectly, as a partner with unlimited liability. Some projects for the harmonisation of cross-border structural changes (mergers and transfers of seat) might apply to all profit-making associations, as do the fundamental freedoms. In addition, there is the Statute on the European Economic Interest Grouping. On all this and for an explanation of the limitation of European company law to limited liability companies, see Grundmann, op. cit. n. 2, at paras. 1291-1295, 1298 et seq.

[4] Edwards, op. cit. n. 2, at p. 1 et seq., but with some reservations; P. Hommelhoff, 'Zivilrecht unter dem Einfluß europäischer Rechtsangleichung', 192 *AcP* (1992) p. 71 at p. 76 et seq.

well be true, or at least may have been true in the 1990s. The First Company Law Directive of 1968 was the first private law directive altogether.[5] Within fifteen years a rather substantive body of nine Directives had been adopted by 1983 (one through twelve, with the exception of the Fifth, Ninth and Tenth Directives).

Company law harmonisation was based on a specific legal basis contained in Article 58(2) of the 1958 Treaty (now Article 44 EC), which was integrated into the Treaty mainly at the insistence of France for very much the same reason that Article 119 of the 1958 Treaty (now Article 141 EC) – again instigated by France – fixed equal treatment of the sexes in EC primary law. Article 58 of the Treaty provided a basis for harmonising 'safeguards ... for the protection of the interests of members and others', mainly creditors.

France feared that when cross-border mobility was allowed, other countries – in particular the Netherlands, which is situated relatively close to Paris – would attract business with lower standards. France feared that companies located in these countries would have a competitive advantage over French companies because they would be subject to fewer safeguards, externalising the negative effects to third parties,[6] for instance by discriminating against women or – in the case of company law – by not having to raise minimum capital. At this time, before the United Kingdom had become a member of the European Community, the Netherlands presented the biggest threat, as it had no vigorously defended minimum capital requirements (which it does today, as can be seen from the *Inspire Art* case recently decided by the ECJ).[7] At this time, the Netherlands was seen as the potential Delaware of Europe, that is to say, a state whose law is most favourable to management because on the whole it contains the fewest safeguards. This was the spectre – the 'dragon' – which it was feared would lead to a 'race to the bottom' or to 'laxity' (see n. 6 *supra*). At this time, Delaware

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[5] Lutter, op. cit. n. 2, at p. 101 et seq.; Habersack, op. cit. n. 2, at para. 77. See also E. Stein, *Harmonization of European Company Laws* (Indianapolis, Bobbs-Merrill 1971) pp. 195-197. The very first European company law deliberations, as early as 1959, concerned the European Company, see P. Sanders, 'Auf dem Wege zu einer europäischen Aktiengesellschaft?', *AWD (RIW)* (1960) p. 1; C. Thibièrge, 'Le statut des sociétés étrangères', *57ème congrès des notaires de France tenu à Tours* (1959) p. 270 et seq., p. 360 et seq.; E. Ulmer, 'Wege zu europäischer Rechtseinheit', Munich University Speeches No. 26 (Munich 1959) p. 12.

[6] T.E. Abeltshauser, 'Towards a European Constitution of the Firm – Problems and Perspectives', 11 *Michigan Journal of International Law* (1990) p. 1235 at p. 1246; A.F. Conard, 'The European Alternative to Uniformity in Corporation Laws', 89 *Michigan L. Rev.* (1991) p. 2150 at pp. 2154 and 2161; W.F. Ebke, 'Unternehmensrecht und Binnenmarkt – e pluribus unum?', 62 *RabelsZ* (1998) p. 195 at p. 207; R. Houin, 'Le régime juridique des sociétés dans la Communauté Economique Européenne', *RTDE* (1965) p. 11 at p. 16; C.W.A. Timmermans, 'Die Europäische Rechtsangleichung im Gesellschaftsrecht – eine integrations- und rechtspolitische Analyse', 48 *RabelsZ* (1984) p. 1 at pp. 12-14; Wouters, loc. cit. n. 2, at p. 269 et seq.

[7] ECJ, Case C-167/01 *Inspire Art* [2003] *ECR* I [not yet reported].

was seen, even in the United States, in a rather negative light.[8] Unity was regarded as the answer to this threat.

3.2 **Diversity as a political compromise**

Unity, however, remained only a goal, never to be attained.

Some Directives never went beyond project status, mainly those that would have enabled the transfer of the company as a whole, namely the proposals on cross-border transfers of seat and cross-border mergers, but also projects such as a law on groups of companies.[9] In addition, for more than four decades, the Statute for a European Company, which was – and still is – seen by many authors as the real centrepiece of European company law, could not be adopted,[10] delaying the establishment of a genuinely European – no longer German, French or Dutch – company. German co-determination was often an impediment, because some feared its loss, others its introduction.[11] An impediment of equal importance, however, was that the more intense the regulation, the

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[8] W.L. Cary, 'Federalism and Corporate Law: Reflections upon Delaware', 83 *Yale Law Journal* (1974) p. 663; M.A. Eisenberg, 'The modernization of corporate law – an essay for Bill Cary', 37 *University of Miami Law Review* (1983) p. 187 at p. 188 et seq.; R. Nader, M.J. Green and J. Seligman, *Taming the giant corporation* (New York, Norton 1976) p. 48. In 1933, Justice L.D. Brandeis had already spoken of a 'race to laxity', in *Ligget* v. *Lee*, 288 U.S. 517, 559 (1933). With regard to radical change, see Winter, Romano and others at n. 27 *infra*.

[9] For all these projects, see the works cited in n. 2.

[10] For the first initiatives, late in 1959, see references at n. 5. The initiatives were finally adopted in two parts: Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company, *OJ* 2001 L 294/1; Council Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company with Regard to the Involvement of Employees, *OJ* 2001 L 294/22. On this regime, see J.-L. Colombani and M. Favero, *Societas Europaea – la Société Européenne* (Paris, Joly 2002); V. Edwards, 'The European Company – Essential Tool or Eviscerated Dream?', 40 *CMLR* (2003) p. 443; Grundmann, op. cit. n. 2, at para. 33; K.J. Hopt, 'The European Company (SE) under the Nice Compromise: Major Breakthrough or Small Coin for Europe?', *Euredia* (2000) p. 465; M. Menjucq, 'La société européenne', 120 *Revue des Sociétés* (2002) p. 225; M.R. Theisen and M. Wenz, eds., *Die Europäische Aktiengesellschaft – Recht, Steuern und Betriebswirtschaft der Societas Europaea (SE)* (Stuttgart, Schäffer-Poeschel 2002).

[11] J. Dine, 'The Harmonization of Company Law in the European Community', 9 *YBEL* (1989) p. 93 at p. 115; Edwards, op. cit. n. 2, at p. 403; C.T. Da Costa and A. de Meester Bilreiro, *The European Company Statute* (The Hague, Kluwer Law International 2003) p. 73. In the German literature, see E. Herfs-Röttgen, 'Arbeitnehmerbeteiligung in der Europäischen Aktiengesellschaft', 19 *NZA* (2001) p. 424 at p. 424 et seq.; H. Hirte, 'Die Europäische Aktiengesellschaft', *NZG* (2002) p. 1 at p. 1. For some contributions exclusively on this topic, see, for instance, G. Krieger, 'Muß die Mitbestimmung der Arbeitnehmer das europäische Gesellschaftsrecht blockieren?', in M. Löwisch, C. Schmidt-Leithoff, B. Schmiedel, eds., *Beiträge zum Handels- und Wirtschaftsrecht, Festschrift für Fritz Rittner zum 70. Geburtstag* (Munich, Beck 1991) p. 303; W. Kolvenbach, 'Scheitert die Europa AG an der Mitbestimmung?', 15 *NZA* (1998) p. 1323.

more adoption proved difficult. The European Company Statute, for instance, comprised more than 400 rules in the first proposal, and just seventy when adopted in 2001 (about half of which are only references to national law or repetitions of what has been harmonised in other measures, for instance rules on merger procedures, so that only about 30 provisions have their own, new content).

Even in the measures adopted, the lacunae remained manifold. Options given to Member States or companies have been criticised, as has the lack of consent and compromise even with respect to the core principles. All this has been perceived as an important step back from unity in the legal regime, which was seen as the ultimate goal. Criticism was particularly intense for accounting law,[12] which has quite correctly been considered the centrepiece of European company law,[13] as discussed below. Even today, an obvious example of compromise can be seen in the Takeover Directive (see n. 2 *supra*), which was recently adopted, again after fifteen years of struggle.

Instead of the unity for which the Union strove, diversity remained a fact, albeit unwanted, due to political restraints and the need for compromise. In Germany, European company law has been seen, for various reasons, as being in crisis. There has been no (successful) legislative action for fifteen, almost twenty years. That is to say, uniformity has not been extended. The last Directive that was adopted dates from 1984, apart from two rather small ones – the Eleventh and Twelfth Directives – which date from 1989. The crisis has also been seen, perhaps even more so, as a crisis of legitimacy, because unity is no longer uncontested as a goal. Reference has been made to the principle of subsidiarity, which found its way into the Treaty in 1993.[14] This brings us to the

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[12] See, for instance, K.J. Hopt, 'Common Principles of Corporate Governance in Europe?', in B.S. Markesinis, ed., *The Clifford Chance Millenium Lectures – The Coming Together of the Common Law and the Civil Law* (Oxford, Hart 2000) p. 105 at p. 113 et seq.; Habersack, op. cit. n. 2, at para. 223; Schwarz, op. cit. n. 2, at para. 406 et seq.; Edwards, op. cit. n. 2, at p. 117; D. Cairns, *Applying International Accounting Standards*, 3rd edn. (London, LexisNexis Butterworths Tolley 2002) p. 61.

[13] In this sense, see K.J. Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron', 3 *JCLS* (2003) p. 221 at p. 247; K.J. Hopt, Europäisches Gesellschaftsrecht – Krise und neue Anläufe, *ZIP* (1998) p. 96 at p. 97; also Lutter, op. cit. n. 2, at p. 60; ibid., 'Das Europäische Unternehmensrecht im 21. Jahrhundert', *ZGR* (2000) p. 1 at p. 5. For its importance, see also W. Schön, 'Gesellschafter-, Gläubiger- und Anlegerschutz im Europäischen Bilanzrecht', 29 *ZGR* (2000) p. 706 (the latter before the European Company had been enacted).

