"An Ever Closer Union" in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the *Societas Europaea*

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"AN EVER CLOSER UNION"* IN
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EUROPAEA

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I. INTRODUCTION

Upper and lower legal levels interact in both the United
States and Europe in the field of corporate law. In the U.S., a
dynamic exists between the federal government and the states.
While the U.S. Congress has tacitly delegated corporate law to
state legislation, the Commerce Clause of the Constitution
continues to authorize the federal government to act.1 During its
periodic entrances into the field, the federal government has
preempted the laws of individual states.2 In Europe, a similar

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* Treaty Establishing the European Community, Preamble, Mar. 25, 1957, 298
U.N.T.S. 15.
† The author wishes to thank Simon Deakin, Professor of Law at the University
of Cambridge; the ESRC Centre for Business Research, University of Cambridge;
Denis Galligan, Professor of Socio-Legal Studies and Director of the Centre for Socio-
Legal Studies, University of Oxford; the UK Fulbright Commission; the Max Planck
Institute for Foreign and International Private Law, Hamburg, Germany; Paul
Davies, Allen & Overy Professor of Corporate Law, University of Oxford; and
Katharina Pistor, Michael I. Sovern Professor of Law, Columbia Law School.
1 See U.S. CONST. art. I, § 8, cl. 3; see, e.g., William W. Bratton & Joseph A.
McCahey, The Equilibrium Content of Corporate Federalism, 41 WAKE FOREST L.
REV. 619, 624 (2006) (“The pattern of restraint does not follow from a constitutional
mandate . . . .”); see also Stephen M. Bainbridge, The Creeping Federalization of
Corporate Law, REGULATION, Spring 2003, at 26 (“The question of who gets to
regulate public corporations thus is not one of constitutional law but rather of
prudence and federalism.”).
amended at 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2006)); Foreign Corrupt Practices
15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78dd-3, 78ff (2006)). This has led to calls for
new models of federalism, in which the state and federal levels would explicitly
dynamic operates between the European Union ("EU") and its Member States; the attempts by the EU to develop a legal apparatus, split between regional and national levels, parallel the division of federal and state responsibilities in the U.S. The EU, however, has had to act in a more measured style: Beginning with its earliest directives and continuing through its recent, framework initiatives, Europe has reserved to its Member States significantly more discretion to tailor regional goals to local environments.

The U.S. has refined its legal approach to corporate identity, based on shared values and integrated legislative, judicial, and political systems among the states over the last two hundred years. Two legal precedents have supported the operations of national business: Paul v. Virginia, a nineteenth century U.S. Supreme Court case, established that states may not burden out-of-state companies with additional regulations; and Dormant Commerce Clause jurisprudence outlawed state legislation that discriminated against companies from other states.

Companies in Europe, however, have not, until recently, been able to merge internationally or reincorporate in a different country. The European Member States demonstrate a wide variation in attitudes towards labor rights, shareholder interact, especially in reaction to the "dualistic" view of federalism espoused by the Rehnquist Court in its preemption caselaw. See also Robert Schapiro, Toward a Theory of Interactive Federalism, 91 IOWA L. REV. 243 (2005).

3 "Regional," for this purpose, refers simply to the European level and not to specific "regions" of Europe, such as the "Benelux region."

4 See Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340), art. 249, para. 3 (noting that [a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods).

5 75 U.S. 168 (1868).

6 See U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce . . . among the several States").


protections, corporate taxation, and other legal areas, making the
task of integration confronting Europe far greater than in the
U.S.9

Significant changes are taking place in Europe, however. The European Union has recently implemented a transnational, pan-European form for corporate law, the Societas Europaea ("SE").10 With the SE, the EU has attempted to craft a corporate identity out of separate systems, in order to enable European companies to operate more seamlessly across the region.11 While the initial purpose of the SE was to provide a complete set of European corporate law rules, political differences made doing so impossible.12 A framework structure, containing numerous references to national law, replaced the concept of a single set of harmonized rules.13 Effectively, thirty distinct types of SEs have

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A comparison between the corporate laws in the US and in the EU shows that the diversity between European corporate laws is much larger than between the corporate laws of the federal states in the US. Whereas it was shown that in Europe the national corporate laws belong to several different legal paradigms, the corporate laws in the US have, despite important differences, so many central features in common that it is reasonable to characterise the US corporate laws as being based upon the same legal paradigm.


By and large, the cultural and institutional differences among our several States as they joined the Federal union were, though distinct, nowhere near as great as those of the nations making up the European Community. A common language was shared. The institutions of commerce were evolving and were in no sense as mature and developed as the business organizations of the present European Community members.

Id.


11 See, e.g., Vanessa Edwards, The European Company—Essential Tool or Eviscerated Dream?, 40 COMMON MKT. L. REV. 443, 443–50 (2003) (“Given the apparently intractable political differences concerning worker involvement which had dogged the proposed legislation, it is perhaps remarkable that agreement ultimately proved possible.”).

12 See SE Regulation, supra note 10, pmbl. 1–7.

13 See, e.g., Frits Bolkestein, Member of the European Comm’n in Charge of the Internal Mkt. and Taxation, Address at the University of Leiden: The New European Company: Opportunity in
resulted, with a supplementary negotiation process for establishing employee representation on company boards. The result has raised concerns that rather than integrating European commercial markets, the SE will instead introduce regulatory competition and dilute national social protections.

The current efforts of the EU to reconcile multiple national regimes into a regional construct have significance for the U.S. Not only do they affect global business and therefore concern American companies, but an understanding of how regional dynamics are evolving in Europe provides a better sense of how legal regimes might evolve in the U.S. Although the two systems are unlikely to mimic each other exactly and the final form of initiatives in Europe remains far from clear, the spirit of how the dynamics in Europe are developing has relevance to the U.S., particularly as the U.S. begins to devise new systems for regulating activities that cross international boundaries.

Diversity (Nov. 29, 2002) (The “initial idea and the tangible achievement we have today, namely ‘the new European Company,’ are worlds apart.”).

14 There are SEs for each of the twenty-seven EU Member States and for each of the three additional Member States of the European Economic Area: Iceland, Lichtenstein, and Norway. TAVARES & BILREIRO, supra note 8, at 18.

15 See Charles M. Tiebout, A Pure Theory of Local Expenditure, 64 J. POL. ECON. 416, 416 (1956) (describing the theory of regulatory competition). According to Catherine Barnard and Simon Deakin,

[T]he mechanism through which competition operates is mobility of persons and resources across jurisdictional boundaries. In [Tiebout’s] ‘pure theory’ of fiscal federalism, local authorities compete to attract residents by offering packages of services in return for levying taxes at differential rates. Consumers with homogenous wants then ‘cluster’ in particular localities. The effect is to match local preferences to particular levels of service provision, thereby maximising the satisfaction of wants while maintaining diversity and promoting information flows between jurisdictions.


16 The first paper dealing with this idea was Luca Enriques, Silence Is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage, 4 J. CORP. L.S. 77, 77 (2004).

17 Another line of scholarship has suggested that companies choose the SE over other national corporate forms, in order to mitigate the requirements of mandatory codetermination. See generally Horst Eidenmüller, Andreas Engert & Lars Hornuf, Die Societas Europaea: Empirische Bestandsaufnahme und Entwicklungs linien einer neuen Rechtsform, 53 AG 721 (2008).
A comprehensive, empirical analysis of the reasons that companies incorporate as SEs has not been conducted until now. While so far the number of companies that have changed their status from national to pan-European has been relatively modest, the group includes leading corporations in sensitive sectors, such as financial services and insurance.

This comparative study of the SE is intended to decipher the mechanisms and processes by which the legislation has triggered the development of a more integrated European market, on the one hand, and guarded against an increase in regulatory arbitrage (both inter- and intra-state), on the other. It is based on extensive in-person interviews with corporate decisionmakers, union leaders, legal advisors, and policymakers in several Member States and at EU headquarters.

The Article begins with an exploration of the approach the SE takes to integration and its roots in EU politics. After describing the methodology, it then presents a series of case studies derived from the interviews, highlighting information gathered in conversations with representatives from companies that have converted to the SE as well as from those that have not.

The data from the interviews suggest that although the EU could not prescribe regional-level rules from the outset, the preferences of companies considering the new form are now stimulating increased convergence of corporate law in Europe. Companies that convert to the SE in order to streamline their multinational operations and reduce their compliance obligations promote the harmonization of additional areas of law and the development of more regionalized regulation. Several features of the SE legislation restrict companies from using the form for inter-state arbitrage. Consequently, it has introduced only

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20 In theoretical studies, Luca Enríques and others predicted that SE would cause regulatory competition in Europe. Enríques, supra note 16, at 79; Marios Bouloukos, The European Company (SE) as a Vehicle for Corporate Mobility Within the EU: A Breakthrough in European Corporate Law, 18 EUR. BUS. L. REV. 535, 549–
minimal regulatory competition to Europe. Member States that undertake to attract reincorporating companies, however, have offered them progressively similar terms, decreasing legal diversity. While the SE has not appeared to threaten employee representation on company boards, mandated in several Member States including Germany, it has contributed to a reduction and diversification in the number and nationality of the employee representatives serving on them, bringing the Member States into closer alignment on the issue and fueling more regionalized labor organization. It will become increasingly important to evaluate the need for safeguards for other constituencies, who do not have power over corporate decisions.

The tensions between state and federal, national and regional, play out with specificity in the corporate law arena, instead of remaining a pure policy debate. Companies must continue to operate, experiencing their own economic cycles as the political context changes. If companies demonstrate that increased federalization is beneficial for profit generation and for other stakeholders, they offer support for the idea of the European Union and the goal of regionalization more generally. While regional consolidation reduces transaction costs for companies, it may come at the expense of social welfare more broadly. The development of innovative approaches for


21 Horst Eidenmüller and others have noted that the SE creates opportunities for arbitrage within individual Member States, as regards their board structures, in addition to the potential for arbitrage among Member States. Eidenmüller, Engert, and Hornuf posed fourteen questions to SE companies in Germany during twenty-minute telephone surveys and found strong evidence that firms use the SE to mitigate the effects of mandatory codetermination. Horst Eidenmüller, Andreas Engert & Lars Hornuf, Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage, 10 Eur. Bus. Org. L. Rev. 1, 13–14 (2009); see also Paul L. Davies, Workers on the Board of the European Company?, 32 Industrial L. J. 75, 75 (2003).

22 See, e.g., Mark J. Roe, Delaware’s Competition, 117 Harv. L. Rev. 588, 635 (2004) (describing the federal government’s potential to be a “good influence—because it’s the custodian of the American economy”—or a “pernicious influence—
organizing areas split between regional and local spheres and divided by borders appears to present a key challenge for modern governance in all parts of the world. “Old America” and the “new Europe” may have much on which they can work together.

II. Methodology

This Article is based on data I gathered in seventy-five interviews, with general counsels, chief financial officers, and other legal advisors at one half of the active SEs. The companies I included have headquarters in Austria, Belgium, China, Cyprus, Estonia, France, Finland, Germany, Luxembourg, Norway, the United Kingdom, and Sweden, and comprise the biotechnology, chemical, electronic, financial service, insurance, medical equipment, metal, oil, paper, real estate, and reinsurance industries.

For context, I also interviewed legal academics, representatives to the European Commission, company lawyers, labor advocates, journalists, and policy analysts at European think tanks and nongovernmental organizations. Directors and officers of companies that considered SE conversions but decided against them in Bermuda, the Czech Republic, Germany, Hungary, Ireland, the Netherlands, Norway, the United Kingdom, Sweden, and Switzerland offered additional viewpoints.

The resulting case study evidence of how European companies perceive the SE sheds light on their decisionmaking and the mechanisms through which EU legislation can advance a single commercial Europe or introduce cross-border or within-country arbitrage. Alternative methods to conducting fieldwork in multiple jurisdictions would not achieve this. Quantitative because it’s susceptible to error and interest group influence” and, due to its over-arching position, can impose inefficient corporate rules).


24 The figure is as of August, 2008, when the Article entered the editing process. By that date, 112 total SEs had been established, with 36 actually conducting operations. The remainder exist legally but do not conduct business or employ any workers.

25 The interviews were not intended as a random sample but as a means for collecting firsthand accounts with which to understand the dynamics driving corporate decisionmaking. See ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 12 (4th ed. 2009); Kathleen M. Eisenhardt, Building Theories from Case Study Research, 14 ACAD. OF MGMT. REV. 532, 534 (1989).
studies are hindered by the wide variation in: (1) the number of SE companies in different Member States; (2) the number of companies in each Member State eligible to transform to the SE; and (3) the number of companies in each Member State that operate transnationally and would benefit from conversion to the SE. The existence of nonoperational SEs also complicates meaningful quantitative analysis, and the SE’s recent implementation precludes gathering time series evidence in order to demonstrate causation. Furthermore, because all of the Member States have transcribed the SE legislation, no control variable exists. The in-depth interviews also reveal disparities between companies’ intentions in converting and the legal obstacles they have encountered in following through: While companies may report an interest in moving or recalibrating their boards, investigating the legal mechanisms required can expose sufficient unexpected costs and obstacles to dissuade them.

III. HISTORY AND CONTEXT

Before exploring how companies in Europe are using the SE, it is first necessary to understand the history and context of the development of the legislation. The institutional structure of the EU, the general legal environment in which European companies operate, and the compromises necessary to attain consensus on the SE legislation demonstrate parallel trends towards more free competition among the Member States. A liberalizing evolution can be documented in each area.

A. Institutional Background

While the U.S. and the EU both represent sovereign entities that have delegated specific responsibilities to a central authority, the EU differs greatly from the U.S. in the circumstances surrounding its inception and the form into which

26 See Landau, supra note 9, at 31.
Superficially at least there are some obvious similarities. The United States began with a number of separate, highly autonomous and proudly parochial colonies and then States, which united together for the common good with great misgivings and strong desires to preserve prerogatives, distinctions and independence. Their union was one driven by mutual economic, commercial and military needs.

Id.
it has evolved.\textsuperscript{27} The EU developed for economic reasons. Its most significant achievements have occurred in the field of business law,\textsuperscript{28} and its supranational structure chiefly reflects the completion of a series of incremental steps towards the creation of a single commercial market.\textsuperscript{29}

The EU was formed in the wake of the Second World War, and at the early stages of the developing Cold War between the U.S. and the Soviet Union.\textsuperscript{30} Its establishment was primarily intended to advance the economic goal of rebuilding and reintegrating the German economy while addressing fresh memories of German initiatives in two major world conflicts.\textsuperscript{31} In 1951, France, Germany, Italy, Belgium, the Netherlands, and Luxembourg signed a treaty creating the European Coal and Steel Community, which placed the industries under a supranational authority and created a common market for

\textsuperscript{27} See Steve J. Boom, \textit{The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?"}, 43 \textit{Am. J. Comp. L.} 177, 208 (1995) (stating that the U.S. Constitution opens with the line "We the people," while the Treaty of Maastricht "opens with 'His Majesty the King of the Belgians; Her Majesty the Queen of Denmark; The President of the Federal Republic of Germany . . . ', leaving no room for doubt that the parties to the Treaty of Maastricht are the sovereign states of Europe, not the 'people of Europe' " (internal citation omitted)).