[14] P. Behrens, 'Krisensymptome in der Gesellschaftsrechtsangleichung', in U. Immenga, W. Möschel and D. Reuter, eds., *Festschrift für Ernst-Joachim Mestmäcker zum 70. Geburtstag* (Baden-Baden, Nomos 1996) p. 831. In a similar vein, see also R.M. Buxbaum and K.J. Hopt, *Legal Harmonization and the Business Enterprise*, Vol. 4 (Berlin, De Gruyter 1988) p. 204. This termi-

centrepiece of the first part of the subject of this paper, namely, diversity seen as a positive element and a goal.

3.3 **A balance between diversity and unity**

The question is whether a 'crisis' cannot also be seen as a chance. In other words, what are the chances for diversity. An answer can be given on three levels.

3.3.1 *Constitutional law*

The first level is that of constitutional law. No textbook or commentary on European company law (of all those cited in n. 2 *supra*) so far sees diversity as an important or even a constitutional element in the overall system. None describes diversity from a comparative law perspective and, even more importantly, all still see diversity as a status that has to be accepted, not as one that is generally desirable, that is to say, as a constituent element of an internal market. No textbook or commentary asks where unity is in fact desirable and where diversity is desirable.

This is surprising, as constitutional law would seem to ask exactly this, on the basis of two of the best-known constitutional law principles. The one that has been invoked more frequently is the principle of subsidiarity, contained in Article 5(2) EC.[15] This is a principle of law, although it leaves broad margins of

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nology is used also by Hopt (1998), loc. cit. n. 13, at p. 96. As explained in n. 1, one could also say that the dragon of European company law is seen in diversity. We all know, however, that without the dragon there would be no picture of Pamina, no love, no adversity and no wisdom.

[15] K.J. Alter, *Establishing the Supremacy of European Law – The Making of an International Rule of Law in Europe* (Oxford, Oxford University Press 2001) p. 205 et seq.; N. Bernard, 'The Future of European Economic Law in the Light of the Principle of Subsidiarity', 33 *CMLR* (1996) p. 633, in particular pp. 640-650; K.J. Hopt, 'Company Law in the European Union – Harmonisation and/or subsidiarity?', 1 *International and Comparative Corporate Law Journal* (1996) p. 41 at p. 50 et seq.; J. Jickeli, 'Der Binnenmarkt im Schatten des Subsidiaritätsprinzips – erste Weichenstellungen in der Rechtsprechung', 50 *JZ* (1995) p. 57 at p. 58; M.J. Ulmer, *Harmonisierungsschranken des Aktienrechts* (Heidelberg, Winter 1998) p. 180. See also W. Schön, 'Mindestharmonisierung im europäischen Gesellschaftsrecht', 160 *ZHR* (1996) p. 221 at p. 228 et seq. (with further references). On the contents of this principle, see R.J. van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law', 5 *Maastricht Journal of European and Comparative Law* (1998) p. 129; ibid., 'The Subsidiarity Principle and the EC Competition Rules – The Costs and Benefits of Decentralisation', in D. Schmidtchen and R. Cooter, eds., *Constitutional Law and Economics of the European Union* (1998) p. 149; N. Bernard, 'The future of European Economic Law in the light of the principle of subsidiarity', 33 *CMLR* (1996) p. 633; C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union – Vorgaben für die Anwendung von Art 3b EGV am Beispiel der gemeinschaftlichen Wettbewerbs- und Umweltpolitik* (Baden-Baden, Nomos 1996); N. Emiliou,

discretion.[16] It is certainly a fundamental principle, apparently based on the conviction that while in some cases a rule at the EC (or central) level produces better results, in others a rule at the national (or decentralised) level will produce better results, or at least will not be patently inferior. However, this principle is only one half of a pair, the other being the much older principle of integration, which in overall terms is the core principle of the Community (Arts. 2 and 3 EC).[17] Is the internal market not mainly concerned with fully implementing the fundamental freedoms for goods, services, capital and the circulation of natural persons and companies, that is to say, with allowing them to enter into contracts across borders without impediments, including for the formation and transformation of companies?[18] In fact, mobility of companies is quite obviously a key structural characteristic of and challenge for European company law – even if it has not yet been realised completely (as demonstrated below). Taking both elements as being interdependent – on the one hand, there are issues for which national rules are more appropriate and are required by the constitution and, on the other, diversity in these cases may not create impediments for arrangements under other laws – can lead only to one conclusion: that the arrangements under different laws meet and compete in one and the same market. This is the concept that is traditionally called jurisdictional competition and which clearly requires further consideration. This will be discussed below in section 3.3.3.

3.3.2 *Case law of the European Court of Justice*

Before this discussion, however, I will demonstrate that, today, even the case law of the ECJ is vigorously furthering this concept in important areas. As is well known, Advocate General La Pergola explicitly addressed and based his opinion (followed in outcome and in principle by the Court) on this concept in the *Centros* case of 1999 (probably the best-known case in the whole of company law).[19] What does the ECJ accept? A Danish couple wanted to open a

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'Subsidiarity – An Effective Barrier against "the Enterprises of Ambition"?', 17 *ELR* (1992) p. 383; J. Palacio González, 'The Principle of Subsidiarity (a Guide for Lawyers with a Particular Community Orientation)', 20 *ELR* (1995) p. 355; A.G. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', 29 *CMLR* (1992) p. 1079; and with respect to company law, see extensively W. Schön, 'Gesellschaftsrecht nach Maastricht – Art. 3b EGV und das europäische Gesellschaftsrecht', 24 *ZGR* (1995) p. 1.

[16] ECJ, Case C-84/94 *United Kingdom* v. *Council* [1996] *ECR* I-5755 at 5811.

[17] First in this sense (to my knowledge): W. Kerber, 'Interjurisdictional competition within the European Union', 23 *Fordham International Law Journal* (2000) p. S217 at pp. S218-S221; in principle also K. Gatsios and P. Holmes, 'Regulatory Competition', in P. Newman, ed., *The new Palgrave Dictionary of Economics and the Law*, Vol. 1 (London, Macmillan/New York, Stockton Press 1998) p. 271 at p. 273.

[18] Probably most explicitly: P.-Chr. Müller-Graff, 'Europäisches Gemeinschaftsrecht und Privatrecht – das Privatrecht in der europäischen Integration', 46 *NJW* (1993) p. 13 at p. 14.

small business in Denmark, exclusively doing business there, but did not want to raise the minimum capital which a limited liability company must have there (if indeed liability is to be limited). The couple created a limited liability company under English law, because no minimum capital was needed there. The business was to be done via a branch (according to the formal arrangement!) in Denmark. Denmark denied registration of the branch, citing that the minimum capital needed under Danish law had not been guaranteed. The ECJ, however, ordered the Danish authorities to register the branch. A similar situation formed the background to the *Überseering* case.[20] A limited liability company created under Dutch law, Überseering BV (Besloten Vennootschap) wanted to trade in

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[19] ECJ, Case C-212/97 *Centros* [1999] *ECR* I-1459. From the abundant literature, see, for instance, P. Behrens, 'International Company Law in View of the *Centros* decision of the ECJ', 1 *EBOR* (2000) p. 125; V. Edwards, 'Case-law of the European Court of Justice on Freedom of Establishment after *Centros*', 1 *EBOR* (2000) p. 147; S. Fortunato, *Il Foro italiano* 2000, IV, Col. 317 (case note); H. Halbhuber, 'National Doctrinal Structures and European Company Law', 38 *CMLR* (2001) p. 1385; E.-M. Kieninger, 'Niederlassungsfreiheit als Rechtswahlfreiheit', 28 *ZGR* (1999) p. 724; P. Kindler, 'Niederlassungsfreiheit für Scheinauslandsgesellschaften? – die "Centros"-Entscheidung des EuGH und das internationale Privatrecht', *NJW* (1999) 1993; A. Looijestijn-Clearie, 'Centros Ltd – A Complete U-turn in the Right of Establishment for Companies?', 49 *ICLQ* (2000) p. 621; W.-H. Roth, 37 *CMLR* (2000) p. 147 (case note); J. Wouters, 'Private International Law and Companies' Freedom of Establishment', 2 *EBOR* (2001) p. 101. For my own opinion and more references to the (hundreds of) case notes on this case, see Grundmann, op. cit. n. 2, at para. 25, n. 30 and accompanying text.

[20] ECJ, Case 208/00 *Überseering* [2002] *ECR* I-9919. On this case, see, for instance, T. Bachner, 'Freedom of establishment for companies: A great leap forward', 62 *Cambridge Law Journal* (2003) p. 47; D.E. Robertson, 'Überseering: Nailing the coffin on Sitztheorie', 24 *The Company Lawyer* (2003) p. 184; S. Lombardo, 'Conflict of Laws Rules in Company Law after *Überseering*: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union', 4 *EBOR* (2003) p. 301; P. Dyrberg, 'Full free movement of companies in the European Community at last?', 28 *ELR* (2003) p. 528; I. Thoma, 'The Überseering Ruling: A tale of serendipity', 11 *ERPL* (2003) p. 545; S. Rammeloo, 'The long and winding road towards freedom of establishment for legal persons in Europe', 10 *Maastricht Journal of European and Comparative Law* (2003) p. 169; F. Wooldridge, 'Überseering: Freedom of Establishment of Companies Affirmed', 14 *EBLR* (2003) p. 227; E. Wymeersch, 'The transfer of the company's seat in European Company Law', 40 *CMLR* (2003) p. 661; P. Behrens, 'Das Internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH und den Schlussanträgen zu Inspire Art', 23 *IPRax* (2003) p. 193; H. Eidenmüller, 'Wettbewerb der Gesellschaftsrechte in Europa – zugleich Besprechung des Urteils des Europäischen Gerichtshofs vom 5.11.2002 in der Rechtssache C-208/00 (Überseering BV gegen Nordic Construction Company Baumanagement GmbH)', *ZIP* (2002) p. 2233; S. Leible and J. Hoffmann, '"Überseering" und das (vermeintliche) Ende des Sitztheorie – Anmerkung zu EuGH, Urteil vom 5.11.2002 – Rs. 208/00, RIW 2002, 945', 48 *RIW* (2002) p. 925. For the first monograph on this issue, see K. Kern, *Überseering – Rechtsangleichung und gegenseitige Anerkennung – eine Untersuchung zum Wettbewerb der Gesetzgeber im Europäischen Gesellschaftsrecht* (Berlin, Duncker & Humblot 2004). For my own opinion and more references to the (host of) case notes on this case, see Grundmann, op. cit. n. 2, at para. 25, n. 40 and accompanying text.

Germany in future and have its headquarters there, but remain a company under Dutch law. The ECJ obliged the German courts to treat this company according to Dutch law.

In other words, companies trading in the same market and having their main business in the same territory are, in the first case, subject to English law and Danish law and, in the second case, to Dutch law and German law. This is clearly jurisdictional competition, that is to say, competition between entities, in this case enterprises, which basically have the same characteristics with regard to business and markets but are subject to different laws. The real question is whether this is efficient competition in the interests of all. One last element from the case law before discussing this 'real' question: the ECJ does not grant the freedom to act under another law without limits. The Member State concerned, for instance Denmark or Germany, can still limit the freedom of choice of laws if it can invoke 'mandatory reasons of public good' for doing so, that is to say, if it has good reasons to do so. These reasons are thoroughly discussed in the case law of the ECJ. We will come back to this case law, namely the *Centros* case and its early roots in the *Cassis de Dijon* case, when discussing information rules in Section 4. What is important here though is that Member States may apparently still channel competition if they have good reasons for doing so.

3.3.3 *Functioning jurisdictional competition as a goal*

This leads us to the core question whether what has been described is *efficient competition in the interests of all* and, if this is not yet the case, what needs to be done. This question is about a theory or 'an order'[21] for jurisdictional competition in European company law or about a 'European system of company laws'.[22] The literature on jurisdictional competition in company law fills whole libraries.[23] With respect to Europe, it has been questioned whether such competition exists at all or whether it can possibly exist.[24] And if the question whether

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[21] In the sense of constitutional economics, see V.J. Vanberg and W. Kerber, 'Institutional competition among jurisdictions – an evolutionary approach', 5 *Constitutional Political Economy* (1994) p. 193 at pp. 212-216; and Kerber, loc. cit. n. 17, at pp. S228-S248; J. Kincaid, 'Liberty, competition, and the rise of coercion in American federalism', in L. Gerken, ed., *Competition among Institutions* (Basingstoke, Macmillan 1995) p. 259; H. Siebert and M. Koop, 'Institutional competition – a concept for Europe?', 45 *Aussenwirtschaft* (1990) p. 439, in particular at p. 455 et seq.

[22] For the first use of this term, see S. Grundmann and W. Kerber, 'European System of Contract Laws – A Map for Combining the Advantages of Centralised and Decentralised Rule-making', in S. Grundmann and J. Stuyck, eds., *An Academic Green Paper on European Contract Law* (The Hague, Kluwer Law International 2002) p. 295.

[23] See the references in the following footnotes.

[24] See H. Merkt, 'Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber"', 59 *RabelsZ* (1995) p. 545; and also E.-M. Kieninger, *Wettbewerb der Privatrecht-*

jurisdictional competition is desirable is raised at all, it is asked very generally, in relation to 'the' jurisdictional competition in European company law, not with respect to specific segments or specific instruments that can be introduced. Both questions must be asked in a different, more differentiating way: in which segments is there or is there not yet competition and how can efficient competition – and overall welfare – be furthered? All this cannot be discussed in detail here.[25] What is possible and indeed necessary, however, is to identify the two or three fundamental ideas and illustrate them with yet another example, besides the *Centros* and the *Überseering* cases.

The starting point is that the advantages of diversity are much too evident[26] to regard jurisdictional competition as negative in principle. Such a negative approach would simply ignore the groundbreaking findings made in this area since the 1960s.[27] The advantages of diversity are mainly that more experimentation is possible, that diverse preferences can better be served and that there is an ongoing struggle for superior knowledge. All these advantages are evident in a

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sordnungen im europäischen Binnenmarkt – Studien zur Privatrechtskoordinierung in der Europäischen Union auf den Gebieten des Gesellschafts- und Vertragsrechts (Tübingen, Mohr Siebeck 2002). See moreover D. Charny, 'Competition among jurisdictions in formulating corporate law rules – An American perspective on the race to the bottom in the European Communities', 32 *Harv.Int.L.J.* (1991) p. 423 at p. 447; Grundmann, references in next footnote (seeing such competition in quite important areas and increasingly in all areas); H. Eidenmüller, 'Wettbewerb der Gesellschaftsrechte in Europa', *ZIP* (2002) p. 2233; K. Heine and W. Kerber, 'European corporate laws, regulatory competition and path dependence', 13 *European Journal of Law and Economics* (2002) p. 47.

[25] See instead S. Grundmann, 'Regulatory Competition in European Company Law – Some Different Genius?', in G. Ferrarini, K.J. Hopt and E. Wymmeersch, eds., *Capital Markets in the Age of the Euro – Cross-Border Transactions, Listed Companies and Regulation* (The Hague, Kluwer Law International 2002) p. 561; S. Grundmann, 'Wettbewerb der Regelgeber im Europäischen Gesellschaftsrecht – jedes Marktsegment hat seine Struktur', 30 *ZGR* (2001) p. 783.

[26] On these advantages, see, for instance, D.C. Esty and D. Geradin, 'Regulatory Co-opetition', 3 *Journal of International Economic Law* (2000) p. 235 at p. 240 et seq.; Gatsios and Holmes, loc. cit. n. 17, at pp. 273-275; H. Hauser and M.O. Hösli, 'Harmonization or regulatory competition in the EC (and the EEA)?', 46 *Aussenwirtschaft* (1991) p. 497; W. Kerber, 'Rechtseinheitlichkeit und Rechtsvielfalt aus ökonomischer Sicht', in S. Grundmann, ed., *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts – Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (Tübingen, Mohr Siebeck 2000) p. 67 at pp. 84-87 (also large parts of W. Kerber, loc. cit. n. 17); Siebert and Koop, loc. cit. n. 21; S. Woolcock, 'Competition among rules in the single European market', in W. Bratton, et al., eds., *International Regulatory Competition and Coordination – Perspectives on Economic Regulation in Europe and the United States* (Oxford, Clarendon Press 1996) p. 289 at p. 298 et seq.; and recently Grundmann and Kerber, loc. cit. n. 22, at pp. 296-306.

[27] Most influential are R.K. Winter, 'State law, shareholder protection, and the theory of the corporation', 6 *The Journal of Legal Studies* (1977) p. 251; then R. Romano, 'Law as a product – some pieces of the incorporation puzzle', 1 *Journal of Law, Economics, and Organization* (1985) p. 225; ibid., 'Competition for state corporate law', in P. Newman, ed., *The new Palgrave Dictionary of Economics and the Law*, Vol. 1 (London, Macmillan 1998) p. 364; ibid., *The Advan-*

complex world with a highly dynamic learning curve. Nobody knows enough to forgo the advantages of competition as a 'discovery device' too easily.[28] The area of company law also develops too fast to leave solutions, once found, unchallenged for long. Regulation at the central level has important advantages as well, mainly in relation to reducing information problems, potentially enhancing economies of scale and reducing the risk of negative external effects. This cannot and will not be doubted and will be taken up where appropriate in the following. That being said, the above-mentioned two or three fundamental ideas can be revealed.

First of all, it is important at least to try to establish whether general competition theory – developed for product markets – cannot also serve as a model for questions of jurisdictional competition. If functioning competition is the aim, this would mean that the conditions would be that the parties concerned have choices, that they have the material information at hand and that restrictions of competition are reduced or eliminated (as are other types of negative external effects on third parties not taking part in the decisions or the distribution of profits). Secondly, it is important that the question should not only be whether there is competition but also how one can further it and whether jurisdictional competition is generally desirable, as well as exactly what measures can be taken to further jurisdictional competition that is desirable, that is to say, functioning competition. The answers to these questions may differ from one segment to another. Not all areas of European company law have the same potential for diversity and its advantages, and not all areas have the same potential for harmonisation. For each segment, the question therefore has to be whether there is enough choice, a possibility of sufficient information, a risk for negative external effects and restrictions of competition and how to confront these parameters. Thirdly, if one proceeds like this, one more parallel to general competition theory is striking. Since World War II, at the latest, all industrialised countries start from the assumption that competition functions better if it is not completely free (which enables some players to use market forces largely in order to eliminate them), but if there is a regulatory framework, a so-called competition order. With regard to jurisdictional competition in Europe, this idea can be expressed by using the term of a 'European system of company laws', which expresses both the idea of multitude and that of a framework system to be installed or developed.

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tage of Competitive Federalism for Securities Regulation (Washington, AEI Press 2002); and L. A. Bebchuk, 'Federalism and the Corporation – The Desirable Limits on State Competition in Corporate Law', 105 *Harvard Law Review* (1992) p. 1435.

[28] Terminology and concept by von Hayek. See, for instance, F.A. von Hayek, 'Competition as a discovery procedure', in ibid., *New Studies in philosophy, politics, economics and the history of ideas* (London, Routlegde and Kegan Paul 1978) p. 179.

One more example – besides the *Centros* and *Überseering* cases, which are largely are about the formation of companies – can be seen in another segment which can be described as corporate finance (investing in companies). This example is a (relatively) old one for Europe, where jurisdictional competition has already existed for some decades, even though it is still increasing in this segment. In the market for corporate finance (capital markets), a distinction has to be made between the rules on the trade in shares and the rules about the rights conferred by these shares, that is to say, the content of the 'product' marketed. The rules on the trade in shares are largely harmonised, although they are mainly information rules. For primary market law, which deals with the issue of securities and their admission to certain segments (for instance stock exchanges), this is the case virtually without exception, the most important legal measure being the General Prospectus Directive of 2003. However, in secondary market law (i.e. the rules on the trade in the securities once issued), the duty to inform the investor is dominant (Art. 11 of the Investment Services Directive).[29] Conversely, the content of the 'product' marketed is determined largely by national law rules. This differs only with respect to those shareholder rights which can be seen as being fundamental ('constitutional') rights. This exception will be taken up more in detail in Section 5.