\textsuperscript{30} See Eric Stein, \textit{International Integration and Democracy: No Love at First Sight}, 95 \textit{Am. J. Int'l L.} 489, 515 (2001) (discussing the consequences of this particular history).


The end of World War II was a time of heroic plans for institutionalizing inter-state relations so as to bring order into international affairs and thus blot out the danger of another war. Nowhere were these feelings expressed more strongly than in Western Europe, where a federation of European states was considered by many to be the only sound basis upon which to build a lasting peace.

\textit{Id.}
them. At roughly the same time, France proposed a European Defense Community with a single European army, in order to rearm Germany while also constraining its military development within a European context. The proposal was rejected in 1954, however, and future European developments continued along the more narrow path of economic integration.

Each European country therefore retains far greater power to govern than the fifty U.S. states. The EU, for example, holds no responsibility for the provision of social welfare, has no police, and sets no education policy. Because it was founded at a date late in the development of the individual Member States, each has its own attitudes towards integration and correspondingly unique legislative goals.

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France responded to the strategic problems posed by West Germany in a strikingly original manner. On the one hand, she proposed the European Coal and Steel Community (ECSC), a plan to put German heavy industry under joint European control; on the other, she proposed a European army into which the rearmed German troops could be integrated. In this fashion the economic and military recovery of Germany would be placed under European, not to say specifically French, control. In the end, the European Defence Community, which implied a unified European command . . . was rejected by the French National Assembly, while the ECSC was implemented.

Id.

34 Id.
With the failure of the European Defence Community, and its corollary, the European Political Community, Monnet and his supporters turned to economic integration as a third-best vehicle upon which to carry Western Europe along the road to political union. The six foreign ministers of the ECSC members met at Messina in June 1955 and agreed to study a Benelux proposal to create a European common market covering all products.

Id.

35 See Stephen Weatherill, Pre-emption, Harmonisation and the Distribution of Competence To Regulate the Internal Market, in THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES, supra note 15, at 41, 42 (noting that we “must interrogate the dilemma of emerging transnational governance in Europe which assumes the economic viability of constructing a single market against a political background of multiple sources of legislative authority”).


37 See, e.g., Ulrich Haltern, Integration Through Law, in EUROPEAN INTEGRATION THEORY 177, 189 (Thomas Diez & Antje Wiener eds., 2004) (“Citizens
each country’s national system of legal rules and distinct cultural norms has posed challenges to the development of the single market.38

Most corporate EU legislation has been based on specific provisions of the Treaty of Rome.39 Signed by France, Germany, Italy, Belgium, the Netherlands, and Luxembourg in 1957, the Treaty launched the creation of the European Economic Community (“EEC”)40 and explicitly enunciated a commitment to the free movement of goods, services, labor, and capital among the Member States, and the development of common policies for external trade, competition, and agriculture.41 It empowered the Council of Ministers to adopt new Community legislation to “co-ordinat[e] to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms . . . with a view to making such safeguards equivalent throughout the Community.”42 Article 235 authorized the Community to “take the appropriate measures” if “action by the Community should

do not identify with the Union; rather, they feel alienated . . . . The reason may be that the nation, through its myths, provides a social home, a shared history, and a common destination.”); see also Hans Lindahl, European Integration: Popular Sovereignty and a Politics of Boundaries, 6 EUR. L.J. 239, 243–44 (2000).


39 See, e.g., ADRIAN DORRESTEIJN ET AL., EUROPEAN CORPORATE LAW 40 (2d ed. 2009).


41 See id. arts. 137, 145, 155, 164.

The Rome Treaty laid the foundations for economic integration. This was the principal focus of the Treaty, and it was a conscious decision after the failures of the more ambitious attempts at European integration of the mid-1950s. The particular form of economic integration chosen was a common market. It was therefore more ambitious than other, lesser modes of integration.


42 Treaty of Rome, supra note 40, art. 54(3)(g).
prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers.”

European businesses have consistently supported European integration. Faced with the need to operate across multiple national systems with different and sometimes conflicting rules, they showed interest in a European-level company, independent of the laws of the individual Member States, even before the formation of the European Community. The first proposal to create the SE was made as early as 1910. A preliminary draft of the SE statute, in 1966, utilized article 235 of the Treaty of Rome as its foundation.

During the prolonged negotiation process over the SE, and in spite of increasing political ill will towards European initiatives, companies’ belief in the utility of a European corporate form persisted. In a 1985 white paper, Completing the Internal Market, the European Commission urged the adoption of the SE, terming it "essential" for enabling companies to coordinate their

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43 Id. art. 235.
44 See, e.g., Stephan, supra note 29.
46 See Pieter Sanders, Projet d’un Statut des Societes Anonymes Europeennes (Etude Serie Concurrence No. 6, 1967) [hereinafter 1966 Preliminary Draft Statute].
47 The Maastricht Treaty was first rejected in a Danish referendum and then approved by French voters by a margin of just one percent. See RICHARD CORBETT, THE TREATY OF MAASTRICHT: FROM CONCEPTION TO RATIFICATION 65–67 (1993). In addition to launching the transition to the Euro and creating the European Central Bank, see Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191), 31 I.L.M. 253 (1992) [hereinafter Maastricht Treaty], it included a provision on a principle called subsidiarity, whereby the Union may not take action unless it can be more effective than national actors, a policy that has its roots in Catholic social teaching. Id. art. 3b. See generally Denis J. Edwards, Fearing Federalism’s Failure: Subsidiarity in the European Union, 44 AM. J. COMP. L. 537 (1996); Christoph Henkel, The Allocation of Powers in the European Union: A Close Look at the Principle of Subsidiary, 20 BERKELEY J. INT’L L. 359 (2002); A.G Toth, The Principle of Subsidiarity in the Maastricht Treaty, 29 COMMON MKT. L. REV. 1079 (1992). Older Member States resented the cost of helping poorer, Eastern European countries to join the enlarging Union. John D. Donahue & Mark A. Pollack, Centralization and Its Discontents: The Rhythms of Federalism in the United States and the European Union, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION, supra note 36, at 73, 112. Others who had cut their budgets to qualify for the Euro resented participating in regional-level projects. Id. Germany in particular, faced with paying for the reunification of the former East Germany, became less eager to contribute financially to Europe. Id.
operations on a cross-border basis. In 1988, a commission memorandum decried the inability of companies in Europe to merge across national borders, the existence of inconsistent national tax laws that skewed corporate decisionmaking, and the lack of mutual recognition of companies among the European Member States. The memorandum deemed cross-border business activity imperative for successful competition against the U.S. and Japan.

B. Legal Environment

The vision for the European single market has changed over time. The idea of a closed, legally uniform arrangement with no competition among the Member States was eventually overtaken by a line of decisions by the European Court of Justice ("ECJ") that has allowed companies more freedom to choose the national legal system under which they will operate. The new judicial openness towards competition among the Member States has since been reflected in European legislation, including the SE.

Throughout the 1960s, the EEC promulgated a series of corporate law directives chiefly designed to prevent competition among the Member States. France sought to prevent its companies from reincorporating in other countries with more permissive legal regimes. Germany joined with it in promoting a program of top-down harmonization of corporate law to prevent such a “race to the bottom.” The first generation of European directives therefore largely restated the laws that the Member States already held in common, such as minimum capital requirements and rules mandating corporate disclosures.

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48 Commission White Paper on Completing the Internal Market, at 4, 26–27, COM (85) 310 final (June 14, 1985).
49 Internal Market and Cooperation, Statute for the European Company, Commission Memorandum, at 5, COM (88) 320 final (June 8, 1988) [hereinafter 1988 Memorandum].
50 Id.
Almost no competition to attract corporate charters developed in Europe. Most Member States have observed the real seat principle, which states that the laws of the country where a company bases its operations govern all of its activities. The principle has prevented companies from incorporating in countries with more lenient legal regimes if their businesses are focused elsewhere.

A series of judgments of the European Court of Justice, beginning in 1999 with Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, transformed the context within which the integration of European corporate law was occurring. The Centros line of cases seemed to introduce the potential for U.S.-style regulatory competition among the EU Member States, although the ECJ's 2009 decision in Cartesio Oktató és Szolgáltató BT may indicate that the development has now run out.

54 See, e.g., Ronald J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function, 49 AM. J. COMP. L. 329, 350 (2001) (stating that while U.S. law converged on Delaware, the real seat principle kept Europe from regulatory competition and hence from convergence of its company laws).

55 See, e.g., Wymeersch, supra note 8, at 668 (“The 'siege reel' criterion was introduced in France after discussion about French companies emigrating to the legally more clement climate in Belgium in the 19th century.”).


59 Case C-210/06, Cartesio Oktató és Szolgáltató bt, 2008 E.C.R. I-9641 (denying a Hungarian company the right to remain subject to Hungarian law after moving its central headquarters to Italy).
In Centros, two Danish citizens incorporated a company in the UK in order to avoid Denmark's rigorous minimum capitalization requirements. They intended to establish a branch of the company in Denmark, which would carry out its principal business. The Danish commercial registry, in an attempt to uphold the spirit of the national laws, refused to register the branch. The ECJ reversed the decision on free establishment grounds, and many legal commentators assumed that the ECJ had indicated that the real seat principle violated the right to free establishment set out in the Treaty of Rome.

Überseering and Inspire Art, two later cases, seemed to confirm a view of the ECJ that companies may incorporate in any Member State they choose. In Überseering, the ECJ held that it was incompatible with the freedom of establishment for a Member State to deny judicial standing to a company that had moved its administrative headquarters. Überseering had been formed according to Dutch law, but its shareholders and principal office were located in Germany. A German court ruled that German corporate law, not Dutch, applied to the company because of the location of its headquarters and that the Dutch corporate entity had no standing in German court. The ECJ overturned the decision of the German court, holding that a

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60 Id.
61 Id.
62 Id.
65 Note that in Cartesio, the ECJ firmly rejected such speculation, affirming the validity of the real seat theory by denying a Hungarian company the right to remain subject to Hungarian law after moving its central headquarters to Italy. Case C-210/06, Cartesio Oktató és Szolgáltató bt, 2008 E.C.R. I-9641, ¶¶ 119, 124. Under Cartesio, if a company moves its real seat, the Member State where it was originally incorporated may choose not to recognize it as a company of its own nationality. Id.
68 Id.
69 Id.
foreign-incorporated company must be recognized, regardless of the location of its administrative seat.\textsuperscript{70} In \textit{Inspire Art}, the ECJ disallowed rules mandating the application of the laws of the host state to companies registered in other Member States.\textsuperscript{71} A Dutch company incorporated in the UK had registered a branch office in the Netherlands, and the Netherlands had applied Dutch corporate law in accordance with its rules for foreign companies.\textsuperscript{72}

The SE legislation reflects the transformation in the equilibrium that had existed in Europe, in which companies did not move between Member States and generally incorporated where they conducted their primary operations. The legislation has explicitly allowed companies to reincorporate, subject to the requirement that they also move their headquarters,\textsuperscript{73} and its references to national law have introduced a novel potential for Member States to begin competing for corporate charters.\textsuperscript{74}

Subsequent EU legislation has followed the approach of the SE in creating a European framework with references to national law, rather than directly harmonizing the substantive law of the Member States. The Takeover Directive,\textsuperscript{75} for example, allows Member States discretion over the legality of defensive measures against hostile bids.\textsuperscript{76} The European Commission adopted “recommendations” rather than binding directives on directors’ remuneration and the role of nonexecutive and supervisory directors.\textsuperscript{77} In September 2001, the Commission established a High Level Group of Company Law Experts (“High Level Group”) to reform the regulatory framework in which EU corporate law

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10155.

\textsuperscript{72} \textit{See id.}

\textsuperscript{73} SE Regulation, \textit{supra} note 10, art. 7.

\textsuperscript{74} \textit{See id.} arts. 4(3), 13, 15(1), 41(1) para. 1, 51, 52(1)(b), 52(2), 53, 54(1)–(2), 57, 59(1), 61, 62(1)–(2).


\textsuperscript{76} \textit{Id.} at 12 (concerning takeover bids).

operates. The High Level Group expressly disavowed the substantive harmonization of corporate law through directives, stating that their lack of flexibility “petrifies” corporate structures.\footnote{Report of the High Level Group of Experts, A Modern Regulatory Framework for Company Law in Europe 31 (2002).}

C. Framework Form

As Europe turned from the complete harmonization of its corporate law towards permitting more open competition among the Member States, the SE itself evolved in a similar way. Successive drafts of the SE legislation over the course of the forty-year negotiation period\footnote{See Council Regulation 2157/2001, 2001 O.J. (L 294) 1 (EC).} reflect increasing deference to the prerogatives of the Member States, especially in the areas of taxation and social rights.


The final legislation, by contrast, contains only seventy articles.\footnote{See Council Regulation 2157/2001, 2001 O.J. (L 294) 1–18 (EC).} The framework it provides refers to national law sixty-five distinct times.\footnote{SE Regulation, supra note 10, arts. 4(3), 13, 15(1), 47(1), 51, 52(1)–(2), 53, 54(1)–(2), 57, 59(1), 61, 62(1)–(2).}

A significant source of disagreement among the Member States concerned whether the SE legislation should include a European system of taxation, with losses in one Member State
offset against gains in another or whether each country could maintain its own, separate scheme.\textsuperscript{85} The Commission’s first proposal for the SE, in 1970, provided for the uniform taxation of SE companies.\textsuperscript{86} Its next proposal, in 1989,\textsuperscript{87} de-emphasized taxation\textsuperscript{88} but afforded companies new freedoms to offset losses among Member States.\textsuperscript{89} The final SE legislation\textsuperscript{90} does not include any provisions on taxation.\textsuperscript{91}

The European Commission also struggled to craft guidelines for employee representation\textsuperscript{92} on company boards sufficiently liberal to satisfy the Member States that have not mandated it, without antagonizing the Member States committed to its continuation.\textsuperscript{93} Several Member States require specific levels of employee representation for different types of companies of different sizes, while others have no equivalent systems.\textsuperscript{94} The Commission’s first proposed legislation mimicked the most rigorous national requirements for representation: a mandatory two-tier board with employees filling at least one-third of the supervisory board seats.\textsuperscript{95} The Commission’s next proposal, in 1989,\textsuperscript{96} divided the legislation into a regulation and a directive, and relegated provisions for employee representation to the

\textsuperscript{85} Compare Proposal for a Regulation on the Statute for a European Company, at 67, COM (89) 268 final (Aug. 25, 1989), with Amended Proposal for a Council Regulation on the Statute for a European Company, at 31, COM (91) 174 final (May 6, 1991) (stating that for the purpose of taxation, the SE must be made subject to the laws of the State in which it resides).