And how about jurisdictional competition in these markets: is it functioning properly and are the necessary framework conditions being met? There is little choice as to which information rules need to be complied with for issuing and trading securities and for rules on trading more generally. These rules are largely harmonised (i.e. uniform). However, information rules leave intact the freedom of arrangement in relation to substance, as demonstrated below. On the other hand, there is freedom of choice with respect to the rules on the content of the securities, because the latter can circulate freely within (and even outside) the Community. This opportunity is guaranteed by law (fundamental freedoms) and also exists in fact. While not any national law can be combined with any issuer and while, under the seat theory, not any issuer can choose a more attractive national law (at least not without major transaction costs), the investor can still take into consideration the efficiency of each national law when investing. Shares which are subject to one particular law may be more attractive, and this can be honoured by investors. Moreover, there are important shareholders' rights and expectations which do not depend on national laws (i.e. statal laws) but on stock exchange listing rules. This is particularly true for so-called corporate governance rules, which deal with core questions of decision-making mechanisms in companies and have been drafted by different (often private) institutions, and which in turn are then referred to by listing rules or taken into

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[29] For all this, see Grundmann, op. cit. n. 2, at paras. 20, 22 et seq.; N. Moloney, *EC Securities Regulation* (Oxford, Oxford University Press 2002) in particular at pp. 118-240 and 643-707.

consideration by rating firms. In this case, the issuer can choose the set of rules he follows more freely.

Moreover, the conditions for an informed choice have to be met. These seem to be good indeed in the market for investments. Both issuers and professional investors are the prime decision makers and may also be expected to be capable of gathering and processing complex and extensive information. It is largely irrelevant that private investors often do not act on an informed basis. The market nevertheless functions, because they follow the informed decision making of professional investors.[30] Moreover, among these professional investors, there is a sufficient number that acquires only smaller blocks and therefore basically has the same interests as small private investors (i.e. they are also interested in minority shareholder protection). The uninformed small players thus have big brothers who – inverting Orwell's famous words – they can watch.

Freedom of choice and information are granted. It is true that freedom of choice could be further increased if issuers had freedom of choice with regard to the applicable law (as is proposed by the incorporation theory which is indeed increasingly followed in Europe).[31] However, the problem of restrictions of competition may be more important. National intermediaries still dominate their markets. Since about three-quarters of the volume of securities they sell are issued by affiliated companies,[32] most of which are certainly subject to the same law, the important market share of national intermediaries is developing into a large market share of securities subject to the same law, and this restricts competition between securities subject to different laws. Nevertheless, the pressure on legislatures resulting from integrated capital markets, that is to say, from the possibility that investors choose between securities subject to different laws,

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[30] M. Bagheri, 'Informational intermediaries and the emergence of the new financial regulation paradigm', 24 *The Company Lawyer* (2003) p. 344 at p. 344 et seq.; G. Spindler, 'Deregulierung des Aktienrechts?', 43 *AG* (1998) p. 53 at pp. 60-65; also H. Eidenmüller, 'Kapitalgesellschaftsrecht im Lichte der ökonomischen Theorie', 56 *JZ* (2001) p. 1041 at p. 1046; M. Ruffner, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft* (Zürich, Schulthess Juristische Medien AG 2000) p. 436 et seq.

[31] After the United Kingdom, Ireland, Denmark, the Netherlands and Switzerland, now also in Austria, and partly in France and Italy. Potentially, even the ECJ asks for the adoption of this theory in internal market relationships. On all this, see the comparative law survey and the discussion of the case law in Grundmann. op. cit. n. 2, at paras. 208, 844 et seq. (with further references).

[32] Stiftung Warentest, *Finanztest* 12/1997, pp. 12-15. For measures which could help to reduce this problem, namely measures supporting or at least no longer discriminating against independent 'pure' information intermediaries who earn only for providing information and not from the transaction, see S. Grundmann and W. Kerber, 'Information Intermediaries and Extending the Area of Informed Party Autonomy – As in Capital Markets and in the Insurance Business', in S. Grundmann, W. Kerber and S. Weatherill, eds., *Party Autonomy and the Role of Information in the Internal Market* (Berlin, De Gruyter 2001) p. 264.

seems to be such that all the major national company law reforms of recent years – and there have been many in all the large Member States – have been motivated by considerations of attractiveness of the legal environment.[33] These are clearly considerations relating to the efficiency of national law, driven by competition. The typical argument for centralised rule making – information problems and negative external effects – thus seems to be weak in questions of corporate finance and the content of shares.

3.4 **First conclusions**

The core idea is after all that having more solutions and types at hand is helpful – if this increase in diversity can be handled – because it allows diverse preferences to be better served, more innovation and more and better experimentation. More solutions and types can indeed often be handled in European company law, because there are sufficient players on all sides of the market who can process very complex information and can therefore act on an informed basis. Furthermore, negative external effects (i.e. externalising the costs to third parties) are either of little importance or can be approached with more focused instruments than restricting jurisdictional competition altogether.

Finally, if diversity is seen as a constituent element of European company law, one last conclusion would be that the whole body of this law – the whole organism or life of a company – should always be described, that is to say, both harmonised/unified law and the areas of the law where the rules are – and in many cases should remain – diverse. This means that whole areas of the law, at least the existing core solutions, should be described from a comparative law perspective, in order to give a comprehensive picture of what European company law is.[34]

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[33] For Germany: Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG) of 6 March 1998, *BGBl.* I 1998, 786; Kapitalaufnahmeerleichterungsgesetz (KapAEG) of 20 April 1998, *BGBl.* I 1998, 707; Gesetz zur Namensaktie und zur Erleichterung der Stimmrechtsausübung (Namensaktiengesetz, NaStraG) of 18 January 2001, *BGBl.* I 2001, 123; Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), available at: <http://www.bmj.de/media/archive/362.pdf>; C.P. Claussen, 'Aktienrechtsreform 1997', 41 *AG* (1996) p. 481; P. Hommelhoff and D. Mattheus, 'Corporate Governance nach dem KonTraG', 43 *AG* (1998) p. 249; J. Zätzsch and M. Gröning, 'Neue Medien im deutschen Aktienrecht – zum RefE des NaStraG', *NZG* (2000) p. 393. For England and France: *Modern Company Law – For a Competitive Economy – The Strategic Framework – A Consultation Document from the Company Law Review Steering Group* (2/1999) *passim*; Y. Guyon, 'Présentation générale de la société par action simplifiée', *Rev. Soc.* (1994) p. 207 at p. 209.

[34] See the pleas in this sense by Wouters, loc. cit. n. 2, at p. 307; Ebke, loc. cit. n. 6, at p. 241 et seq. For the first steps in this sense in textbook form, see Grundmann, op. cit. n. 2, in particular at paras. 3, 12 and 13.

4. Disclosure and information as the dominant instruments

The second constituent element is closely linked to the first. It can be described by the old capital market law saying 'sunlight is the best disinfectant' or, in a more positive sense, as 'comply or explain'. What is explained to the public need not comply with a rule set by a regulatory authority. As stated in *The Magic Flute*, the truth nullifies any crime (see n. 1 *supra*). The increasingly strong tendency to rely primarily on information rules and construct an information model will be described in three steps: first the principle, then the examples which in reality cover virtually the whole area of harmonisation and finally a tentative explanation for the fact that harmonisation consists mainly of information rules. This now brings us to a principle which at first sight may seem surprising, at least if formulated so acutely. After a second, more careful glance, however, one cannot seriously doubt it.

4.1 **The principle**

Starting from the beginning, the First Directive of 1968 is also called the Disclosure Directive, and for good reason. Information rules dominate European company law,[35] in contrast to many national (limited liability) company laws.

The starting point must be primary EC law, that is to say, EC treaty law. According to this, the national (and probably also EC) legislature may not opt for mandatory substantive rules or impose them on suppliers from other Member States when the need for protection can also be served by disclosure.[36] If an informed decision by the parties concerned is possible (disclosure and capacity to process and use the information), no mandatory substantive solution may be

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[35] S. Grundmann, 'Information und ihre Grenzen im Europäischen und neuen englischen Gesellschaftsrecht', in U.H. Schneider, ed., *Festschrift für Lutter* (Cologne, Otto Schmidt 2000) p. 61; ibid., 'Ausbau des Informationsmodells im Europäischen Gesellschaftsrecht', 42 *DStR* (2004) p. 232. On the information model in company law, see the monograph by H. Merkt, *Unternehmenspublizität – Offenlegung von Unternehmensdaten als Korrelat der Marktteilnahme* (Tübingen, Mohr Siebeck 2001) (though concentrating less on European company law). On the information model in contract law, see the monograph by Grundmann, Kerber and Weatherill, op. cit. n. 32 (concentrating on European contract law).

[36] This idea is based on the fundamental freedoms interpreted in the light of Art. 5(3) EC. First, on the free movement of goods, see ECJ, Case 120/78 *Cassis de Dijon* [1979] *ECR* 649 at 664. Then, on the freedom of establishment and company law, see ECJ, Case C-212/97 *Centros* [1999] *ECR* I-1459 (1495). The Court's position, at least in principle, is that EC primary law (with the fundamental freedoms) also applies to the EC legislature. See ECJ, Joined Cases 80/77 and 81/77 *Commissionaires Réunies and Fils de Henri Ramel* [1978] *ECR* 927 at 944-947; Case C-341/95 *Bettati* [1998] *ECR* I-4355 at 4380 et seq. See J.A. Usher, 'Common organisations: no escape from fundamental Treaty rules', 3 *ELR* (1978) p. 305 at p. 308; more recently K. Mortelmans, 'The relationship between the Treaty rules and Community measures for the establishment and functioning of the internal market – Towards a concordance rule', 39 *CMLR* (2002) p. 1303. See

imposed. The consequences of this rule may be explained with reference to the issues decided by the Court in the above-mentioned cases, starting with the *Centros* case. The ECJ based its decision on several arguments, the most important probably being that Danish creditors, whom the minimum capital requirement is designed to protect, can find out whether a company has raised (minimum) capital in the companies register of the relevant country (e.g. in the case of an English limited liability company in the English companies register). It must be clear from the business correspondence in which register this information can be found. As this information is available to the Danish contracting partner, there are no mandatory reasons of public good to prescribe a minimum capital requirement for companies from another Member State, because fundamental freedoms apply only to cross-border cases. In the *Centros* case, this argument is perhaps doubtful. Is the information really so easy to gather? Who knows that the relevant companies register is located in Cardiff? However, the argument will be further strengthened when there is a European electronic companies register (as of 2007).[37] All the data will then be available with a simple mouse click. The debate concerning mandatory reasons of public good has been very heated from the outset, ever since the lead decision in the famous *Cassis de Dijon* case. Here the argument invoked by Germany was that a minimum requirement for the alcoholic content of liquor was needed so that the public would not be misled. The Court held that the public could read the information on the bottle and that therefore this substantive mandatory requirement was inapplicable under the freedom of goods. Information was seen to be sufficient.