\textsuperscript{86} See 1970 Draft Statute, supra note 82.


\textsuperscript{89} See 1970 Draft Statute, supra note 82, arts. 278–81, at 220–23; 1975 Draft Statute, supra note 80, arts. 278–81, at 119–21.


\textsuperscript{91} SE Regulation, supra note 10, recital 20.


\textsuperscript{93} Employee involvement has posed a similar obstacle to the adoption of the Fifth Directive and the Cross-Border Merger Directive. See, e.g., Geoffrey Fitchew, Political Choices, in EUROPEAN BUSINESS LAW: LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION 1, 12 (Richard M. Buxbaum et al. eds., 1991).

\textsuperscript{94} INDUSTRIAL RELATIONS IN EUROPE 30 (European Comm’n ed., 2000).

\textsuperscript{95} 1970 Draft Statute, supra note 82, arts. 62, 73, 137.

directive.97 After it failed to draw sufficient support, the Commission established the High Level Group, chaired by former Commission President Etienne Davignon. The High Level Group devised a solution to the deadlock on employee representation by judging the Member States’ attitudes towards representation too diverse for harmonization and outlining a negotiation process, in place of a static set of compromise rules.98 The final directive sets out a compulsory negotiation period between management and employees, with a principle known as “before and after” taking effect when negotiations fail.99 According to the principle, management must guarantee that the same level of representation, if any, will continue after conversion to the SE.100 The directive seemed to assure the Member States that companies with representation would not be able to use the SE to evade it and that companies without representation would not have to offer it to their employees if they converted to the SE.101 In fact, however, because the legislation does not preempt national law,102 companies have converted to the SE in order to substitute its rules for national requirements for employee representation.103


98 1991 O.J. (C 176) 1, COM (91) 174.


100 Id.


A compromise on the SE was finally reached in December 2000. Following negotiations with the European Parliament, the SE came into force on October 8, 2004. As of January 2008, 129 SE corporations have been established, although many of them do not yet conduct operations or employ any workers.

IV. HOW ARE COMPANIES USING THE SE?

Legal commentators, beginning with Luca Enriques, predicted that the SE legislation’s references to national law would combine with the SE’s ability to move to create possibilities for Member States to compete for incorporations. They forecast a new European corporate charter market. Horst Eidenmüller and others noted that the SE Directive also offers opportunities for arbitrage within Member States over employee representation. Companies may choose between the rules of the new form and national requirements for board structures.

My interview data, however, suggest that the SE primarily facilitates within-group restructuring by allowing for legal cross-border mergers. Companies have used SE conversions to absorb their subsidiaries and establish branches, without the legal contortions that had previously been necessary. Branched structures have enabled companies to gain integrated supervision in specific industries.

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104 Presidency Conclusions, Brussels European Council, para. 21 (Oct. 16, 2008).
106 See infra Part III.B.3.
108 Id. art. 8; see also TAVARES & BILREIRO, supra note 8, at 11.
110 See, e.g., Bouloukos, supra note 20, at 549; Stith, supra note 20.
111 SEs may opt for a one-tier or two-tier board and negotiate employee participation, Council Regulation 2157/2001, art. 7, 2001 O.J. (L 294) 4 (EC), with a fall-back position defined by the “before and after principle.” Id. art. 38(b); see also Davies, supra note 21, at 80–81; Eidenmüller, Engert & Hornuf, supra note 21, at 2.
This Article analyzes case studies of how companies are making use of the SE and argues that the patterns of use will ultimately lead to a deeper regionalization of law and regulation in Europe. Companies in industries in which a parent company and its branches are not regulated together have demanded new regional regulatory structures and the harmonization of additional areas of law. While many companies report that the cost of reincorporating and making changes to corporate boards outweighs the benefits to be gained, those that have used the SE to move have reduced distinctions in the laws of the Member States. The few companies that have converted to the SE to adjust the number and nationality of employee representatives on their boards have established new boards more similar to those in countries without employee representation. This Section explores the mechanisms for legal convergence that use of the SE provides, and it describes the aspects of the legislation that constrain companies from employing the form for regulatory competition and internal arbitrage.\(^{112}\)

A. Completing the Single Market?

Companies in specific industries have used the SE to correct a misalignment that has developed between national regulatory oversight and international business activities. Most multinational companies in Europe have continued to report to multiple national supervisors, even as the strategies they pursue and the risks they assume take place on an increasingly regional or global level. Because the SE allows for legal cross-border mergers, it facilitates regional restructuring by enabling companies to replace their subsidiaries with branches. Leading companies in the insurance and reinsurance industries have

converted to the SE and adopted a branched structure, in order to achieve integrated regulation at the level of the parent company.\textsuperscript{113}

As a result, the form appears to be progressing\textsuperscript{114}: In the four years since its introduction,\textsuperscript{115} the number of companies to convert has risen sharply.\textsuperscript{116} Companies in sectors where unified regulation is unachievable, however, have been less likely to adopt the SE. The complete legal environment with which companies interact constrains what they can use the form to accomplish.

\textsuperscript{113} See, e.g., Weatherill, \textit{supra} note 35, at 41.

\textsuperscript{114} According to one company lawyer, eighty-five percent of his time over the last eight months has been spent on SE projects. Interview with Anonymous Source No. 28, location not identified (Feb. 21, 2008) (on file with author).


\textsuperscript{116} See infra Figure 1.
The SE is therefore a nascent but revealing factor that challenges the Member States to cede national authority over corporate law and regulation. While originally they could not agree on a complete system of corporate law, the diverse national systems of the Member States will begin to converge as companies interested in converting to the SE encounter its limitations and demand more legal harmonization and regional regulation.

Questions persist, however, over the normative benefits of convergence, particularly for noncorporate stakeholders. The desirability of bank branching has become central to the debate over how to protect citizens from the consequences of financial crises. Small countries, such as Iceland and Austria, may have difficulty rescuing large, vertically integrated companies that operate transnationally. In the banking sector

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117 EUROPEAN TRADE UNION INSTITUTE, OVERVIEW OF CURRENT STATE OF SE FOUNDING IN EUROPE 3 (2010).

118 Assets in Iceland’s banking sector were eight times its GDP, half of which were non-local. Pelt Tightening: A Country Staggers Back to its Feet, ECONOMIST, July 23, 2009, available at http://www.economist.com/node/14098340.


specifically, political obstacles inhibit the use of taxpayer money to bail out depositors from other countries. Yet streamlining the regulation of cross-border business activities through branching could assist executives and directors of large companies in their monitoring and compliance duties by reducing the number of regulatory interfaces and also their complexity. Gathering information in a single supervisor could also provide a truer, more comprehensive picture of the activities of multinational companies and contribute to more accurate predictions of systemic problems.

1. Within-Group Restructuring

Companies have adopted the SE to reduce their expenses. Prior to the implementation of the Directive on Cross-Border Mergers, the SE provided the only means for companies to complete legal, international mergers. The SE legislation has therefore liberated them from the costly legal contortions that had previously been necessary. It has also enabled them to absorb their subsidiaries and establish branches. Companies that have used the SE to adopt a branched structure for integrated supervision have reported savings of more than €350 million. The SE has enabled them to reduce share price premiums, the cost of complying with reporting requirements, and the amount of regulatory capital they must reserve. The SE has also created a mechanism for companies to move between Member States, which has allowed them to consolidate their operations without losing other privileges. In describing its motivation for creating the SE, the European Commission stated,


122 See TAVARES & BILREIRO, supra note 8, at 21 (“With the sole exception of Italian law, most national laws render cross-border mergers almost impracticable.”).

123 See, e.g., Bouloukos, supra note 20, at 539 n.11 (explaining the complicated methods companies used instead).

124 Interview with Anonymous Source No. 28, location not identified (Feb. 21, 2008) (on file with author).
“it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.”125

a. Cross-Border Mergers

Companies have converted to the SE in order to gain ownership of their subsidiaries using mergers rather than takeovers, at lower cost and risk.

Case 1: Allianz (Germany)

Allianz, the blue chip German insurance and asset management company operating in twenty-nine European countries, became an SE in order to merge with its 55.4%-owned Italian subsidiary, Riunione Adriatica di Sicurtà (“RAS”).126 RAS owned substantial holdings in four subsidiaries of Allianz located in Switzerland, Austria, Portugal, and Spain. Absorbing RAS conferred nearly complete ownership of the subsidiaries, simplifying Allianz’s structure.127

126 Interview with Anonymous Source No. 21, location not identified (Jan. 21, 2008) (on file with author).
127 See infra Figure 2.
Although conversion to the SE took more than one year, it formed a necessary step in the absorption of RAS by Allianz. Without the capacity to complete a cross-border merger, Allianz could only have acquired RAS through a takeover bid. While a merger requires the approval of two-thirds of a target’s shareholders, a takeover bid requires the cash acquisition of nearly all of the target’s shares in order to trigger a squeeze-out.
process. National law proscribes the squeeze-out threshold; in Italy the threshold is ninety-eight percent. Observers say that hold-out shareholders would have prevented Allianz from buying enough shares in RAS to complete a takeover.

b. Creation of Branched Structures

Other companies have used the SE to merge with their international subsidiaries and replace them with branches. While subsidiaries must report individually to their national regulators, branches in some sectors may report jointly to the national regulators of their parent companies. The streamlined supervision that results reduces compliance costs and eliminates conflicting obligations.

Case 2: Scor (France)

Scor, the French reinsurance company, created three SEs in order to take advantage of the 2005 EU Reinsurance Directives, which offer combined supervision to reinsurance


132 See Interview with Anonymous Source No. 3; Interview with Anonymous Source No. 4; Interview with Anonymous Source No. 5; Interview with Anonymous Source No. 29; Interview with Anonymous Source No. 30; Interview with Anonymous Source No. 31; Interview with Anonymous Source No. 39; Interview with Anonymous Source No. 65.


134 See, e.g., Jean Dermine, Presentation at the Conference on Cross-Border Banking, Regulatory Challenges: European Banking Integration: Don't Put the Cart Before the Horse (Oct. 11, 2005); European Commission, Supervision of Branches, MARKT/G/3/MV D 2 (2007). Even so, the host country remains responsible for liquidity issues as well as monetary policies. See Council Directive 2000/12, art. 22, 2000 O.J. (L 126) 1, 3 (EC).

135 Ample reasons to retain subsidiaries persist, however. Subsidiaries boast limited liability, a separate, “local” legal entity, and predictable tax treatment, among other features. See Jean Dermine, European Banking Integration and the Societas Europaea: From Host-Country to Home-Country Control, in CROSS-BORDER BANKING: REGULATORY CHALLENGES 49, 51 (Gerard Caprio, Jr. et al. eds., 2006) (“Irrespective of the existence of a single market, the international management literature predicts that international firms will operate with a mix of branches and subsidiaries . . . .”).

companies and their branches. Reinsurance involves the distribution of global risk, and the directives reflect the desirability of monitoring the overall strategies of reinsurance companies rather than their activities within individual Member States. Scor converted Scor SA, the French holding company at its head, into Scor SE. Over the next year and a half, it established two subordinate SE companies, Scor Global Life SE and Scor Global P&C SE; merged into them its German, Italian, and Dutch subsidiaries; and established new branches in their place.

By replacing its subsidiaries with branches, Scor achieved not only centralized regulation but also significant savings in compliance and corporate governance costs. Branches, unlike subsidiaries, do not have to file corporate reports, convene separate boards, or pay VAT taxes on transactions with their parent companies.

In other sectors, however, the SE would not have provided the same benefits. As one lawyer explained, “[e]ach regulated industry is different; selling tractors would be different [because the branches of a tractor company would continue to report to multiple national regulators]. The SE was sold to the public as a one-size fits all tool, and it’s not.”

137 Reinsurance Directives, supra note 136, recital 9 (“This Directive . . . mak[es] it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.”); id. art. 15(1) (“The financial supervision of a reinsurance undertaking, including that of the business it carries on . . . through branches . . . shall be the sole responsibility of the home Member State.”).

138 See id. recital 4.

139 Interview with Anonymous Source No. 20; Interview with Anonymous Source No. 45.

140 As the CFO of one SE said in an interview, “The FSA tried to make us have independent directors in our tiny UK subsidiary. I said go to hell and established a branch.” Interview with Anonymous Source No. 20.


142 See Case C-210/04, Ministero dell’Economia e delle Finanze v. FCE Bank PLC, 2006 E.C.R. I-2803 ¶ 24 (noting that services rendered by a company in one member state to its branch in another member state are outside of the scope of VAT).

143 Interview with Anonymous Source No. 45.
c. **Pooling of Regulatory Capital**

Companies that use the SE to replace their subsidiaries with branches reduce the amount of money that they must hold in reserve. The Solvency II Directive\(^{144}\) dictates how much regulatory capital insurance and reinsurance companies must maintain.\(^{145}\) Under the Directive, subsidiaries must set aside their own funds, whereas money held by branches counts for the parent company.\(^{146}\)

**Case 3: Sampo Life (Finland)**

Sampo Life, the Finnish life insurance company, decreased its pool of regulatory capital by adopting a branched SE structure. It merged its Estonian, Lithuanian, and Latvian subsidiaries into Sampo Life Insurance Baltic, an SE company headquartered in Estonia and established new branches in Latvia and Lithuania.\(^{147}\) The money the subsidiaries independently held now counts for the company’s total reserves because it is located in the SE’s branches.\(^{148}\)

Use of the SE to absorb the subsidiaries, rather than the Directive on Cross-Border Mergers, mitigated scrutiny of Sampo Life from national supervisors.\(^{149}\) The SE signaled a legitimate, European-level restructuring.\(^{150}\) As the CFO of a multinational reinsurance company stated, “It’s much brighter to say we’re becoming an SE—we consider Europe a unique market and we will act through branches—than it is to say we’re pulling out our subsidiaries.”\(^{151}\) Other interview subjects in the study similarly characterized the SE as an important cover in carrying out

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\(^{145}\) Id.

\(^{146}\) See id. (providing a formula for the calculation of solvency capital requirements); Interview with Anonymous Source No. 20, location not identified (Feb. 12, 2008) (on file with author); Interview with Anonymous Source No. 30, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 45.

\(^{147}\) Interview with Anonymous Source No. 57, a CFO of a multinational reinsurance company, location not identified (Apr. 28, 2008) (on file with author).

\(^{148}\) Interview with Anonymous Source No. 56, location not identified (Mar. 3, 2008) (on file with author).

\(^{149}\) Interview with Anonymous Source No. 20.

\(^{150}\) Interview with Anonymous Source No. 57.

\(^{151}\) Id.
reorganizations that would otherwise trouble clients and regulators.  

Unlike Scor, however, Sampo Life Insurance Baltic could not attain centralized regulation by transforming into a branched SE. Consumer rights remain under national supervision. Sampo Life Insurance Baltic offers three different insurance products in order to comply with varying national regulations.

d. Consolidation of Operations

The SE has also allowed companies to move between Member States, enabling them to centralize their operations without jeopardizing licenses they have previously acquired.

Case 4: Swiss Re (Switzerland)

Swiss Re, the insurance and reinsurance multinational, adopted the SE in order to gain access to EU legislation more cheaply. Using the form, it shifted its insurance and reinsurance business from their original Swiss headquarters to two new Luxembourgian entities.

The rules governing SEs enabled Swiss Re to consolidate its insurance subsidiaries in Luxembourg without disturbing their

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152 Interview with Anonymous Source No. 4, location not identified (Dec. 10, 2007) (on file with author); Interview with Anonymous Source No. 28, location not identified (Feb. 21, 2008) (on file with author); Interview with Anonymous Source No. 30, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 34, location not identified (Feb. 6, 2008) (on file with author); Interview with Anonymous Source No. 43, location not identified (Jan. 23, 2008) (on file with author).


154 Interview with Anonymous Source No. 57.

155 Council Regulation 2157/2001, art. 8, 2001 O.J. (L 294) 1, 4–5 (EC). Following the transformation of the Tenth Directive, the cross-border merger is another possible mechanism for reincorporating. It allows companies to merge into empty companies in other jurisdictions.

156 Interview with Anonymous Source No. 64, location not identified (Apr. 25, 2008) (on file with author).
licenses to conduct business in the U.S.\textsuperscript{157} The company combined its Dutch and British subsidiaries into a British SE, moved the SE to Luxembourg, and established a German branch.\textsuperscript{158} British law does not provide for legal mergers, so the company used a court-approved transfer of assets and liabilities to join the subsidiaries.\textsuperscript{159} Completing the move without using the SE form, however, would have required it to liquidate each business, establish new companies in Luxembourg, and apply for new licenses.\textsuperscript{160}

Other companies, however, have undertaken similar restructurings without the SE. Partner Re, another multinational reinsurance company, transferred its headquarters from Switzerland to Ireland to qualify for the EU Reinsurance Directives but did not convert to the SE.\textsuperscript{161} The company feared exposure to employee representation and unpredictability in its tax treatment, particularly its rights to offset losses in one jurisdiction against its total profits.\textsuperscript{162} It also believed that remedying gaps or problems in the legislation would require it to petition national courts one at a time, rather than directly lobbying a single body.\textsuperscript{163}

Swiss Re also used the Directive on Cross-Border Mergers, rather than the SE, to relocate its reinsurance subsidiaries. It formed a private company in Luxembourg and has gradually merged in the subsidiaries.\textsuperscript{164}

2. Drive To Harmonize Additional Areas of Law

To reach consensus on the SE, the Member States harmonized only the specific aspects of corporate law on which they could agree. While the framework design earned critical political support, harmonizing some laws and not others has allowed for national laws and regulations to interfere with

\textsuperscript{157} SE Regulation, \textit{supra} note 10, art. 29.
\textsuperscript{158} \textit{Id.}; \textit{see also} Interview with Anonymous Source No. 65, location not identified (Apr. 25, 2008) (on file with author).
\textsuperscript{159} Interview with Anonymous Source No. 64.
\textsuperscript{160} Interview with Anonymous Source No. 65.
\textsuperscript{161} Interview with Anonymous Source No. 64; \textit{see also} Interview with Anonymous Source No. 65.
\textsuperscript{162} Interview with Anonymous Source No. 43, location not identified (Jan. 23, 2008) (on file with author).
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} Interview with Anonymous Source No. 64.
potential benefits from conversion to the form. Individual laws can not easily be isolated from the broader systems within which they operate. Without additional harmonization, it is unlikely that the SE will attract many companies. Companies in regulated industries without regional supervisory systems have few incentives to convert. Harmonizing additional areas of corporate law is therefore essential to improving its viability, if that is the primary goal.165

a. Deposit Guarantees

Uncoordinated national deposit guarantee schemes have discouraged European banks from converting to the SE. Banks must contribute to funds guaranteeing their savings in every Member State in which they operate.166 Each one has different rules governing banks’ obligations.167 The differences attracted attention in the wake of the failure of the Icelandic bank Landesbanki. The British and Dutch governments had to loan Iceland money to rescue depositors in the British and Dutch branches of the bank.168


Case 5: Nordea Bank (Sweden)

Nordea Bank, the largest financial services group in the Nordic and Baltic regions, publicized its intention to become an SE in 2003. It planned to convert in order to integrate its subsidiaries into a Swedish SE and operate through branches. The branched structure would confer centralized supervision, savings in compliance and governance expenses, and a larger lending base. Although banks may not loan more than ten percent of their total capital to a single customer, money held by branches counts toward the total, while money held in subsidiaries does not. The financial crisis has, however, raised questions over the desirability of allowing large, vertically-integrated banks that operate through branches. If they fail, individual countries may not have enough money to bail them out.

Nordea never completed the conversion because of costs arising from national deposit guarantee schemes. If Nordea had become an SE, all of its European deposits would have shifted to the Swedish parent company, along with the risks associated with them. The funds that Nordea had already invested in the other countries’ systems, however, would not have flowed with the deposits to Sweden. This constrained Nordea’s plans, as it had already allocated substantial funds in the countries’ schemes. Nordea petitioned the European Commission for a harmonized, European-level system of deposit

Waibel, Bank Insolvency and Sovereign Insolvency, in CROSS-BORDER BANK INSOLVENCY (Rosa Maria Lastra ed., 2011).

169 Interview with Anonymous Source No. 7, location not identified (Feb. 1, 2008) (on file with author).
171 Council Regulation 2531/98, art. 4, 1998 O.J. (L 318) 1; see also Interview with Anonymous Source No. 7.
172 Interview with Anonymous Source No. 8, location not identified (Feb. 1, 2008) (on file with author); Interview with Anonymous Source No. 27, location not identified (Feb. 5, 2008) (on file with author); Interview with Anonymous Source No. 33, location not identified (Feb. 4, 2008) (on file with author).
173 Interview with Anonymous Source No. 7.
174 Interview with Anonymous Source No. 8.
175 Id.
guarantees, but issues of national sovereignty in banking regulation have so far prevented the Member States from reaching a solution.176

b. National Regulatory Systems and Attitudes

Further harmonization would also be necessary for the SE to attract companies in other industries, including telecommunications and pharmaceuticals. Telecommunications companies do not receive any benefits from using the SE to adopt a branched structure. They must operate a subsidiary in every country in which they do business.177 Member States license individual companies, not branches, to operate at specific frequencies.178 Pharmaceutical companies must register their drugs for use within individual Member States in accordance with expensive procedures.179 Allianz, despite becoming an SE, left its Italian subsidiary in place because Italy allows only independent, Italian license holders to underwrite insurance there.180

Persistent protectionism has led to additional obstacles. A lawyer counseled an executive search company not to convert to the SE because regulators in Eastern Europe would block the conversion of Eastern European subsidiaries into branches, viewing the restructuring as a way to take money out of the region.181 Companies House, the government register of British companies, notified an Austrian SE that it could not establish a

176 Interview with Anonymous Source No. 7.
177 “Telecommunications companies do not receive any benefits from using the SE to adopt a branched structure,” according to a representative of a Swedish telecommunications company in an interview for the study. Interview with Anonymous Source No. 48, location not identified (Feb. 18, 2008) (on file with author). “They must operate a subsidiary in every country in which they do business,” the representative said. Id.
178 Interview with Anonymous Source No. 46, location not identified (Feb. 19, 2008) (on file with author).
179 “Pharmaceutical companies,” according to the lawyer of a German multinational pharmaceutical company, “must register their drugs for use within individual Member States in accordance with expensive procedures.” Interview with Anonymous Source No. 44, location not identified (Jan. 23, 2008) (on file with author).
180 Interview with Anonymous Source No. 21, location not identified (Jan. 21, 2008) (on file with author).
181 Interview with Anonymous Source No. 47, location not identified (Feb. 18, 2008) (on file with author).
branch in England. The suggestion that PepsiCo might buy Danone caused French politicians to retain the national “jewel” for France. In 2007, the German energy company E.ON dropped its bid for Endesa, a Spanish utility company, after the Spanish government opposed the deal in favor of a rival bid from another Spanish company. The European Commission criticized the actions of Spain to thwart the merger, and referred the case to the European Court of Justice. “Europe continues to fight yesterday’s battles; there is very little community of purpose,” stated one policy analyst.

c. Corporate Taxation

Significantly more companies would adopt the SE if it offered a system of unified taxation. The deficiency in the SE legislation has energized discussions of how best to organize corporate taxation at the European level. A proposal called the

182 Interview with Anonymous Source No. 53, location not identified (Mar. 19, 2008) (on file with author).
185 Id.
186 Interview with Anonymous Source No. 15, a policy analyst, location not identified (Feb. 7, 2008) (on file with author).
187 Interview with Anonymous Source No. 2, location not identified (Dec. 5, 2007) (on file with author); Interview with Anonymous Source No. 4, location not identified (Dec. 10, 2007) (on file with author); Interview with Anonymous Source No. 5, location not identified (Dec. 11, 2007) (on file with author); Interview with Anonymous Source No. 9, location not identified (Dec. 11, 2007) (on file with author); Interview with Anonymous Source No. 25, location not identified (Feb. 4, 2008) (on file with author); Interview with Anonymous Source No. 29, location not identified (Jan. 22, 2008) (on file with author); Interview with Anonymous Source No. 32, location not identified (Feb. 4, 2008) (on file with author); Interview with Anonymous Source No. 33, location not identified (Feb. 4, 2008) (on file with author); Interview with Anonymous Source No. 40, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 42, location not identified (Mar. 18, 2008) (on file with author); Interview with Anonymous Source No. 51, location not identified (May 20, 2008) (on file with author); Interview with Anonymous Source No. 66, location not identified (Mar. 11, 2008) (on file with author).
188 See, e.g., Roopa Aitken & Chris Morgan, Societas Europaea: Is Tax an Incentive or a Barrier?, 15 EUR. BUS. L. REV. 1343, 1347 (2004) (“Because the introduction of the SE will not eliminate the current tax problems faced by
Common Consolidated Corporate Tax Base ("CCCTB") has received the most popular support,\textsuperscript{189} and most companies interviewed in the study favor it.\textsuperscript{190}

The absence of harmonized tax provisions has been extensively criticized,\textsuperscript{191} including by the European Commission.\textsuperscript{192} Operating across uncoordinated national tax regimes subjects companies to double taxation and under taxation, overly tax-driven arrangements, and extra compliance costs.\textsuperscript{193} Currently, each country taxes companies' subsidiaries multinational groups, its introduction has fuelled the debate for a more tax efficient method for operating within Europe.\textsuperscript{194}

The adoption of the European Company . . . has made it more urgent to define the tax framework at the European Union level. To become an attractive vehicle, it is not enough to ensure that the existing body of European Union tax company legislation is fully applicable to the European Company. The full benefits in establishing a European Company may only be achieved if existing companies can form such a company without any imposition of additional tax pre-incorporation expenses and avoid the outstanding tax obstacles impeding their cross-border operations.


\textsuperscript{191} Frits Bolkestein, Member of the Eur. Comm’n in Charge of the Internal Mkt. and Taxation, Address to Conference at the University of Leiden: The New European Company: Opportunity in Diversity (Nov. 29, 2002).

\textsuperscript{192} I concede that work remains to be done in some areas: in particular, I refer to the taxation aspects, which, quite rightly, are of concern to potential users . . . . This leaves the SE-Statute without any tax rules. This is a rather unfortunate situation, which I regret very much. Clearly, the lack of appropriate tax rules significantly reduces the practical attractiveness of the European Company Statute. Business representatives emphasize this quite forcefully.

and branches individually, and companies have no ability to consolidate their overall profits and losses.\textsuperscript{194}

Leaving taxation to national law, however, helped secure the passage of the SE legislation.\textsuperscript{195} Member States with low corporate tax rates—including Estonia, with no tax on retained earnings; Ireland, with a twelve and a half percent tax rate; and Slovakia, with a seventeen percent tax rate—would not have supported legislation that would have eliminated their competitive advantages in regard to corporate taxation.\textsuperscript{196}

The CCCTB does not affect national tax rates. It simply sets out a common definition for what constitutes a taxable profit and procedures for allocating the profit among the Member States.\textsuperscript{197} Under the proposed system, a company would aggregate its total income according to a uniform set of rules for deductions and other accounting issues, assign the income proportionally among the locations in which it operated, and pay taxes according to national rates.\textsuperscript{198}

3. U.S. Comparison

The U.S. has developed a complex regulatory regime with competences split between federal, state, and local levels.


The absence of special tax provisions in the Regulation, coupled with the principle of equal treatment, means an SE is subject to the tax laws of the Member State of which it is considered a resident for tax purposes and, when operating internationally, applicable international regulations, treaties, and the laws of the (Member) States in which it operates. Consequently, as a tax resident of the EU, an SE is potentially subject to the tax laws of [thirty] countries.

\textit{Id.}

\textsuperscript{195} See, e.g., Pieter Sanders, \textit{The European Company}, 1968 J. BUS. L. 184, 189 ("The creation of a European company is one thing, the solution of the tax problems involved is another.").

\textsuperscript{196} CTR. FOR EUR. POLICY STUDIES, \textit{CORPORATE TAXATION AND THE EUROPEAN COMPANY STATUTE} 23 (2008); see also Daniel Shaviro, \textit{Some Observations Concerning Multijurisdictional Tax Competition}, in \textit{REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES}, supra note 15, at 51–52 ("A related Tiebout argument would suggest that tax competition permits jurisdictions to specialize in catering to diverse consumer preferences or local needs, such as by collectively offering a choice between high-tax, high-service and low-tax, low-service options.").


\textsuperscript{198} See \textit{id.}.
Constitutionally, states may issue laws and regulations on any topic that federal law has not preempted. The federal government may also delegate the authority to implement federal regulatory programs to the states.

The U.S. has centralized an increasing amount of regulatory power at the federal level. Professor Mark J. Roe detailed the areas of corporate law that the federal government has expropriated from the states:

Federal securities laws in the 1930s took much of voting away from the states, set up the means to take insider trading away from the states, and mandated delivery of information to shareholders. In the 1950s, the SEC federalized the proxy contests. The 1960s witnessed the first successful hostile takeover, which Congress sought to impede with the Williams Act.

And federal authorities effectively grabbed hold of specific but ordinary corporate matters in the 1970s: the rules governing the going private transaction—the central corporate transaction of that era—were partially federalized; state law allowed selective stock buybacks [and the SEC reversed it]; the states allowed voting discrepancies among shareholders [but the stock exchanges under SEC pressure reversed them]. [For a time] the circuit courts were turning corporate fiduciary law into federal law. While that [diminished, some still remains].