This principle – the supremacy of information rules – is also followed by the EC legislature. Information rules in this sense are certainly all rules prescribing the disclosure of information, whether individually or in a standardised form. However, information rules also include rules covering any violation of information rules (i.e. when information, though prescribed, is either not provided or incorrect) and rules guaranteeing the reliability of information (e.g. via independent examination of the information by an auditor). These include liability rules, rules on the binding force of information given and rules on its examination by independent professionals. This brings us to the examples.

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monographs by U.T.M. Scheffer, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenzen des Gemeinschaftsgesetzgebers* (Frankfurt am Main, Lang 1997); R.-O. Schwemer, *Die Bindung des Gemeinschaftsgesetzgebers an die Grundfreiheiten* (Frankfurt am Main, Lang 1995).

[37] Arts. 3 and 3a of First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, *OJ* 1968 L 65/8, as amended in 2003 (*OJ* 2003 L 221/13).

4.2 **Examples**

Information rules are rules which oblige companies to disclose the most important facts concerning their legal and financial situation, including their accounts, in the companies register. This, of course, is the centrepiece of regulation in the First Directive. However, even rules which do not seem to directly impose a duty to disclose often solve information problems – especially in cross-border cases. This is the case with most of the remaining rules of the First Directive and most of the rules of the Second Directive. This may be illustrated here with just one example, as most other rules are structured similarly. The First Directive states in another rule that the power of representation of the board must be unrestricted but that diverging agreements (with the contracting partner individually) are possible. The question is what the effects of this rule are, as it seems to concern substance rather than disclosure. Indirectly, however, it regulates the problem of who has to procure the information. The question how much power of representation has been granted can be judged much better by the principal represented (i.e. the company) rather than by the contracting partner. The latter therefore receives the maximum protection – the power of representation is unrestricted and no restriction can be invoked against him. The burden to change this legal situation is with the company and such a change is possible only when it is guaranteed that the other partner receives the information (e.g. in an individual agreement).

The First and Second Directives are certainly elements of European company law. However, the highest degree of harmonisation can be found in accounting law – in the Fourth, Seventh and Eighth Directives and now in the amendments and the IAS Regulation[38] – and in capital market law. Accounting law is exclu-

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[38] On all these measures, see Grundmann, op. cit. n. 2, at paras. 15-18 (comprehensive survey); and in more detail A.-K. Achleitner and G. Behr, *International Accounting Standards – ein Lehrbuch zur Internationalen Rechnungslegung*, 3rd edn. (Munich, Beck 2003); W. Busse von Colbe, 'Vorschlag der EG-Kommission zur Anpassung der Bilanzrichtlinien an die IAS – Abschied von der Harmonisierung?', *BB* (2002) p. 1530; ibid., 'Anpassung der EG-Bilanz-Richtlinien an die IAS', *Zeitschrift für Kapitalmarktorientierte Rechnungslegung* (2001) p. 199; D. Cairns, *Applying International Accounting Standards*, 3rd edn. (London, LexisNexis Butterworths Tolley 2003); A.G. Coenenberg, *Jahresabschluss und Jahresabschlussanalyse – Betriebswirtschaftliche, handelsrechtliche, steuerrechtliche und internationale Grundlagen – HGB, IAS/IFRS, US-GAAP, DRS*, 19th edn. (Stuttgart, Schäffer-Poeschel 2003); Ernst & Whinney, *The Fourth Directive – its effects on the annual accounts of companies in the European Economic Union* (London, Kluwer 1979); S. Fortunato, *Bilancio e contabilità di impresa in Europa* (1993); S.J. Gray and A.G. Coenenberg, *International Group Accounting* (London, Croom Helm 1988); P.J. Heuser and C. Theile, *IAS-Handbuch – Einzel- und Konzernabschluss* (Cologne, Otto Schmidt 2003); G. Kloos, *Die Transformation der 4. EG-Richtlinie (Bilanzrichtlinie) in den Mitgliedstaaten der Europäischen Gemeinschaft – eine Analyse der verbliebenen Rechnungslegungsunterschiede aufgrund von nationalen Wahlrechtsausnutzungen* (Berlin, Duncker & Humblot 1993); K. Küting and C.-P. Weber, *Der Konzernabschluß – Lehrbuch und Fallstudie zur Praxis der Konzernrechnungsle-*

sively about information – mainly of shareholders and creditors – on the financial situation of the company (if one does not consider the repercussions of the Second Directive as to the distribution of profits). It is important to emphasise when and why accounting law and its disclosure philosophy came into being, that is to say, from which moment onwards accounts were no longer only a tool for managing the business. The core idea was that renouncing to the personal liability of the members – personal liability as a substantive law solution – was only possible if more information was given as a corollary, that is to say, if the financial situation was disclosed.[39] The information rule superseded the substantive law rule. This is a Copernican revolution in limited liability company law, not just in European (limited liability) company law. What is characteristic of the latter, though, is that accounting law is its centrepiece.

European capital market law[40] not only forms a constituent part of European company law (more on this in detail later), but also provides the next example. European company law contains a substantial amount of primary capital market law. This consists primarily of disclosure rules (and the requirement that securities that are to be officially listed on a stock exchange have to be admitted by a public authority) that apply when securities are first offered or when they are admitted to a certain capital market segment, for instance to a regulated market in the sense of European capital market law. Moreover, European capital market law is largely a comprehensive set of information and listing rules, at least where the security is to be officially listed but also increasingly if it is introduced into a regulated market (blockholdings, *ad hoc* disclosure of material facts). In other segments, mainly in relation to public offerings, European capital market law regulates only the core disclosure duty – the duty to issue a prospectus – again quite comprehensively. European capital market law also comprises an extensive regime for secondary capital markets, that is to say, the rules that apply when securities that have already been issued are traded. These rules mainly bind the intermediaries that organise such trade, namely the provi-

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gung, 7th edn. (Stuttgart, Schäffer-Poeschel 2001); C.W. Nobes, 'The Harmonisation of Company Law Relating to Published Accounts of Companies', 5 *ELR* (1980) p. 38; D. Ordelheide and KPMG, eds., *Transnational Accounting* (London, Macmillan 1995).

[39] See only the title of Merkt, op. cit. n. 35.

[40] Moloney, op. cit. n. 29; Grundmann, op. cit. n. 2, at paras. 19-24; J. Ekkenga, *Anlegerschutz, Rechnungslegung und Kapitalmarkt – eine vergleichende Studie zum europäischen, deutschen und britischen Bilanz-, Gesellschafts- und Kapitalmarktrecht* (Tübingen, Mohr Siebeck 1998); N. Elster, *Europäisches Kapitalmarktrecht – Recht des Sekundärmarktes* (Munich, Beck 2002); S. Heinze, *Europäisches Kapitalmarktrecht – Recht des Primärmarktes* (Munich, Beck 1999); S. Kalss, *Anlegerinteressen – der Anleger im Handlungsdreieck von Vertrag, Verband, und Markt* (Vienna, Springer 2001); Merkt, op. cit. n. 35; S. Weber, *Kapitalmarktrecht – eine Untersuchung des österreichischen Rechts und des Europäischen Gemeinschaftsrechts* (Vienna, Springer 1999). For a recent survey, see P.O. Mülbert, 'Konzeption des europäischen Kapitalmarktrechts für Wertpapierdienstleistungen', *WM* (2001) p. 2085.

ders of investment services. They are mainly aimed at transforming information from primary capital market law (which is designed in a standardised way and therefore primarily for those with the most extensive need of information, i.e. professional investors) into much simpler information, that is more easily digestible and tailored to the specific needs of each individual investor and can be different from one investor to the other.[41] It is important that providers of investment services must act exclusively in the interest of their investors (strict duty of loyalty). There are also some specific prohibitions of violations of the duty to behave fairly which are particularly evident and capable of undermining the confidence of the public at large (e.g. insider dealing). Altogether, however, disclosure rules clearly dominate.

The First, Second, Fourth, Seventh, Eighth and Eleventh Directives and the Capital Market Law Directives are all primarily about information, the most important ones almost exclusively. All these Directives are principally concerned with a third-party relationship, that is to say, with creditor and investor protection (when investment decisions are taken) (see Section 5.1 *infra*). Besides these acts, there are few European Company Law Directives that also concentrate on the (internal) structure of the company. Apart from the statutes for supranational types of companies (which are also not extensive) and parts of the Second Directive and the Takeover Directive, there are only the Third and Sixth Directives on (national) mergers and divisions. Both Directives deal with specific forms of structural change. The following elements are seen as the basic ones (and recur in all proposals for other structural changes, such as international mergers or transfers of seat or in the statutes on supranational types of companies).[42] They are a merger plan and report prepared by the board and dealing with the relevant legal and economic chances and risks of the transaction (providing information); the examination of such information by an independent expert (information intermediaries); and the guarantee for the owners (of both companies) to have, collectively, the ultimate decision-making power

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[41] S. Grundmann and W. Kerber, 'Information Intermediaries and Party Autonomy – The Example of Securities and Insurance Markets', in S. Grundmann, W. Kerber and S. Weatherill, eds., *Party Autonomy and the Role of Information in the Internal Market* (Berlin, De Gruyter 2001) p. 264 at pp. 269-271, 291; N. Moloney, 'The Regulation of Investment Services in the Single Market: The Emergence of a New Regulatory Landscape', 3 *EBOR* (2002) p. 293 at p. 311 et seq. and p. 323; S. Heinze, *Europäisches Kapitalmarktrecht – Recht des Primärmarktes* (Munich, Beck 1999) pp. 376-386.

[42] P. Hommelhoff and K. Riesenhuber, 'Strukturmaßnahmen, insbesondere Verschmelzung und Spaltung im Europäischen und deutschen Gesellschaftsrecht', in in S. Grundmann, ed., *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts – Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (Tübingen, Mohr Siebeck 2000) p. 259 at pp. 272-279.

(resolution by both shareholder meetings with qualified majority in each).[43] To summarise all this, it must be said that in virtually every rule, and certainly in every act, information and informed choice (i.e. the information model) are dominant.

4.3 **Explaining the dominant position of these instruments**

Information rules are only part of an information model if a second element is added to information, namely the freedom of choice given to the parties. Information and freedom of choice have already been mentioned as the two basic conditions for functioning competition.

On the basis of what has been discussed so far, the dominant role of information rules in European company law becomes even more evident and understandable. It should be stressed from the outset that information rules in European company law are in most cases mandatory. In terms of their core characteristics, however, they differ from mandatory rules that prescribe substantive solutions. Unlike these rules, mandatory information rules, though mandatory in construction, leave intact the freedom of the parties to design the arrangements. They do not exclude different solutions for different preferences and experimentation – all are core advantages in a market economy based on private initiative.[44] This is indeed a different category of rules.

This also has its consequences for the relationship between unity and diversity. For information rules, the advantages of unity are more important. Information rules are mainly aimed at making arrangements in the market more visible and facilitating comparison (e.g. of products). Comparison is facilitated if the core parameters are always presented according to the same system. In the case of information rules, therefore, uniform standards are of particular importance. Of equal importance is reducing information problems resulting from diversity, which is a fundamental aspect of rule making at the central level. Such a requirement for uniform law does not exist (to the same extent) in the case of product rules, as long as one supplier can act under its national law in the whole Community (home-country principle). This is because clients typically do not even know their own law and therefore do not have substantially less information about the law if there is diversity. Conversely, the disadvantages of central regulation are less pronounced in the case of information rules. As already explained, information rules leave one with the freedom to make one's own ar-

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[43] Moreover, the decision on the single share (granting a sell-out right to each individual shareholder). The sell-out right can, however, be found only in some instances in the Directives. For as critical view, see Hommelhoff and Riesenhuber, loc. cit. n. 42, at pp. 276 et seq.

[44] See, for instance, quite recently Grundmann and Kerber, loc. cit. n. 22, at pp. 296-306 (the whole contribution also on the following). For more detail, see the monograph by Grundmann, Kerber and Weatherill, op. cit. n. 32.

rangements. In other words, they do not hamper diversity in the arrangements which can serve diverse preferences and allow experimentation.

If the advantages of uniform regulation are particularly pronounced in the case of information rules, and the disadvantages less evident than in the case of substantive mandatory rules, one conclusion is evident. It is advantageous if those who make European company law – like those who make European contract law – mainly use information rules. These rules are in fact the lubrication that is needed for the smooth functioning of a market that is characterised by the fact that freedom of choice between diverging arrangements is steadily increasing. In this market, many highly professional players (and many others) make the core decisions on both sides of the market. In other words, the conditions for an informed choice are particularly good. Moreover, the volumes are often such that even a considerable investment in the gathering and the retrieval of information pays off.

5. Pairs of concepts

This section deals with some concepts which come in pairs, extremes or opposite poles. These pairs can all be explained on the basis of the system of unity, diversity and information discussed so far. As in *The Magic Flute*, fire and water are only elements of the complete realm of light and wisdom. These pairs, however, have the advantage that they allow for a bit more substance in European company law, providing the flesh for the bones that form the structure.

5.1 Internal organisation and third-party relationships (including voice and exit)

The First Directive – prescribing information duties (mainly to third parties), regulating the power of representation in the third-party relationship and reducing cases of nullity with the aim that a third party is not deprived of 'its' debtor[45] – is paradigmatic in that it deals primarily with the third-party relationship. Most aspects of internal organisation, for instance the question in which cases the power of representation is subject to limits in the intra-company relationship, have not been harmonised. This trend has continued. The capital rules in the Second Directive are seen, though not always correctly, as mainly protecting

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[45] See J. Dabin, 'Les difficultés d'application de la première directive communautaire de coordination du droit des sociétés, en matière de validité des engagements des sociétés anonymes', in M. Lutter, H. Kollhosser and W. Trusen, eds., *Festschrift für Johannes Bärmann* (Munich, Beck 1975) p. 235 (in the title, he already focuses quite clearly on the 'binding force of the agreements' entered into by the company). See also Grundmann, op. cit. n. 2, at paras. 39-41 and 232-261.

creditors.[46] The accounting law contained in the Fourth, Seventh and Eighth Directives is still seen in some Member States primarily as a safeguard for creditors. In other Member States, very much in line with the trend of new developments in EC accounting law, it is regarded more as a safeguard for the shareholder, albeit – interestingly enough – not so much for the latter's role within the company as for its role as an investor who acquires and sells securities in reaction to this information.[47] This is again a third-party relationship, now of (potential) shareholders or creditors (bonds). The third-party relationship to the shareholder is what matters. Hirschman therefore speaks of exit,[48] which makes the outside world clearly visible. Clearly then, capital market law is investor related in this sense (and exclusively so). This will be taken up in the last pair of concepts because it is so characteristic. The same is true – in principle – for the 'Thirteenth' Directive, the Takeover Directive, which applies only to companies whose shares are traded in a regulated market. The limitation of liability in the Twelfth Directive is also a dimension that has effects on the third-party relationship.

This leads to an altogether surprising harmonisation regime. Is the steady organisation of collaboration not the main characteristic of companies or so-called firms that distinguishes them from the market?[49] The harmonisation regime, however, does not really deal with the organisation of collaboration, but deals mainly with the third-party relationship (i.e. the external relationship). A structural characteristic that seems evident, but is rarely emphasised, is the ex-

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[46] See, for instance, Habersack, op. cit. n. 2, at para. 153; P.O. Mülbert and M. Birke, 'Legal Capital – Is there a Case against the European Legal Capital Rules?', 3 *EBOR* (2002) p. 695 at pp. 716-722; W. Schön, 'Gesellschafter-, Gläubiger- und Anlegerschutz im Europäischen Bilanzrecht', 29 *ZGR* (2000) p. 706 at p. 709 et seq.; L. Enriques and J.R. Macey, 'Creditors versus capital formation: The case against the European legal capital rules', 86 *Cornell Law Review* (2001) p. 1165 at pp. 1185 and 1202 (implicitly). Placing a greater emphasis (for good reasons) on shareholder protection now is the High Level Group II, *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe of 4 November 2002,* available at: <http://www.europa.eu.int/comm/internal_market/de/company> pp. 78-93; see also Grundmann, op. cit. n. 2, at para. 353 et seq.

[47] Achleitner and Behr, op. cit. n. 38, at p. 14; Grundmann, op. cit. n. 2, at paras. 492-494, 509-511; Hopt, loc. cit. n. 12, at p. 114; P. Joos and M. Lang, 'The effects of accounting diversity: Evidence from the European Union', 32 *Journal of Accounting Research* (1994) p. 141 at p. 144; B. Kremin-Buch, *Internationale Rechnungslegung – Jahresabschluss nach HGB, IAS und US-GAAP – Grundlagen, Vergleich, Fallbeispiele*, 3rd edn. (Wiesbaden, Gabler 2001) p. 1.

[48] A.O. Hirschman, *Exit, Voice and Loyalty* (Cambridge, Mass., Harvard University Press 1970).

[49] For a groundbreaking approach, see R.H. Coase, 'The Theory of the Firm', 4 *Economica* (1937) p. 386. Today, see, for instance, F.H. Easterbrook and D.R. Fischel, *The Economic Structure of Corporate Law*, 2nd edn. (Cambridge, Mass., Harvard University Press 1996) p. 8 et seq.; H. Eidenmüller, loc. cit. n. 30, at p. 1042; O. Hart, *Firms, Contracts, and Financial Structure* (Oxford, Clarendon Press 1997) pp. 6-8, 15-55.

troversion of European company law. It does, however, fit beautifully into a picture of mainly market-driven forces that influence companies and for which uniform framework rules were considered necessary. Unity was quite clearly considered much more important for the external relationship than for relationships within the company. This forms a first answer to the question in the first section regarding where unity is preferable and where diversity is preferable.

5.2 **Entrepreneurs and investors**

There are certainly exceptions where the internal structure of and relationships within the company are at stake. The question is whether they fit into the structure described so far. This concerns mainly the Second Directive (in part), even more so the Third and Sixth Directives and, also in part, the Takeover Directive. This brings us to a second concept, that of entrepreneurs and investors. The important principle of equal treatment of shareholders is contained in the Second Directive. This has been extended to a case which was strongly disputed for a long time, namely equal treatment in takeover situations. The instrument in this case is the mandatory bid contained in the Takeover Directive, which guarantees that the ratio between the investments remains the same even in cases where a control premium is paid. This avoids the dilution of any share.[50] Avoiding dilution is also the core idea of the pre-emption right contained in the Second Directive,[51] which concerns the second important structural change in which this risk exists. Furthermore, in the Third and Sixth Directives and the

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[50] For more details on the function and the economics of the mandatory bid, see several contributions in K.J. Hopt and E. Wymeersch, eds., *European Takeovers – Law and Practice* (London, Butterworths 1992), including E. Wymeersch, The Mandatory Bid: A Critical View', p. 351 at pp. 356-359; B. Lecourt, *L'influence du droit communautaire sur la constitution des groupements* (Paris, Librairie générale de droit et de jurisprudence 2000) *passim*; Hopt, loc. cit. n. 13, at p. 259; P.L. Davies, 'The Notion of Equality in European Takeover Regulation', in J. Payne, ed., *Takeovers in English and German Law* (Oxford, Hart 2002) p. 9 at p. 23 et seq.; J. Reul, *Die Pflicht zur Gleichbehandlung der Aktionäre bei privaten Kontrolltransaktionen – eine juristische und ökonomische Analyse* (Tübingen, Mohr 1991) p. 188 et seq., in particular pp. 238-250; H. Krause, *Das obligatorische Übernahmeangebot – eine juristische und ökonomische Analyse* (Baden-Baden, Nomos 1996). Today, the mandatory bid is also seen positively by most authors in law and economics. See also S.A. Ravid and M. Spiegel, 'Toehold Strategies, Takeover Laws and Rival Bidders', 23 *Journal of Banking & Finance* (1999) p. 1219 at. p. 1237 *et passim*. *Contra*, for instance, C. Bergstrom, P. Hogfeldt, J.R. Macey and P. Samuelsson, 'The Regulation of Corporate Acquisitions – A Law and Economics Analysis of European Proposals for Reform', *Columbia Business Law Review* (1995) p. 495 at pp. 516-519. See also L.A. Bebchuk, 'Efficient and Inefficient Sales of Corporate Control', 109 *Quarterly Journal of Economics* (1994) p. 957 (seeing a high probability that the rule filters good and bad takeovers).