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201 See, e.g., REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES, supra note 15, at xviii (“For most of the twentieth century, power and regulatory responsibility shifted inexorably from the states to Washington. But, over the past two decades, ‘new federalists’ have argued for a reallocation of regulatory authority from the federal government back to the states and even to local government.”); Landau, supra note 9; U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: THE MIXED RECORD OF THE 1980S (1993).
New securities rules [in the 1990s] obliterated parallel state law [by expressly preemption of state laws.] And Sarbanes-Oxley, reflecting congressional urgency [in 2002] to react to the Enron scandals, [mandates] a host of corporate governance matters—from the power of the audit committee to [management construction of] internal control systems, to the micro-details of loans to managers. . . . [A]ll [these were] once province[s] of state law.202

As regards bank deposit guarantees, the Glass Steagall Act of 1933203 established the Federal Deposit Insurance Corporation (“FDIC”), which guarantees the checking and savings deposits of state and federally chartered banks at the federal level.204 The Act was designed to restore public trust in the banking system following the Great Depression.205 To qualify for its protections, banks must comply with specific liquidity and reserve requirements.206 Bank failures during the 1980s and 1990s tested the FDIC system. While no serious bank runs occurred, taxpayers and surviving banks paid $36 billion to support failed banks, and regulators allowed profitable banks to enter speculative real estate deals.207

Corporate taxation in the U.S. occurs at both the federal and state level. Tax revenues have played an important role in state finances. The 1870 federal census indicates that Connecticut, Delaware, Maryland, Massachusetts, New Jersey, and Pennsylvania earned more than half their total tax revenues from companies.208 The expansion in out-of-state markets, through catalog sales and the internet, has made apportionment of tax revenues among states increasingly difficult.209 To
increase their revenues, the states have considered adopting a combined reporting system that would allow states that provide services to out-of-state companies to levy taxes and would create a process for coordinating corporate tax policies.210

Both the U.S. and Europe appear to be moving towards increased centralization and regionalization in law and face similar challenges in coordinating multi-level regimes for modern companies.

B. Introducing Regulatory Competition?

Although the original purpose of the SE was to provide companies with a unified body of European law,211 the myriad references to national law in the final legislation212 combine with the ability that it affords companies to reincorporate213 to create new opportunities for Member States to compete for incorporations. Many commentators therefore predicted that the SE would introduce a more American-style commercial market to Europe.214 In reality, many factors constrain companies from using the SE as a vehicle for regulatory competition, and only minimal inter-state arbitrage has resulted.

Unlike the U.S., which allows companies to incorporate and reincorporate in any state they choose, regardless of the connections that they have to it,215 the EU has long sought to prevent competition for corporate charters among the Member States.216 European policymakers have believed that the creation

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210 NAT’L CONFERENCE OF STATE LEGISLATURES, TAX POLICY HANDBOOK FOR STATE LEGISLATORS 37, 43 (2d ed. 2003).
211 See 1970 Draft Statute, supra note 82.
212 SE Regulation, supra note 10, arts. 4(3), 13, 15(1), 47(1), 51, 52(1)–(2), 53, 54(1)–(2), 57, 59(1), 61, 62(1)–(2).
213 Id. art. 8; see also TAVARES & BILREIRO, supra note 8, at 11.
214 See, e.g., Bouloukos, supra note 20, at 549; McCahery & Vermeulen, supra note 20; Stith, supra note 20.
215 See Ribstein, supra note 58, at 825–27. The states must recognize corporations incorporated in other jurisdictions, and the law of the state of incorporation governs disputes, wherever they may occur.
of a “race” among the Member States would encourage overly-
permissive regulation, rather than promote innovation. Most
Member States have blocked companies from relocating by
requiring them to register in the same place in which they
establish their headquarters.

The SE, however, made it legal for companies to
reincorporate. According to article 8 of the SE Regulation:

Community had no intention of letting one of the member states become the
‘Delaware of Europe.’

coined the phrase “race to the bottom”); see also Catherine Barnard, Social Dumping
and the Race to the Bottom: Some Lessons for the European Union from Delaware, 25

218 See, e.g., Stefan Grundmann, Regulatory Competition in European Company
Law—Some Different Genius?, in CAPITAL MARKETS IN THE AGE OF THE EURO:
CROSS-BORDER TRANSACTIONS, LISTED COMPANIES AND REGULATION 561, 562–63,
565 (Guido Ferrarini et al. eds., 2002); Jan Wouters, European Company Law: Quo

219 See Treaty of Rome, supra note 40, arts. 54(3)(g) (now TEC art. 44(3)(g)), 220
(now TEC art. 293); Luca Enriques, Company Law Harmonization Reconsidered:

220 See, e.g., ADRIAAN DORRESTEIJN ET AL., EUROPEAN CORPORATE LAW 20
(1995); Mathias Siems, Convergence, Competition, Centros and Conflicts of Law:
generally THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH (Klaus J. Hopt et
al. eds., 2006).

221 Following the transformation of the Tenth Directive, the cross-border merger
is another possible mechanism for reincorporating. It allows companies to merge
into empty companies in other jurisdictions.

222 Most national legislatures providing for the international transfer of seat
require

that the transfer to another Member State of a company registered in their
territory—and consequently subject to their laws—should be accompanied
by the dissolution of the company at stake, as well as the constitution of the
company in the Member State of arrival according to its national laws. This
operation implies a change of the applicable law to the company, and
therefore, the loss of its legal personality. Without the continuity of the
legal personality of the company, there is in reality no transfer of seat, but
a sole dissolution and subsequent re-formation of the company.

See, e.g., TAVARES & BILREIRO, supra note 8, at 50.

For decades, the transfer of the seat of a company has been the subject of
controversy in European company law. Although the subject was expressly
mentioned in the European Treaty, experts have not been able to agree on
a workable solution. Also, in most States, national company law has not
been able to come forward with acceptable solutions. As a consequence,
companies were prevented from enjoying the same freedom of movement as
natural persons, and this notwithstanding their express assimilation in the
Treaty.

Wymeersch, supra note 8, at 661 (internal citations omitted).
“The registered office of an SE may be transferred to another Member State . . . [and] shall not result in the winding up of the SE or in the creation of a new legal person.” The provision allows Member States to compete in the legal fields the SE leaves to national law, which include directors’ liability, insolvency, auditing, and criminal rules.

Few companies have actually used the SE to move and take advantage of differences in national legal systems. Based on my empirical data, it appears that several factors dissuade them. The companies that have reincorporated have done so for unique reasons and others that are similar and have transformed into SEs have not moved. The complete legislation and the context in which it operates limit the benefits that companies can attain from relocating.

1. Preconditions

Article 7 of the SE Regulation discourages companies from moving. It requires them to locate their registered office and head office in the same Member State, in line with the real seat principle. Many companies I interviewed explained that they would have considered reincorporating if they did not also have to move their headquarters.

223 See SE Regulation, supra note 10, art. 8.
224 See, e.g., Heine & Kerber, supra note 9, at 64 (“[D]ue to the above-mentioned path dependences much time will be needed, before a dynamic competition process can develop, and it can be expected that this competition will have to tackle with a whole set of serious problems.”).
225 SE Regulation, supra note 10, art. 7.
226 Although the ECJ seemed to suggest in Centros that the real seat theory might contravene the right to free establishment, in 2009 the ECJ affirmed the legality of the theory in the Cartesio case. See Case C-210/06, Cartesio Oktató és Szolgáltató bt, 2008 E.C.R. I-9641.
227 See Interview with Anonymous Source No. 2, location not identified (Dec. 5, 2007) (on file with author); Interview with Anonymous Source No. 4, location not identified (Dec. 10, 2007) (on file with author); Interview with Anonymous Source No. 5, location not identified (Dec. 11, 2007) (on file with author); Interview with Anonymous Source No. 9, location not identified (Dec. 11, 2007) (on file with author); Interview with Anonymous Source No. 10, location not identified (Dec. 11, 2007) (on file with author); Interview with Anonymous Source No. 16, location not identified (Dec. 12, 2007) (on file with author); Interview with Anonymous Source No. 17, location not identified (Dec. 13, 2007) (on file with author); Interview with Anonymous Source No. 27, location not identified (Feb. 5, 2008) (on file with author); Interview with Anonymous Source No. 29, location not identified (Jan. 22, 2008) (on file with author); Interview with Anonymous Source No. 30, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 46,
Transferring headquarters to a different country is difficult for companies. Smaller companies tend to be embedded in their local economies, and sufficient numbers of their employees may not be willing to move to other Member States.\textsuperscript{228} Larger companies tend to have political ties to their countries, and relocating may carry political consequences.\textsuperscript{229} Moving a head office can also attract negative publicity.\textsuperscript{230} A representative of a Finnish company stated that it considered moving its headquarters to avoid lenient mandatory bidding requirements in Finland\textsuperscript{231} but decided not to because “headquarters are political.”\textsuperscript{232}

Case Study 6: Narada (Norway)

Narada, the battery manufacturing company originally based in Norway, moved an SE company from Norway to the UK, in the absence of such concerns. It structured a joint venture with its main customer, the Norwegian telecommunications

\textsuperscript{228} See, e.g., John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications, 93 NW. U. L. REV. 641, 655 (1999) (“Language and culture are important constraints. Even after the Common Market, Europe is criss-crossed by national borders that, as a social matter, restrict the mobility of labor. Hence, labor is more resistant to corporate migration in Europe than in the United States.”).

\textsuperscript{229} See, e.g., Stith, supra note 20, at 1611.


\textsuperscript{231} In Finland, a shareholder’s obligation to make an offer for all of a listed company’s outstanding shares had not been triggered until the shareholder attained two-third of total voting power, a very high threshold. See Securities Market Act (1989/495) chap. 10, § 4 (Fin.), superseded by Council Directive 2004/25, art. 1, 2004 O.J. (L 142) 12 (EC). When Finland implemented the EU Takeover Directive in Bill HE 6/2006, it reduced its mandatory bid rule to a dual threshold of 30% and 50% of voting rights.

\textsuperscript{232} See Interview with Anonymous Source No. 46.
company Eltek, as an SE to allow for flexibility to hire staff in any country in Europe. After selecting a British manager, it transferred the SE to the UK.233

2. Costs

Exit taxes, dissenters’ rights, and labor negotiations increase the cost of using the SE to move. Many companies initially interested in reincorporating have found the process to be too expensive after a full investigation of the requirements. Those that have moved have contributed to the convergence of the laws of the Member States.

While the SE eliminates legal barriers to relocating,234 the legislation does not address obstacles posed by national taxation.235 Taxes that Member States levy on exiting companies challenge their freedom of movement.236 Germany, for example, requires companies that relocate to pay full liquidation taxes.237 Only one Member State, Portugal, does not charge exit taxes.238

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233 See Interview with Anonymous Source No. 69, location not identified (Mar. 12, 2008) (on file with author).
235 Case C-9/02, Hughes de Lasteyrie du Saillant v. Ministere de l'Economie, 2004 E.C.R. 1-2409, however, has raised questions over the legality of exit taxes. While the European Court of Justice made a clear distinction between people and corporations, it held that France could not charge exiting residents taxes that it did not apply to domestic residents without violating the Freedom of Establishment. See id. at 1-2409 [70].
236 See, e.g., Bouwman & Werbrouck, supra note 194, at 104; see also TAVARES & BILREIRO, supra note 8, at 161.
 [Despite] Article 8 of the Regulation . . . , the majority of the Member States continue to tax such transfer as if the company was being wound up or liquidated.

The reason for this widespread practice is that, in most Member States, with the transfer of the company’s registered office to another Member State, i.e., the host State, the SE will cease to be subject to unlimited tax liability in the home country. Therefore the objective is to prevent any capital gains, which have accrued in the home State, evading taxation. The taxation of capital gains upon the transfer of the company's registered office to another Member State is the last chance to tax the appreciation and gains in such assets upon their actual transfer.

Id. For additional authority, see Anne Fairpo, Societas Europaea and Mobility, 892 TAX J. 24, 24 (2007).
A 2005 European directive, however, allows companies that maintain a presence to which their assets can be attributed for continuing taxation to defer their payment of capital gains.

Case Study 7: Prosafe (Norway)

Prosafe, the Norwegian shipping company, found it expensive to use the SE to reincorporate. The company moved to Cyprus to avoid changes to the national tonnage tax system in Norway. In 1996, Norway adopted a permissive scheme of tonnage taxation to enable the country to develop as a competitive shipping base. It did not tax the operating profits of companies unless they paid taxable dividends to shareholders or moved their assets out of the country. In September 2006, however, the government announced a new plan to reclaim the tax credits. It demanded payment on all tax liabilities deferred under the 1996 law over a period of ten years and moved to impose forward taxes on shipping companies.

Prosafe paid the full amount of its deferred tax liabilities when it left Norway. Since the reincorporation, Norway has

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240 Id. tit. IVb, arts. 10b–10d.

241 The SE enabled Prosafe to avoid the capital gains taxes it shareholders would have paid, though, had it needed to establish a brand new company in Cyprus, buy it, and liquidate the Norwegian company. By using the SE, Prosafe could continue business without interruption. See Paul Storm, The Societas Europaea: A New Opportunity?, in 1 THE EUROPEAN COMPANY, supra note 190, at 3, 11 (detailing cumbersome administrative procedures for moving a head office but emphasizing the lack of need to wind up the old company or create a new legal personality).

242 Interview with Anonymous Source No. 52, location not identified (Feb. 21, 2008) (on file with author).

243 “The special rules for taxation of shipping companies were adopted with effect as from 1996 and laid down in section 51A of the law on wealth and income tax No. 8 of 18 August 1911. . . . The rates of the tonnage tax were set out in chapter 5 of the Annual Tax Decree by the Parliament.” EFTA Surveillance Auth. v. Norway, 143/03/COL (2006). For a discussion of the changes in 2006 to the tonnage tax system that had been in place in Norway since 1996, see Wikborg Rein’s Shipping Offshore: Update 1/2008, at 28, available at http://www.wr.no/storage/Magasiner/SO_1_2008_screen.pdf.

244 See Lov om Skatt av Formue og Inntekt (Law on Wealth and Income Tax) § 51A, no. 8 (Aug. 18, 1911).


246 Interview with Anonymous Source No. 52.
passed additional legislation taxing exiting companies as if their full valuation has been realized. Odjfell, another Norwegian shipping company, converted to the SE in order to leave Norway but so far remains incorporated there.

The SE legislation also authorizes Member States to adopt procedures for compensating shareholders who oppose reincorporation and to establish protections for creditors. The

247 “In 2007 Norway introduced new exit taxation rules adopting a new section 10-71 of the Tax Act, making SE companies subject to an exit tax when moving their effective management or tax residency from Norway to another country. On March 10 2010, the EFTA Surveillance Authority (“ESA”) issued a letter of formal notice to Norway for failing to comply with its obligation under articles 31, 34 and 40 of the Agreement on the European Economic Area (“EEA”) by imposing an immediate taxation on companies that transfer their seat or assets and liabilities to another EEA state and on the shareholders of such companies and for breach of the SE Regulation.” ESA Issues Formal Notice About Exit Tax, INT’L TAX R., June 1, 2010, at 88.