[51] See, for instance, High Level Group II, *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe of 4 November 2002*, available at: <http://www.europa.eu.int/comm/internal_market/de/company> p. 90 et seq.; E.A.

Takeover Directive, a second core issue is dealt with, namely that whenever the framework changes, as in all cases of structural change, the shareholders should at least collectively have the final say (see n. 42 et seq.). The same idea applies to the competence of the shareholder meeting in cases of capital increases or decreases, that is to say, whenever the capital changes. While the European Company Statute does not fix competences in many respects, it does so in the case of charter amendment, again prescribing a resolution by the shareholder meeting (Art. 59(1) of the Statute).

The two core rules concerning the internal relationships are thus that the ratio between the different shares is guaranteed (no unilateral change of the 'investment agreement' between the shareholders) and that the shareholders collectively decide on any important change or, more specifically, any change which concerns the framework. These rules can – and should – be seen as the 'constitutional rights' which are guaranteed to any shareholder throughout Europe, even if he invests across borders. All core rules in the four Directives – the Second, Third and Sixth Directive and the Takeover Directive – have been listed in this enumeration. In this context, one oft-criticised structural decision taken by the European legislature seems plausible, and in fact much more logical, than the alternative solution. This is the fact that the four Directives are exceptional in that they substantially deal with internal relationships and not (almost) exclusively with third-party relationships (although the third-party relationship is also present in these four Directives, see both *supra* and *infra*). These four Directives apply only to the public limited company, not to the private limited company, and this is precisely what has been criticised.[52]

Indeed, to those authors who see the Second Directive as mainly oriented towards creditor protection (see n. 46 *supra*), it must seem illogical that the Second Directive applies only to PLCs, when it is limited liability companies that become insolvent more often. If creditor protection is secondary (see also n. 46 *supra*), the picture changes. In the case of the Third and Sixth Directives

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Baldamus, *Reform der Kapitalrichtlinie* (Cologne, Heymann 2002) pp. 200-234. However, the pre-emption right is granted only in the case of capital increases for cash. This does not change the fact that whenever it is granted, the reason is to avoid dilution.

[52] For criticism of some or all of these Directives, see M. Conte and F.F. Maccabruni, 'Analogie e permanenti differenze fra il diritto societario italiano e quelli dei principali paesi del'Unione Europea', 3 *Contratto e Impresa. Europa* (1998) p. 939 at p. 941; J. Dine, 'The Community Company Law Harmonization Programme, 4 *ELR* (1989) p. 322 at p. 324; M. Lutter, 'Das Europäische Unternehmensrecht im 21. Jahrhundert', 29 *ZGR* (2000) p. 1 at pp. 7, 9 et seq.; Habersack, op. cit. n. 2, at para. 50. The first recital of the First Directive still stressed more generally that limited companies (including private limited companies) typically work on a more international basis. See also E. Wymeersch, 'Company Law in Europe and European Company Law', Financial Law Institute Working Paper Series 2001/06 (2001) pp. 5-7. British authors often rather stress the choices thus created. See, for instance, Edwards, loc. cit. n. 2, at p. 12. See also the explanation in Grundmann, op. cit. n. 2, at paras. 14, 75, 1300-1303.

and the Takeover Directive, shareholder protection is seen as the most important orientation.[53] The question is whether this makes the restriction of these acts to PLCs more plausible. The core difference, if the question is seen from a European integration perspective, is not so much that the law on PLCs is often mandatory and the law on limited liability companies is not (the United Kingdom does not make this distinction),[54] nor that the structure of the board differs (this need not be the case even in Germany),[55] nor that capital protection is a characteristic only of PLCs (this is true at the EC level, but not in most national laws on the continent).[56] The only criterion which really distinguishes both types of companies in all countries, and which seems to be important to the European legislature, is the following. Only a PLC may raise its (stock) capital from the public at large, by means of public offerings. A limited liability company may not. Either there is a direct prohibition on the limited liability company, or it may only have a restricted number of shareholders, or the transfer of the shares is restricted (e.g. it requires authentication by a public notary and thus the shares cannot be traded on capital markets).

If the PLC is the only instrument which can be used for mass investment, then only this type of company has an intensive relationship with the internal

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[53] See differences in wording in the fourth, sixth and also eighth recitals of the Third Directive (of which, in turn, the Sixth Directive is only a variation). For criticism with respect to the low intensity of creditor protection, see, for instance, P. Farmery, 'Removing Legal Obstacles to Cross Border Mergers: EEC Proposal for a Tenth Directive', *Bus. L. Rev.* (1987) p. 35 at p. 35. On the other hand, see J. Heenen, 'La Directive sur les Fusions Internes', *CDE* (1981) p. 15 at p. 21 (precise rule). The Takeover Directive does not mention creditor protection anyway.

[54] Section 8(2) of the Companies Act; R.R. Pennington, *Pennington's Company* Law, 8th edn. (London, Butterworths 2001) p. 30; C.-H. Witt, 'Das Informationsrecht des Aktionärs und seine Durchsetzung in den USA, Großbritannien und Frankreich – funktionale Gesamtbetrachtung im Vergleich zum deutschen Recht', 45 *Aktiengesellschaft* (2000) p. 257 at p. 263. See also the broad comparative law survey in M. Lutter and H. Wiedemann, eds., *Gestaltungsfreiheit im Gesellschaftsrecht* (Berlin, De Gruyter 1998).

[55] In Germany, the two-tier board – with a supervisory board alongside the managing board – is mandatory for PLCs (Section 95 et seq., in conjunction with Section 23(5)(1), of the *Aktiengesetz*). A similar situation applies in a private limited company when it is subject to codetermination (Sections 1(1)(1) and 7 of the Codetermination Law). For a short comparative law survey, see, for instance, E. Wymeersch, 'A Status Report on Corporate Governance Rules and Practices in Some Continental European States', in K.J. Hopt, H. Kanda, M. Roe, E. Wymeersch and S. Prigge, eds., *Comparative Corporate Governance – The State of the Art and Emerging Research* (Oxford, Clarendon Press 1998) p. 1045 at pp. 1034-1040; also Grundmann, op. cit. n. 2, at paras. 412, 418-422.

[56] Rules on capital protection apply in a rather similar way to the limited liability company. See M. Lutter, 'Limited Liability Companies and Private Companies', in D.F. Vagts, ed., *Business and Private Organizations, Vol. XIII of the International Encyclopedia of Comparative Law* (Dordrecht, Nijhoff/Tübingen, Mohr Siebeck 1998) pp. 33-52 and 150-160; ibid., 'Die Entwicklung der GmbH in Europa und in der Welt', in *Festschrift für 100 Jahre GmbHG-Gesetz* (Cologne, Otto Schmidt 1992) p. 49 at p. 64 et seq.

market. Entrepreneurial investment requires careful consideration of the charter and therefore also of the applicable law. Mass investment under different laws, which is merely returns-oriented, is possible only in the PLC. Therefore, the core problem created by diversity, namely the difficulty in gathering and considering information on a wide range of different solutions, arises only here. Harmonising the law on the organisation of the PLC is of real relevance for the internal market. Harmonising the law on the organisation of the limited liability company is not, because the decision on entry into the organisation is taken on an individual basis. One further point is that, in spite of this characteristic, the organisation of the PLC is by no means fully harmonised, but only with respect to the 'constitutional rights' of the investors (see already above). In other words, investors who do not act professionally or as entrepreneurs should have constitutional rights. This should help them build enough confidence to follow the decisions taken by professional and entrepreneurial investors (see n. 30 *supra*). Only then can they be sure that all consequences are carried equally by all investors and that no one derives additional gains. Equal treatment in all situations is thus seen as the core condition for the functioning of the information model in which professional and entrepreneurial investors can gather all material information, even complex and extensive, and other investors can profit by following.

Extroversion, safeguarding shareholders' constitutional rights in all Member States and thus encouraging cross-border investment all culminate in a third pair of concepts, which can be described as a market orientation in European company law.

5.3 **Firm and market**

The third pair of concepts is about firms (organisation) and markets or, more precisely, capital markets. Of all the textbooks on European company law, only one English textbook also includes capital markets.[57] This is understandable. Not only does England have the largest stock exchange (London Stock Exchange) and capital market, but it also has by far the highest degree of (capital) market capitalisation of companies – five times higher than, for instance, German companies if compared with output in terms of gross income.[58] The question concerning the structure of European company law is thus whether capital

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[57] Edwards, op. cit. n. 2, at pp. 228-332. However, see also Lutter, op. cit. n. 2, at pp. 528-650; and now also Grundmann, op. cit. n. 2, at paras. 19-24.

[58] On the size of the stock exchanges, see Deutsches Aktieninstitut, *DAI Factbook 2001 – Statistiken, Analysen und Graphiken zu Aktionären, Aktiengesellschaften und Börsen* (Frankfurt, Deutsches Aktieninstitut 2003) p. 5-01. In 2003, the three largest were London ($2,164.7 billion), Euronext ($1,889.5 billion) and Frankfurt ($1,071 billion). For market capitalisation, see Wymeersch, loc. cit. n. 55, at pp. 1155-1157 (with a similar ranking).

market law should be seen as an integral part of it. This is certainly my view, for several reasons.