Effective from 7 October 2008 new exit tax rules were implemented in Norway. Pursuant to these rules exit tax will be levied when tangible or intangible assets are moved out of the Norwegian tax jurisdiction, based on the market value of the assets. However, if the assets are moved within the EEA, the tax payable on tangible assets (except for merchandise) may be deferred provided: (i) the assets maintain within the EEA and (ii) there is a tax treaty in force between the EEA Member State and Norway, which provides for the exchange of information and assistance in regard to collection of tax. The exit tax for tangible assets is annulled if the asset is not realised within five years. For intangible assets and merchandise the exit tax is definitive and is payable on the day of exit. This rule also applies on emigration of a company from Norway. If a company ceases to be a resident in Norway for tax purposes under the Norwegian Tax Act section 2-2 or under a tax treaty, the emigration from Norway will mean that gains/loss on the assets are subject to tax/are tax deductible as if the asset or liability was realised. However, if the company continues to be subject to tax in Norway through a permanent establishment after the emigration, no capital gains taxation will take place after the exit. Such tax exemption is only available on application to the Ministry of Finance under section 11-21 of the Norwegian Tax Act. The emigration of a company will also be considered as a realisation on the hands of the shareholders at the time of exit.


248 Interview with Anonymous Source No. 54, location not identified (Mar. 6, 2008) (on file with author).

249 See Council Regulation 2157/2001, art. 8(2)–(4), 2001 O.J. (L 294) 1, 5 (EC) (endowing creditors with prior information rights); id. art. 8(16) (allowing creditors to litigate claims arising prior to the transfer in the departure State); id. art. 8(15) (blocking transfers when proceedings for winding up, liquidation, insolvency, or suspension of payments have taken place). Council Regulation 2157/2001, art. 8(7), 2001 O.J. (L 294) 1, 5, (EC) also allows Member States to legislate additional rules.
cost of complying is unpredictable, making it difficult for companies to evaluate the merits of a potential move.

Furthermore, the formula that the SE Directive sets out for negotiating employee representation carries additional costs. Employees from different countries have varied experience in participating in labor negotiations, and the process can be unwieldy in practice.

Case Study 8: Elcoteq (Finland)

Elcoteq, the electronics manufacturing company previously located in Finland, and the main supplier to Nokia, the Finnish electronics company, was the first company in Europe to convert to the SE for the purpose of moving its headquarters.250 In 2005, Elcoteq’s shareholders approved the reincorporation of the company in Luxembourg.251 It merged its Finnish parent company with its Luxembourgian subsidiary to create a Luxembourgian SE and then established branches in Switzerland and Finland.252 The new company retained its original Estonian and Hungarian subsidiaries.253

Elcoteq had difficulties recruiting talented employees to Finland.254 At the time of the conversion, only one percent of the company’s workforce lived in Finland, and most of its officers worked from Switzerland.255

The bilateral tax treaty between Luxembourg and Switzerland, however, primarily motivated the move.256 The treaty eliminates taxes at the level of the head office on income the company allocates to the Swiss branch. Interest on loans provided by the Swiss branch also qualify as a cost for tax purposes, reducing the company’s overall taxable income.257

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For example, under SE-Ausführungsgesetz [SEAG], Dec. 12, 2004, BGBl. I, § 13(1) (Ger.), creditors are entitled to a deposit security.

250 See Interview with Anonymous Source No. 63, location not identified (Mar. 8, 2008) (on file with author).

251 See id.

252 See id.

253 See id.

254 See id.

255 See id.; see also Aitken & Morgan, supra note 188 (stating that because tax treatment of an SE is equivalent to that of a national private limited company "the relevant double tax treaties concluded between the country and other countries will apply to an SE").

256 See, e.g., Shaviro, supra note 196, at 58–59.
Shareholders who opposed the move had the right to sell their shares to the company. 258 Elcoteq could not determine in advance how many shareholders would object and therefore how much the reincorporation would cost. 259 The SE legislation also did not address whether the dissenting shareholders were entitled to the average share price during the time period leading up to the shareholder vote or the price on the day of the vote. 260

The move from Finland to Luxembourg stimulated convergence in the countries’ laws. 261 Like most of Europe, but not Luxembourg, Finland does not prescribe a nominal share value. 262 During negotiations related to the move, Luxembourg repealed its rules, aligning itself with the rest of the continent. 263 Luxembourg has also legislated a “one share-one vote” requirement, 264 while Finland has not. 265 Elcoteq amended its share structure to comply with Luxembourg’s rule. 266

[The main mechanism for such [non-mandatory] harmonization is a web of more than 1,500 bilateral tax treaties that provide complicated rules for coordinating the claims of ‘source’ countries where income is earned and ‘residence’ countries where business owners are found. However, rather than emerging spontaneously without broader harmonizing institutions, these treaties generally follow, in their broad outlines, a set of model treaties first developed in the 1920s through intensive multilateral negotiations under the auspices of the International Chamber of Commerce and the League of Nations. The global setting of these agreements lowered transaction costs for individual countries to agree on specific terms of mutual forbearance. In addition, to businesses that were anxious to avoid double taxation, the global institutions offered a forum at once more favourable than national politics and yet able to be leveraged into such politics through the argument: this is what everyone else is doing; you’d better join the club.

Id. (internal citation omitted).

258 See Interview with Anonymous Source No. 63.

259 See id.

260 See id.


264 See id. § IV, art. 46.

265 See Limited Liability Companies Act, supra note 262, ch. 3, §§ 1(2)(1), 3(1).

266 Interview with Anonymous Source No. 63, location not identified (Mar. 8, 2008) (on file with author).
company had originally issued two series of shares, with the shares held by the founders carrying ten times the votes of the other series.  

In addition, the SE’s provisions for employee representation exposed Eastern European Member States to Finland’s robust protections on workers’ rights. Elcoteq struggled to negotiate with representatives from its Baltic subsidiaries whose language frequently lacked translations for basic collective bargaining terms. The company also had to pause negotiations while some countries drafted laws establishing a process for selecting employee representatives. The SE legislation required them to be elected pursuant to national legislation.

3. Limits

Although the SE has made reincorporation legal, in the absence of a U.S.-style internal affairs doctrine, companies derive few rewards from relocating. Consequently, companies have shown caution in using the form to move. By contrast, numerous startup companies have registered in the UK to gain other advantages the jurisdiction offers, following the recent case law of the ECJ.

Most European business and labor regulations apply based on where a company operates, not where it incorporates. Many aspects of the securities laws pertain to where shares are traded, and a company pays taxes everywhere it earns income.

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267 Id.
268 Id.
269 Id.
270 Id.
271 See supra text accompanying note 100.
272 See infra Figure 3.
276 See, e.g., Bouwman & Werbrouk, supra note 194 (“[A]n SE is potentially subject to the tax laws of [thirty] countries.”); Helminen, supra note 193, at 29 (“Consequently, the introduction of the SE legal form will not eliminate the fact that
The majority of registered SEs do not yet operate.277 These “shelf companies” (“shelfs”) exist legally but do not conduct business or employ any workers. Private companies, such as Foratis AG in Germany, create the empty corporate structures to sell.278 Their customers can move the shelfs into other Member States and put them into operation. The pre-made forms, established according to the laws of a different Member State, appeal to companies in Member States with complicated rules for forming SEs. Conducting business through a company that was once a shelf also saves the buyers time and, in some jurisdictions, increases access to investment capital and other contracts.279

So far, only four companies have converted a shelf into an operational company,280 and many commentators cite the large number of shelfs to dismiss the usefulness of the SE.281 The proportion of SE companies that conduct business, however, appears to be growing.282 The remaining shelfs could be moved
and activated at any time, suggesting the potential for future relocations.²⁸³

Figure 3. Operating vs. Non-operating SEs²⁸⁴

Meanwhile, many new companies have established themselves in the UK in order to access its capital markets and judicial system. Between 2003 and 2006, more than 67,000 foreign entities registered British private limited companies (“plcs”). Most came from France, Germany, the Netherlands, and Norway.²⁸⁵ The low-cost German airline, Air Berlin, for example, registered as a UK plc, went public, and listed on the German DAX.²⁸⁶ British plcs avoid employee representation rules, although workers must continue to serve on the boards of subsidiaries located in countries that require representation.²⁸⁷

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²⁸³ It should also be noted that SE Regulation art. 14, para. 1, mandated the Member States to implement the SE Directive prior to October 8, 2004. On that date, however, only five member states—Austria, Belgium, Denmark, Finland, and Sweden—had done so. See SE Regulation, supra note 10, art. 14, para. 1.
²⁸⁴ See EUROPEAN TRADE UNION INSTITUTE, supra note 117.
²⁸⁷ See, e.g., Simon Deakin, Regulatory Competition Versus Harmonization in European Company Law, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES, supra note 15, at 190, 205–06; Cheffins, supra note 274, at 441–42.
The first-order incorporations in the UK have also prompted convergence among the laws of the Member States. France, Spain, Germany, and the Netherlands have all recently eliminated or lowered their minimum capital requirements to match the UK’s more lenient standards. The Dutch and German consultation documents explicitly reference the need to compete with the UK. Germany has also begun to allow new companies to establish themselves according to the same terms the UK offers, and the Dutch Parliament has launched a review of its private limited company law.

4. U.S. Comparison

In the U.S., although the Commerce Clause of the Constitution provides for federal authority over matters of corporate law, an informal understanding, the “internal affairs doctrine,” assigns to state law matters that pertain to the “internal affairs” of corporations. The “internal affairs” include the relationships among directors, officers, and investors.

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292 See Seibert, supra note 289.

293 See Draft Reform Law, supra note 288.


295 See supra note 291.

296 See Gonzalez v. Raich, 545 U.S. 1, 16–18 (2005).


298 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971); see also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987) (“It thus is an accepted part of the business landscape in this country for States to create corporations, to
Each state offers its own system of corporate rules, and companies may incorporate anywhere, regardless of their connections to a particular state. The other states must recognize companies registered elsewhere; the law of the state of incorporation governs disputes, no matter where they occur.299

The desirability of the charter market and whether it has caused a race to the top or to the bottom in corporate law has long been debated. Companies pay franchise taxes and additional fees to states in order to incorporate, which introduces the potential for state competition to attract their business.300 Over time, however, Delaware has become the state of choice for the significant majority of incorporated and incorporating companies. It has built up specialized courts accustomed to adjudicating complicated corporate matters and a rich store of precedent case law, which has promoted foreseeable outcomes and stability in the law. Today, Delaware is home to over fifty percent of the companies listed on the New York Stock Exchange and almost sixty percent of Fortune 500 companies.301

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299 See Ribstein, supra note 58, at 825–27.

300 See, e.g., ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 15–16 (1993); Bernard S. Black, Is Corporate Law Trivial?: A Political and Economic Analysis, 84 NW. U. L. REV. 542, 548–49 (1990); Heine & Kerber, supra note 9 (“Historically this system had never been designed deliberately, but emerged in the context of the fight against trusts and monopolies at the end of the nineteenth century, when the government of New Jersey attempted to give monopolies and trusts a new home—in exchange for the payment of a tax for using the corporate law. So, the incentive of the states to engage in charter competition is the raising of the ‘franchise tax.'” (citations omitted)); Jonathan R. Macey, Corporate Law and Corporate Governance: A Contractual Perspective, 18 J. CORP. L. 185, 195 (1993).

Theorists who believe the convergence on Delaware represents the conclusion of a race to the bottom argue that regulatory competition among the states has caused Delaware to adopt pro-management rules, to the detriment of shareholder rights. Others see a race to the top in corporate law and credit market forces with promoting innovation and experimentation, which have led to efficiency gains.  

Reincorporating in Delaware has costs. Delaware charges higher franchise taxes than other states, and companies that do not actually conduct business there must pay additional fees to the states in which they operate. A relocating company must pay filing charges and hold a shareholder meeting for approval of the move. Privately-held companies reincorporate by merging with a shell corporation registered in Delaware. Any shareholder who votes against the merger can exercise appraisal rights and receive the full cash value of his shares.

The preeminence of Delaware also remains subject to the threat of federal preemption and other mechanisms of federal control. Although the U.S. has no federal statute for corporate law, from the Securities Act of 1933 to the Sarbanes-Oxley Act of 2002, and President Theodore Roosevelt called for federal regulation of corporations. The Federal Bureau of Corporations existed between 1890 and 1912. See generally Melvin I. Urofsky, Proposed Federal Incorporation in the Progressive Era, 26 AM. J. LEGAL HIST. 160 (1982) (discussing the history of

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303 See ROMANO, supra note 300, at 34.

304 See DEL. CODE ANN. tit. 8 § 251 (West 2010); ROMANO, supra note 300, at 34.

305 See DEL. CODE ANN. tit. 8 § 252; ROMANO, supra note 300, at 34.

306 See DEL. CODE ANN. tit. 8 § 262; see, e.g., ROMANO, supra note 300, at 34.

307 See Roe, supra note 22, at 598–99; see also Landau, supra note 9, at 32–33.

308 This is not for lack of trying. At the Constitutional Convention, James Madison proposed a scheme for federal incorporation, JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 638 (1966), and President Theodore Roosevelt also called for federal regulation of corporations. THEODORE ROOSEVELT, First Annual Message, in THE WORKS OF THEODORE ROOSEVELT 15, 81, 92 (Herman Hagedorn ed., 1926). A Federal Bureau of Corporations existed between 1890 and 1912. See generally Melvin I. Urofsky, Proposed Federal Incorporation in the Progressive Era, 26 AM. J. LEGAL HIST. 160 (1982) (discussing the history of
Act of 2002, federal legislation has long competed with Delaware and displaced its less optimal rules. When the federal government has intervened, it has generally done so as a monopoly legislator and entirely preempted the states. Thus, corporate law in the U.S. has alternated between two extreme poles: It has either been entrusted to unfettered inter-state competition or has been relinquished to a central, monopolistic actor.

The SE, however, appears unlikely to contribute substantially to the creation of a “European Delaware.” Unlike in the U.S., SE companies must demonstrate a connection to the Member State in which they incorporate and pay other fees, without gaining many advantages in return.

C. Threatening Social Europe?

Because the SE legislation did not preempt national laws, companies may convert to the form in order to substitute its rules for national requirements. As SEs, they can select between a one-tier or two-tier board and renegotiate employee representation, raising concerns that they will adopt the form to arbitrage around national standards for workers’ rights. In fact, while some European companies have adopted one-tier board structures, and others have used the SE to decrease the

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312 See Legal Diversity, supra note 19, at 14–15.
313 SE Regulation, supra note 10, at 38.
315 See supra note 21.
size of their supervisory boards and appoint foreign works to them, the costs have been high and labor unions are adapting. The interview data suggest that the SE will contribute to an eventual equilibrium of smaller, more international supervisory boards and more regionalized labor strategies. Even though companies are using the SE to relax employee representation, those accustomed to codetermination appear committed to the stakeholder model, in which companies serve the interests of employees and other groups, rather than focusing solely on the maximization of shareholder wealth.

Executive and nonexecutive directors serve together on one-tier boards, which have responsibility for making and executing corporate decisions. Two-tier boards contain a management board, made up of executive directors who run the company directly, and a supervisory board of nonexecutives, who oversee the management board through the appointment, supervision, and removal of its members.

Employee representation developed from the efforts of European trade unions to secure a direct say for their members in the affairs of the companies for which they worked. Many Member States specify a level of employee representation required on the boards of different types of companies of different sizes. In Austria, for example, all joint stock companies and any limited liability company with more than three hundred employees must appoint employee representatives to one third of the seats on the supervisory board. In Hungary, any company with more than two-hundred employees must appoint employee representatives to one-third of the seats on the supervisory

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317 See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”); Mark J. Roe, The Shareholder Wealth Maximization Norm and Industrial Organization, 149 U. PA. L. REV. 2063, 2065 (2001) (“Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.”). But see Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180, 185 (Del. 1986) (deferring to the business judgment of directors and seemingly requiring shareholder interests to be primary only in cases of a sale of control).
318 Codetermination does not exist under Belgian, British, Bulgarian, Cypriot, Estonian, Italian, Latvian, or Lithuanian law.
Germany has the most rigorous requirements: employees occupy one-half of the supervisory board seats in large German companies.321

1. Limited Benefits from One-Tier Option

The choice of a one-tier board structure has not been significant for most companies. Every participant in the study emphasized that large companies with employee representation would not adopt the SE in order to select a one-tier board: A unitary board would place employee representatives alongside management, eliminating the barrier restricting them to a supervisory function. In addition, the national laws of most Member States that require dual boards do not delineate how a one-tier board with employee representatives would operate, although Germany has explicitly legislated codetermination in one-tier SE companies.322 As a result, only smaller SE companies without employee representation have chosen a one-tier structure.323 They have done so to streamline their operations and to increase the power of their executive directors, aligning themselves more closely with companies from Member States without employee representation systems.

Case 9: Plansee (Austria)

Plansee, the closely-held Austrian metalworks company, used the SE to replace its two-tier board with a one-tier board, even though it had to increase the number of outside representatives on the board to do so.324 Plansee is part of a


321 See Gesetz über die Mitbestimmung der Arbeinehmer [Codetermination Act of 1976], May 4, 1976, BGBl. I at 1153, §§ 1, 7 (Ger.); Jan von Hein, Between a Rock and a Hard Place—German Codetermination Under Pressure, KYOTO J.L. & POL. May 2007, at 1, 2.


323 For example, Mensch und Maschine Software, a German SE with 350 employees and Sevic Systems, another Germany company with approximately 100 employees. See ETUI, Established SEs Fact Sheet Overview, supra note 18 (select companies from the index).

324 Interview with Anonymous Source No. 53, company lawyers and officers, location not indentified (Mar. 19, 2008) (on file with author).
group of related companies; the other two are based in Luxembourg and have one-tier structures.\textsuperscript{325} Their managing directors previously served on the Supervisory Board of Plansee and could therefore control Plansee’s managing director.\textsuperscript{326} With the new, one-tier SE, all of the managing directors sit on the same level in all three companies.\textsuperscript{327} Plansee’s lawyers and officers say that the new organization appears more understandable to potential foreign investors and venture partners.\textsuperscript{328}

Case 10: PCC (Germany)

PCC, the closely-held German energy company, also used the SE to establish a one-tier board. The new structure has enabled the owner, who chairs the board, to strengthen his control of the company. Before the conversion, a supervisory board of three outside directors ratified his decisions.\textsuperscript{329} The integrated board now has only one external member, a former representative to the supervisory board, who serves alongside the company’s owner, and a former member of the Management Board.\textsuperscript{330} The owner can more easily pass initiatives he proposes under the new arrangement.\textsuperscript{331}

Many companies describe the European branding that the SE offers as an additional benefit of conversion.\textsuperscript{332} PCC conducts extensive operations in Poland and has failed to complete two attempted takeovers of Polish chemical companies.\textsuperscript{333} The company blames the failures on a perception in Poland that

\begin{thebibliography}{99}
\item[] 325 Interview with Anonymous Source No. 59, company lawyers and officers, location not identified (Mar. 10, 2008) (on file with author).
\item[] 326 Id.
\item[] 327 Id.
\item[] 328 Interview with Anonymous Source No. 53; Interview with Anonymous Source No. 59.
\item[] 329 Interview with Anonymous Source No. 55, location not identified (Feb. 28, 2008) (on file with author); Interview with Anonymous Source No. 58, location not identified (Apr. 28, 2008) (on file with author).
\item[] 330 Interview with Anonymous Source No. 55; Interview with Anonymous Source No. 58.
\item[] 331 Interview with Anonymous Source No. 55; Interview with Anonymous Source No. 58.
\item[] 333 Interview with Anonymous Source No. 55.
\end{thebibliography}
German corporate ownership threatens Polish employment. It has eagerly embraced the European status that the SE confers.

2. Survivability of Stakeholder Models

While all German companies with employee representation have retained their two-tier boards after converting to the SE, many of them have changed the size and composition of their supervisory boards. The SE Directive sets out a process for negotiating an agreement with workers that holds the potential to ease the demands of codetermination, even though the overall proportion of employee representation must remain the same. The process, however, has proven both costly and difficult, and the companies that have undertaken it have not eliminated codetermination entirely, as they could have by reincorporating in a Member State that does not require it. Instead, the

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334 Id.
335 Id.
336 For example, Allianz, BASF, Carthago Value Invest, Fresenius, Hager, Man Diesel, Max Boegl International, Porsche Holding, and Surteco. See ETUI, Established SEs Fact Sheet Overview, supra note 18 (select companies from the index).
337 Using the political system to reduce the burden of German codetermination has not been possible. See, e.g., Angel R. Oquendo, Breaking on Through to the Other Side: Understanding Continental European Corporate Governance, 22 U. PA. J. INT’L ECON. L. 975, 994 (2001). Since its enactment in 1952, the German Codetermination Act has been revised only once in 1976. According to Oquendo,

[D]uring the debate that led to the enactment of the 1998 Corporate Control and Transparency Act, the acting Minister of Justice, businessmen, and legal experts unanimously supported reducing the size of the supervisory council. Nonetheless, unions and the Minister of Labor opposed this position. They eventually carried the day and blocked the reform.

Id.
338 SE Directive, supra note 10, § 2, art. 3(4).
340 If we assume that a German stock corporation with more than 2000 employees, Widget AG (“Widget”), wants to get rid of the German regime of worker participation on the supervisory board, it can merge with a British public limited company by forming a European Company, Widget SE, to be registered in the UK. The British partner in the merger could be small and unimportant; it could be a wholly owned subsidiary of Widget. This move will not free Widget from codetermination; it will have to negotiate with its employees and their union the agreement provided for in the Directive. . . . But two years after the date of the registration Widget can make a next move: now the firm is able to transform the (British) SE into a British plc. UK law does not impose any form of employee participation on companies.
companies in the study described codetermination as an important instrument of legitimacy for making decisions that adversely affect their employees. While more concentrated governance makes it faster for companies to make choices and implement them, codetermination facilitates consensus and defuses conflict. Labor unions have also begun to refocus their strategies in response to changes in the character of employee representation on boards.

German codetermination rules include two important thresholds: companies with more than 500 employees but less than 2,000 must offer one third of their supervisory board seats to employee representatives, companies with more than 2,000 employees must offer one half of the positions. In the latter case, not only employee codetermination but also the size of the supervisory board is fixed by mandatory law. As a result, German companies with fewer than 2,000 employees have converted to the SE in order to hold the proportion of employee

Neither the SE-Regulation nor the SE-Directive require the preservation of codetermination in such a case.

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340 Interview with Anonymous Source No. 2, location not identified (Dec. 5, 2007) (on file with author); Interview with Anonymous Source No. 4, location not identified (Dec. 10, 2007) (on file with author); Interview with Anonymous Source No. 10, location not identified (Dec. 11, 2007) (on file with author); Interview with Anonymous Source No. 17, location not identified (Dec. 13, 2007) (on file with author); Interview with Anonymous Source No. 21, location not identified (Jan. 21, 2008) (on file with author); Interview with Anonymous Source No. 25, location not identified (Feb. 4, 2008) (on file with author); Interview with Anonymous Source No. 26, location not identified (Feb. 23, 2008) (on file with author); Interview with Anonymous Source No. 27, location not identified (Feb. 5, 2008) (on file with author); Interview with Anonymous Source No. 29, location not identified (Jan. 22, 2008) (on file with author); Interview with Anonymous Source No. 30, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 38, location not identified (Jan. 30, 2008) (on file with author); Interview with Anonymous Source No. 42, location not identified (Mar. 18, 2008) (on file with author); Interview with Anonymous Source No. 45, location not identified (Feb. 15, 2008) (on file with author); Interview with Anonymous Source No. 74, location not identified

341 See, e.g., Teichmann, supra note 103, at 1333.

342 Drittelbeteiligungsgesetz [One-Third Employee Representation Act], May 18, 2004, BGBl. I at 974, last amended by Gesetz, July 30, 2009, BGBl. I at 2479, § 1 (Ger.).

343 Gesetz über die Mitbestimmung der Arbeiternehmer [Codetermination Act of 1976], May 4, 1976, BGBl. I at 1153 (Ger.).

344 Id. II, § 7 (12 members in companies with a workforce not exceeding 10,000 employees, 16 members in companies with a workforce not exceeding 20,000 employees, 20 members in companies with a workforce exceeding 20,000 employees).
representation to the lower level. Those with more than 2,000 employees have used the SE to renegotiate the size of their supervisory boards, even though they have not been able to change the percentage of representation on the boards.345

Case 11: Fresenius (Germany)

Fresenius, the German healthcare company with a staff of 1,000 in one hundred countries, converted to the SE in order to freeze the size of its supervisory board prior to reaching the 2,000 employee threshold.346 The company expected to acquire a hospital business with many additional employees.347 Without the SE, it would have had to increase its supervisory board to twenty people from twelve.348

Case 12: Allianz (Germany)

With a workforce of more than 181,000, German codetermination rules mandate Allianz to provide half of its supervisory board seats to employees, but the SE allowed the company some changes. The company followed the process set out in the SE directive. It created a Special Negotiating Body of European employees349 to conduct negotiations with management. The negotiations concluded with a reduction in the size of the supervisory board from twenty to twelve, albeit with the same fifty percent ratio of employees that German law requires.350 Whereas previously the employee representatives all

345 See, e.g., Jeffrey N. Gordon, Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany, 5 COLUM. J. EUR. L. 219, 222 (1999) (“Supervisory boards are unwieldy—commonly twenty seats.”); Mark J. Roe, German Codetermination and German Securities Markets, 5 COLUM. J. EUR. L. 199, 200 (1999) (“Information flow to the board is poor, and the board is often too big and unwieldy to be effective.”).
346 Interview with Anonymous Source No. 29, location not identified (Jan. 22, 2008) (on file with author).
347 Interview with Anonymous Source No. 31, location not identified (Feb. 22, 2008) (on file with author).
348 Interview with Anonymous Source No. 29; Interview with Anonymous Source No. 31; Interview with Anonymous Source No. 74, location not identified (Apr. 28, 2008) (on file with author).
came from Germany, the new supervisory board includes a French and a British employee.\footnote{Interview with Anonymous Source No. 21, location not identified (Jan. 21, 2008) (on file with author); Interview with Anonymous Source No. 29; Interview with Anonymous Source No. 74.}

Companies with and without codetermination emphasized in interviews that smaller supervisory boards are easier to coordinate; fewer people can make decisions more quickly. Smaller numbers also improve confidentiality and save money that companies spend on board salaries.

The cost of converting to the SE in order to make changes can be substantial, however, and some German companies have chosen simply to keep their original supervisory boards in place rather than enter the negotiations.\footnote{Interview with Anonymous Source No. 28, location not identified (Feb. 21, 2008) (on file with author).} Allianz paid a total of €95 million to transform into an SE.\footnote{Statutes of Allianz SE, Nov. 2007, § 18.1.} The negotiation process can also pose challenges.\footnote{See, e.g., Christoph Teichmann, \textit{Restructuring Companies in Europe: A German Perspective}, 15 EUR. BUS. L. REV. 1325, 1335 (2004) ("To be sure, the negotiation procedure of the directive is burdensome and time consuming. Given the time pressure usually involved in international mergers and acquisitions, the negotiation period of six months provided for by the directive may fatally affect the dynamics of such transactions.").} BASF, the German chemical company, spent three months simply to nominate and elect thirty-two representatives to the Special Negotiating Body from the different countries in which it operates.\footnote{Interview with Anonymous Source No. 29.} All of the German companies that have converted to the SE have negotiated their representation for the entire six-month period that the directive allows. For some companies, the “before and after”\footnote{SE Directive, \textit{supra} note 10, recital 18.} fallback principle has blocked any adjustments, despite what they have paid to initiate the process.\footnote{SE Regulation, \textit{supra} note 10, recital 18.}

Legal uncertainties regarding what companies can negotiate also persist. Allianz, as well as BASF, has asserted that a company’s articles of association determine the size of its supervisory board.\footnote{Interview with Anonymous Source No. 21; Interview with Anonymous Source No. 29; Interview with Anonymous Source No. 42, location not identified (Mar. 18, 2008) (on file with author).} Other legal commentators, however, have suggested that the size of the supervisory board can itself be
established through the negotiation process with the Special Negotiating Body. The legislation does not resolve the question clearly.359

Labor unions are observing the developments closely. The reduction in the size of Allianz’s supervisory board to twelve and the internationalization of its members tracks the experience of other large German companies that have made the transition to the SE.360 Some fear the form will weaken labor strength because employees from different Member States have conflicting interests and no common history of acting together.361 Others argue that internationalization enhances the legitimacy of employee representation because it reflects the actual composition of modern workforces.362

According to the European Trade Union Institute for Research, Education, and Health and Safety (“ETUI”), the SE is forcing the creation of a more regional arrangement for union activities.363 The European Trade Union Confederation (“ETUC”)
has begun to intermediate in negotiations. It provides translators to help workers act collectively.\(^{364}\) It also hopes to broaden the workers’ goals, as multinational companies pay decreasing attention to national unions who refer to national rights under national law and pit national unions against each other.\(^{365}\)

The debate that the SE has prompted has also introduced new discussions about workers’ rights in countries with few protections of them. Unionization among Member States varies widely. The union density rate in Norway is nearly eighty percent, while in France it is only ten percent.\(^{366}\) Collective bargaining coverage in Slovenia is nearly complete, while in Lithuania it is only ten percent.\(^{367}\) Every country in which an SE operates, however, must provide representatives to the Special Negotiating Body,\(^{368}\) spreading awareness of bargaining power to countries that have not allowed it. Sample Life Insurance Baltic SE, for example, trained candidates to the Special Negotiating Body from its Estonian, Latvian, and Lithuanian subsidiaries, where workers had not undertaken similar roles before.\(^{369}\)

In contrast to the Baltic States, Scandinavia has a strong tradition of union representation. More than eighty percent of the Swedish population belongs to a union, and Swedish
companies with more than twenty-five employees must appoint workers to their boards. In beginning the conversion process to the SE, Nordea and its principal union, the Confederation of the Nordic Bank, Finance and Insurance Unions (“NFU”), worked together closely to strengthen union organization at its subsidiaries. Only its Polish subsidiary had a trade union. The NFU received a grant from the European Union to conduct a series of meetings at the subsidiaries, and Nordea’s directors participated. According to the directors, developing reliable employee contacts would benefit the company.