For lawyers, the first reason should be decisive, and this is (1) that all Capital Market Directives (except for the Investment Services and the Market Abuse Directives for secondary markets) are also based on Article 44(2)(g) EC. The European legislature apparently intended to enact 'safeguards ... for the protection of the interests of members and others', mainly creditors. The European legislature indeed planned (2) to enact the Stock Exchange Directive as the Sixth Company Law Directive[59] and in recent years has seen capital markets and more intensive harmonisation of company structure as an inseparable unit.[60] There are, moreover, important structural arguments. The core importance (3) of capital and the raising of capital for limited liability companies is evident – in many languages they are even called 'capital companies'. Whenever the general public thinks about these companies or hears about them on TV or in the press, it is in one respect, namely the performance of these companies on capital markets. Can a company law discussion really exclude the core parameter of public perception in the perception of thousands upon thousands of shareholders?

Moreover, the limited liability company which raises capital on capital markets has today developed (4) into a separate type of company – at least in European company law, because it clearly follows distinct rules – a separate type which is by no means marginal, such as certain types of partnerships falling under European company law in certain instances. There are clearly different rules for PLCs raising (stock) capital on financial markets and those not doing so. Today, there is no longer just the distinction between private and public limited companies; there is the private limited company, the public limited company without capital market orientation and the public limited company with capital market orientation. In accounting law, the centrepiece of European company law, the IAS Regulation in particular has clearly established the most important distinction as the one between (groups of) companies with capital market orientation and those without, as opposed to a distinction between different types of companies (see n. 38 *supra*). In addition, the Takeover Directive, which was known for a long time as the Thirteenth Directive and is certainly another centrepiece of harmonisation (see n. 2 *supra*), applies only to companies raising (stock) capital in (regulated) capital markets. The Directives which

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[59] Proposal of 5 October 1972 for a Council Directive coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, *OJ* 1972 C 131/61 (in the other official languages).

[60] See Communication from the European Commission, 'Implementing the framework for financial markets: action plan', 11 May 1999, COM (1999) 232 final; Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001, Annex 5, pp. 12, 20 et seq. (Lamfalussy report) available at: <europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf>.

distinguish between the PLC and the limited liability company somehow appear second rate when compared with those Directives distinguishing between companies according to capital market orientation. No expert on European company law would probably say that capital protection and mergers have the same appeal and importance for European company law as accounting law and takeover law have.

Both these areas are significant for capital market law in still further respects. The parallels between accounting law and capital market law are so evident that (5) the latter almost appears to be an extension of the former.[61] The Takeover Directive is also important in that (6) it clearly shows that, even in relation to the core question of organisation, that is to say, in relation to the question of corporate governance, capital markets and capital market law is of the utmost importance. In large companies today, it is commonly believed that shareholders influence management behaviour primarily by purchase and sale.[62] The antagonism between shareholder and management is a focus, if not the focus, of limited liability company law, at least for the PLC. If the groundbreaking distinction made by Hirschman between 'voice' and 'exit' (see n. 48 *supra*) – between influencing the decisions by voting and by leaving the company – is really taken seriously, then to exclude capital markets and capital market law means excluding one of the two alternatives. This alternative gives the shareholder an even more individual choice. Finally, the intensity of harmonisation (7) should be borne in mind. It would be paradoxical indeed to disregard that part of legislation enacted under Article 44(2)(g) EC which is most intensively European, namely European capital market law (financing). Company law in the traditional sense (organisation) is much less intensively harmonised, even less so with regard to the internal organisation of companies.

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[61] Very convincing in this regard is Mülbert, loc. cit. n. 40, at p. 2086; also W.F. Ebke, 'The Impact of Transparency Regulation on Company Law', in K.J. Hopt and E. Wymeersch, eds., *Capital Markets and Company Law* (Oxford, Oxford University Press 2003) p. 173 at p. 190 et seq.

[62] See, for instance, E. Wymeersch, 'Factors and Trends of Change in Company Law', 2 *International and Comparative Company Law Review* (2000) p. 481 at p. 484 et seq. There is a host of literature on corporate governance, see, for instance, K.J. Hopt, H. Kanda, M. Roe, E. Wymeersch and S. Prigge, eds., *Comparative Corporate Governance – The State of the Art and Emerging Research* (Oxford, Clarendon Press 1998); K. Keasy, S. Thompson and M. Wright, eds., *Corporate Governance*, 4 vols. (Oxford, Oxford University Press 1997); P. Hommelhoff, M. Lutter, K. Schmidt, W. Schön and P. Ulmer, eds., *Corporate Governance (Symposium ZHR/ZGR)* (Heidelberg, Verlag Recht und Wirtschaft 2002); J.A. McCahery, P.W. Moerland, M.J.G.C. Raaijmakers and L. Renneboog, eds., *Corporate Governance Regimes – Convergence and Diversity* (Oxford, Oxford University Press 2002); J. Tirole, 'Corporate Governance', 69 *Econometrica* (2001) p. 1; R. Trigo Trinidade, 'Corporate Governance – La responsabilité des conseils d'administration dans les sociétés', 8 *ERPL/REDC* (2000) p. 281 (all with further references).

If company law is about collaboration between persons, the shareholders' perspective is certainly paramount. They have two ways in which they can react to behaviour by the management ('the company') – via resolutions in the shareholders meeting (including the nomination of the board) and via exit (exercising influence through stock prices) -which both have repercussions for board members. To consider large companies without considering capital markets changes their character, making them like a fish out of water. It is therefore a typically continental European – and in particular German – way of thinking to perceive European company law as being in crisis (or to have done so in 1996). If capital markets are considered as well, the picture is different. This is because, in the 1970s and early 1980s, in parallel to a fairly intensive harmonisation of company organisation, there was (some) harmonisation of stock exchanges: first the Stock Exchange Admission Directive in 1979 and then the Stock Exchange Prospectus Directive in 1980. All these legal measures organised the classical institutions, both the organisation of the firm and stock exchanges. In the second phase, however, the perspective with respect to corporate finance was broadened, with company organisation remaining in the background (and some important projects did not come to fruition for political reasons). During this period – the late 1980s and early 1990s – the duty to issue a prospectus was extended to all capital markets (in the case of public offerings). Moreover, through secondary market law, mainly the Investment Services Directive, capital market law was strengthened to reach all investors, even those who do not read prospectuses (see n. 41 *supra*). It was at this time that the Takeover Directive was drafted, although it was only adopted a few months ago. The Takeover Directive creates a closer link between organisation and capital markets than any previous act. Although there may have been a crisis in the law on company organisation at the EC level, there has never been a crisis in European company law as a whole. It is just that the emphasis shifted for a while.

6. From crisis to boom

The word crisis should not end these considerations. The last five years have been golden years for all aspects of European company law.[63] All the major sub-areas of European company law have evolved: they are now more intense, larger and more optimistic. The following developments are worth mentioning, but cannot be detailed in this paper, which deals mainly with the issue of structure. As pillars of European company law, each of them is worthy of a separate

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[63] On the changes relating to mobility, for example, see S. Grundmann, 'Die Mobilität der Kapitalgesellschaften – the Golden Five', *Festschrift für Raiser* (2004, forthcoming).

essay of its own.[64] Following the publication of the current textbooks on European company law – Edwards (1999), Habersack (1999, now 2003) and Schwarz (2000) – one is confronted with the following developments:

1) The entire area of accounting law, which is probably the core area of European company law (see n. 13 *supra*), has a completely new foundation. As of 2005, accounting law will finally be truly uniform, much more modern and oriented towards international trends, especially for groups that are financed on capital markets. This new law of accounting is also open to all other players (if the Member State whose laws apply gives them this choice).
2) The corpus of capital market law measures has been completely reformed. All the Stock Exchange Directives have been consolidated into one Stock Exchange Directive, and all rules on prospectuses into one General Prospectus Directive. Similarly, EC law on secondary markets is completely new, with the Insider Dealing Directive being extended to a Market Abuse Directive. The Investment Services Directive as the second core piece of legislation was also reformed in 2004.
3) The most important lacuna in European company law is probably the absence of instruments for cross-border restructuring (mobility of companies as a whole is still not a reality). In this respect, the four decisions of the ECJ in *Centros*, *Golden Shares*, *Überseering* and *Inspire Art* have at least made it much more likely that such transactions will soon be possible and, if understood correctly, probably even more: that no national rule may be applied which makes cross-border mergers or transfers of seat more expensive than the equivalent in national law, unless it can be justified by mandatory reasons of public good (and few reasons have been accepted as such) and that national rules which deal with the nationality of the company are accepted without scrutiny. This no longer applies to any negative consequences of withdrawing the nationality of a company, for instance the dissolution of the company. Indeed, there is now a new proposal for the harmonisation of the international merger (see n. 2 *supra*).
4) With the adoption of the European Company, three goals have been achieved: (i) there is a type of company which is European in style and is reasonably well designed for large enterprises; (ii) in principle, cross-border transfers of seat and mergers within the European Company are no longer problematic; and (iii) there is now a model for solving the problems of codetermination, which had previously frustrated so many projects for cross-border mobility of the company as a whole. This should help to overcome similar problems in other pending cross-border mobility projects, particularly in the light of the new proposal for the harmonisation of the international merger.

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[64] For more detail, see Grundmann, op. cit. n. 2.

5) Finally, even though only a diluted version of the Takeover Directive was adopted, the core area of organisation is now for the first time closely linked to the core area of capital market law.

In conclusion, there has been fundamental change over the last three to five years in the fundamental freedoms, in the area most intensively harmonised (i.e. capital market law), in the core area of traditional European company law (i.e. the law of accounting) and in the range of supranational types of companies – everywhere in fact – which has led to developments which redefine the core of each of these areas. In addition, the European Insolvency Proceedings Regulation now deals with the most important reason for dissolution, the First Directive has been changed, other changes have been proposed and even a truly European corporate tax law now seems possible. European company law is experiencing almost more than a boom. It is a company law for integrated markets, with a clear and distinct structure.