3. U.S. Comparison

While the Supervisory Board structure does not exist in the U.S., national corporate governance debates have recently focused on the importance of outside monitors on company boards. Following Enron and other corporate scandals, in the Fall of 2003, the SEC approved new rules mandating publicly-listed companies to fill the majority of their board seats

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370 THE EUROPEAN COMPANY—PROSPECTS FOR WORKER BOARD-LEVEL PARTICIPATION IN THE ENLARGED EU, supra note 368; id. at 83–85.
371 Interview with Anonymous Source No. 7.
372 Id.; Interview with Anonymous Source No. 8, location not identified (Feb. 1, 2008) (on file with author).
with independent directors.\textsuperscript{377} The Sarbanes-Oxley Act of 2002\textsuperscript{378} also requires independent directors to serve on the audit committees of company boards.\textsuperscript{379} The rules reflect the assumption that outsiders oversee management more closely than insiders do and also act in the best interests of shareholders when they review corporate decisions. Several empirical studies, however, have indicated that their appointment actually offers few benefits to shareholders, as measured by firm performance and stock price.\textsuperscript{380} Independent directors served in the majority of board positions at Enron.\textsuperscript{381}

Employee ownership has also become increasingly common. In 2006, twenty million Americans held shares in their workplace through a 401(k) plan, employee stock option plan, or direct stock grant, and roughly eleven million held stock options.\textsuperscript{382} Nearly thirty-five percent of employees of companies that issued stock owned its shares.\textsuperscript{383}

Unionization and attitudes towards unionization tend to be uniform in the U.S., although the western states have recently experienced higher growth in unionization\textsuperscript{384} than the rest of the country.\textsuperscript{385} Most labor unions belong to national umbrella


\textsuperscript{379} Id. § 301, 116 Stat. at 775–77 (codified as amended at 15 U.S.C. §§ 78j–l(m) (2006)).

\textsuperscript{380} See Sanjai Bhagat & Bernard Black, The Uncertain Relationship Between Board Composition and Firm Performance, 54 BUS. LAW. 921, 942 (1999) (“Most studies find little correlation, but a number of recent studies report evidence of a negative correlation between the proportion of independent directors and firm performance—the exact opposite of conventional wisdom.”).


\textsuperscript{382} National Center for Employee Ownership, Data Show Widespread Employee Ownership in U.S. (Mar. 2, 2007), http://www.nceo.org/library/widespread.html.

\textsuperscript{383} See id. (stating the results of the 2006 General Social Survey).

\textsuperscript{384} See AFL-CIO, Facts and Statistics: United States, Union Membership, available at http://www.aflcio.org/issues/factstats/factstats.cfm (last visited Oct. 10, 2010). The percentage of workers belonging to a union increased by 2.3% in Washington state and by 1.2% in California between 2000 and 2007. Id. In Tennessee and Illinois, it decreased by 3.8% each, within the same time period. Id.

\textsuperscript{385} Unionization overall, however, has fallen considerably. According to the U.S. Bureau of Labor Statistics, unionization dropped from 32% of the private sector in 1956 to 7.8% in 2005. United States Department of Labor, Bureau of Labor
organizations: the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) or the Change to Win Federation, which separated from the AFL-CIO in 2005. The National Labor Relations Board, a federal agency, oversees the administration of the National Labor Relations Act, which has regulated unions operating in the private sector since 1935. An array of federal and state law governs public-sector unions; state labor boards primarily oversee their operations.

The SE has contributed to the reorganization, but retained the presence, of employee representatives on company boards in Member States with codetermination systems and has also influenced the level at which labor unions direct their efforts.

V. CONCLUSION

For the U.S. and for Europe, the question of how to integrate economic markets at the regional level while retaining respect for local autonomy is critical, but each has chosen to navigate the

391 See, e.g., ALASKA STAT. § 23.40.080 (2010); CONN. GEN. STAT. ANN. § 5-271 (West 2010); MASS. GEN. LAWS ANN. ch. 150E, § 2 (West 2004); OHIO REV. CODE ANN. § 4117.03 (West 2010).
392 See, e.g., 5 ILL. COMP. STAT. ANN. 315/1 to /27 (West 2010); OHIO REV. CODE ANN. § 4117.02 (West 2010) (requiring a three-member labor board); N.Y. CIV. SERV. LAW §§ 200–14 (McKinney 2010).
tensions arising from multi-level governance in different ways. Companies clamor for a single set of rules to follow, as early support in the U.S. for mutual recognition of companies by the states and the demand for first-order incorporations in the UK by European companies has demonstrated. Several companies in the study called for a global corporate form, even more ambitious than the SE’s protracted attempt to create a unified body of European corporate law.393

Because the competition between the states over corporate law has largely been won by Delaware, the U.S. experience reflects the imposition of rules pre-chosen by a single legislator, either Delaware or the federal government.394 When the federal government has intervened in matters of corporate regulation, it has done so completely,395 using the doctrine of preemption396 to


395 For calls for a less “dualistic” approach to U.S. federalism and suggesting new models such as “dynamic federalism,” “interactive federalism,” and “cooperative federalism,” see, for example, Daniel J. Elazar, Cooperative Federalism, in COMPETITION AMONG STATE AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 80–83 (Daphne A. Kenyon & John Kincaid eds., 1991); Erwin Chemerinsky, Empowering States When It Matters: A Different Approach to Preemption, 69 BROOK. L. REV. 1313 (2004); Renee Jones, Does Federalism Matter?: Its Perplexing Role in the Corporate Governance Debate, 41 WAKE FOREST L. REV. 879 (2006); Schapiro, supra note 2.

396 The federal preemption doctrine disallows state laws that are inconsistent with federal legislation or which impinge on areas in which Congress has already “occupied the field” with legislation. See, e.g., John O. McGinnis, Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery, 90
exclude the states from the field. Where state and federal spheres of regulation coexist, such as proxy regulation, they hew self-consciously to a dualistic notion of federalism, in which the federal securities laws may govern disclosure and procedure but may not intrude into state law areas of corporate governance.

Democratic processes and direct representation support a powerful federal Congress, and the political consensus it embodies offers it the possibility to implement swift, radical change. In the absence of any competitor to the federal government, however, robust federal legislation threatens to succumb to rent-seeking or over-reaction. Many commentators, for example, view the Sarbanes-Oxley Act as the misguided result of a rush by Congress to respond to public anxiety. They advocate a more measured process of experimentation and learning, in order to strike a more efficient balance between the deterrence of corporate fraud and the cost of corporate compliance.

Reflecting its history and also by virtue of political necessity, the EU has had to preserve far more diversity in national laws from the outset of its regional regulatory initiatives. It has been faced with the escalating demands of businesses for measures easing their operations across European borders, as well as recent decisions by the European Court of Justice. As a result, the EU has begun to chart a new relationship between an upper-level regulatory authority and those of the individual Member States different from the U.S. federalist arrangement. Lacking

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CAL. L. REV. 485, 526 n.203 (2002) (discussing the Supreme Court’s “promiscuous use” of preemption); Alison Cassady, Tying the Hands of States: The Impact of Federal Preemption on State Problem-Solvers, at 2 (National Association of State PIRGS, July 2004) (“Federal preemption has often tied the hands of state legislators and regulators eager to solve problems facing their constituents”). Under Business Roundtable v. SEC, however, federal regulatory agencies may not unilaterally preempt state law; they require clear congressional authorization to do so. 905 F.2d 406, 412, 414 (D.C. Cir. 1990).

Where state and federal spheres of regulation coexist, such as proxy regulation, they hew self-consciously to a dualistic notion of federalism, in which the federal securities laws may govern disclosure and procedure but may not intrude into state law areas of corporate governance.

Compare Dieter Grimm, Does Europe Need a Constitution?, 1 EUR. L.J. 282, 291 (1995) (“The European public power is not one that derives from the people, but one mediated through States. Since the Treaties thus have not an internal but an external reference point, they are also not the expression of a society’s self-determination as to the form and objectives of its political unity.”), with PHILIPPE C. SCHMITTER, HOW TO DEMOCRATIZE THE EUROPEAN UNION . . . AND WHY BOTHER? (2000).


See, e.g., Eric Stein, International Integration and Democracy: No Love at First Sight, 95 AM. J. INT’L L. 515, 516 (2001) (“[T]he long-range tendency has been toward more integration in a complex pattern of shared governance . . .”).
a founding integrative myth similar to the U.S.\footnote{See \textit{European Business Law: Legal and Economic Analyses on Integration and Harmonization} 16 (Richard M. Buxbaum et al. eds., 1991) (stating that European Commission members “do not arrive in office with any manifesto or programme other than what is in the EEC Treaty”).} and reflecting its nature as a composite union of mature nations, its approach has been more indirect and subtle\footnote{See, e.g., Juliet Lodge, \textit{Transparency and Democratic Legitimacy}, 32 \textit{J. COMMON MKT. STUD.} 343, 344 (1994); Eric Stein, \textit{Democracy Beyond Nation-State: On World Trade Organization and European Union} 10 (University of Georgia School of Law Occassional Paper Series, 2002), available at http://digitalcommons.law.uga.edu/ru nk_oc/2 (“Georg Ress calls the [European] Council the Kremlin of the West.”). See also generally \textit{Openness and Transparency in the European Union} (Veerle Deckmyn & Ian Thomson eds., 1998).} The history of the EU has been marked by covert attempts to offer incremental possibilities for economic integration, with minimal interference in the legal systems of its Member States.\footnote{See, e.g., Christian Joerges, \textit{Deliberative Supranationalism”—Two Defences}, 8 \textit{EUR. L.J.} 133, 149–50 (2002) (discussing the “legitimacy of transnational governance which can neither be derived from national constitutional law nor from a supranational order of superior validity,” becoming, therefore, “the core and enduring problem of European law”).} The legislative methodology of the SE parallels the genesis of the EU and the long-standing debates over the powers it should carry over local jurisdictions.

The SE has tested the ability of the European Member States to pool their authority over corporate law. After decades of negotiation, the EU reached a compromise that, instead of expropriating the Member States, maintains divergences in their legal systems by creating a simple framework with minimal European law. In this way, it secured from Member States their support for the SE both with and without codetermination systems, an area in which true consensus was unlikely ever to emerge. In the five years since the agreement, a growing number of companies from a variety of industries have navigated substantial legal uncertainties and expended significant investments to convert to the new form. Most companies have done so to streamline their operations and to generate regulatory efficiencies through centralized branch structures. A few have used it to gain flexibility for headquarters relocation, or for organization of their boards of directors.

The remaining diversity in the laws and regulatory techniques of the Member States has facilitated a process in which companies can express their preferences for particular systems and can bring about convergence without the need for ex
choices by a centralized regulator. The EU unveiled the SE in the absence of true European corporate law or corporate tribunals. While use of the form has been selective, and it has captured the interest only of selected companies, it has become a pilot project for what European corporate law could represent and pointed to the sectors and Member States that are most likely to want it.

This discovery model, termed “reflexive harmonization,”

provides a useful building block for U.S. cross-border regulatory efforts, in areas where international agreement is impossible.

Pressure to transcend national boundaries and address emerging transatlantic challenges has intensified in the U.S. The current crisis in the credit markets underscores the need for

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404 See supra note 19.

405 See, e.g., REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES, supra note 15, at xvi.

The United States and the European Union increasingly collaborate on a range of regulatory issues in an effort to remove non-tariff barriers and thus to facilitate trade. For instance, bilateral regulatory harmonization and mutual recognition efforts have been undertaken by the United States and the European Union in the context of the New Transatlantic Agenda. The two blocks have agreed to consult each other in the early stages of drafting regulations and to rely to a greater extent on each other’s technical resources and expertise. Recent global mergers such as Boeing/McDonnell Douglas, WorldCom/MCI, and Daimler/Chrysler have also illustrated the growing level of cooperation between the US Department of Justice and the European Commission on antitrust matters.

Id. at 41 (internal citations omitted); see also EUROPEAN BUSINESS LAW: LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION 399 (Richard M. Buxbaum et al. eds., 1991) (“More frequent will be the determination—especially in bank and capital market law—that a global solution would be even better than a European one . . . . [I]n this case the clear choice would be a regional solution . . . . coupled so far as possible with . . . multilateral regulation . . . .”). But see Stephan, supra note 29, at 788.

The project of unifying substantive international commercial law . . . . has its own political economy with predictable and unattractive implications for what it produces. International unification instruments display a strong tendency either to compromise legal certainty or to advance the agendas of interest groups. In either case they offer no obvious gains as compared to rules produced through the national legislative process.

Id.

international regulatory techniques, as securitization and globalization carry business activities farther across national frontiers. Mechanisms inspired by the pragmatic, learning-by-doing approach in Europe would facilitate compromise in areas where consensus is difficult and would also constrain the pendulum-like swings that appear to characterize the current national character.

Progress in this direction, however, must consider carefully the consequences of allowing companies to select and deselect the rules according to which they will operate. Rather than triggering countries to compete to offer attractive legal regimes, companies themselves are actively using the SE to press for more streamlined regulation and harmonized law. Companies want to take full advantage of integrated markets, to improve their position by reducing costs and gaining regulatory predictability. The companies are several steps ahead of the Member States themselves, which struggle to cooperate to build cross-border regulatory systems. The Member States’ desire to foster an integrated market conflicts with their other prudential concerns, such as maintaining regulatory control and retaining or avoiding employee representation on boards. Where they can, companies are bypassing the Member States’ inability to coordinate cross-border regulation by carrying out their own restructuring and moving directly to regulation by a single Member State.

The approach has placed tremendous power in the hands of companies to choose the systems around which company law will begin to converge in Europe. Facilitating their choices may conflict with protecting the interests of other stakeholders. Necessary considerations include whether the ability of workers to organize is helped or harmed by the transformation of their companies to the SE, the effect of reorganization on creditors and on managers, and whether SE companies increase systemic risk in the markets due to reduced regulation or decrease it by adopting streamlined structures that are more easily monitored by company directors.

Companies that convert to the SE will provide measurable answers to these and other questions, useful for evaluating Europe’s approach to developing a centralized, transnational

market, in spite of the caution the legislation reflects. The SE constitutes a valuable test case for gauging the viability of unified corporate identities and international regulatory regimes. It should be of significant relevance to legislators and policymakers on both sides of the Atlantic.