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"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 CORPORATE IDENTITY?: A TRANSATLANTIC PERSPECTIVE ON REGIONAL DYNAMICS AND THE *SOCIETAS 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

* Treaty Establishing the European Community, Preamble, Mar. 25, 1957, 298 U.N.T.S. 15.

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1 *See* U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, William W. Bratton & Joseph A. McCahery, *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.").

2 *See, e.g.*, Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78mm (2006)); Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2006)); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1978) (codified as amended at 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[3] 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.[4]

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*,[5] 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[6] outlawed state legislation that discriminated against companies from other states.[7]

Companies in Europe, however, have not, until recently, been able to merge internationally or reincorporate in a different country.[8] The European Member States demonstrate a wide variation in attitudes towards labor rights, shareholder

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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").

[7] *But see* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Scalia, J., concurring) (denouncing the Dormant Commerce Clause and seeking to limit it to facially discriminatory local and state taxes).

[8] *See, e.g.*, CARLA TAVARES DA COSTA & ALEXANDRA DE MEESTER BILREIRO, THE EUROPEAN COMPANY STATUTE 1 (2003); *see also* Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40 COMMON MKT. L. REV. 661, 690 (2003).

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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[9] *See, e.g.*, Klaus Heine & Wolfgang Kerber, *European Corporate Laws, Regulatory Competition and Path Dependence*, 13 EUR. J.L. & ECON. 47, 61 (2002).

> 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.

Id. For additional authority, see also W. Loeber Landau, *The Federal and State Roles in Regulating United States Business Corporations*, *in* HARMONIZATION OF COMPANY AND SECURITIES LAW: THE EUROPEAN AND AMERICAN APPROACH 31, 32 (Boudewijn Wachter ed., 1989).

> 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.

[10] *See generally* Council Regulation 2157/2001, 2001 O.J. (L 294) 1 [hereinafter SE Regulation]; *see also* Council Directive 2001/86/EC, (18), 2001 O.J. (L 294) 22, 23 [hereinafter SE Directive].

[11] SE Regulation, *supra* note 10, pmbl. 1–7.

[12] *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.").

[13] *See* SE Regulation, *supra* note 10, pmbl. 4, 12, 20, 21, 26, arts. 4(3), 13, 15(1), 47(1), 51, 52(1)(b)–(2), 53, 54(1)–(2), 57, 59(1), 61, 62(1)–(2); *see also* 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,[14] with a supplementary negotiation process for establishing employee representation on company boards. The result has raised concerns that rather than integrating European commercial markets,[15] the SE will instead introduce regulatory competition[16] and dilute national social protections.[17]

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.

Catherine Barnard & Simon Deakin, *Market Access and Regulatory Competition*, *in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 199 (Catherine Barnard & Joanne Scott eds., 2002); *see also* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES xxiii (Daniel C. Etsy & Damien Geradin eds., 2001).

[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 Entwicklungslinien 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,[18] 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.[19] 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.[20] Consequently, it has introduced only

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[18] *See Established SEs Fact Sheet Overview*, ETUI, http://ecdb.worker-participation.eu/show_overview.php?letter=A&orderField=se_name&status_id=3&title=Established%20SEs (describing a continually updated list of established SE companies) (last visited Feb. 4, 2011).

[19] *See, e.g.*, Simon Deakin, *Reflexive Governance and European Company Law*, 17 EUR. L. J. 224 (2009); Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?* (Ctr. for Bus. Research, Univ. of Cambridge, Working Paper No. 323 (2006)) [hereinafter *Legal Diversity*].

[20] In theoretical studies, Luca Enriques and others predicted that SE would cause regulatory competition in Europe. Enriques, *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,[21] 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.[22] The development of innovative approaches for

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50 (2007); Clark D. Stith, Note, *Federalism and Company Law: A 'Race to the Bottom' in the European Community*, 79 GEO. L.J. 1581, 1611–12 (1991). Other commentators who have analyzed the possibilities, however, have hypothesized that the SE is not a sufficiently attractive tool. Joseph A. McCahery & Erik P. M. Vermeulen, *Does the European Company Prevent the 'Delaware Effect'?*, 11 EUR. L.J. 785, 792 (2005); W. Bratton, J. McCahery & E. Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis* (European Corporate Governance Institute, Law Working Paper No. 91, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086667.

[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"[23] 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.[24] 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.[25]

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

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because it's susceptible to error and interest group influence" and, due to its overarching position, can impose inefficient corporate rules).

[23] *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Francis Bowen ed., Henry Reeve trans., 3d ed. 1863) (1835).

[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 Sate 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,[26] the EU differs greatly from the U.S. in the circumstances surrounding its inception and the form into which

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[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.[27] The EU developed for economic reasons. Its most significant achievements have occurred in the field of business law,[28] and its supranational structure chiefly reflects the completion of a series of incremental steps towards the creation of a single commercial market.[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.[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.[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

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[27] *See* Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?,"* 43 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)).

[28] *See, e.g.*, First Council Directive 68/151, 1968 (EC) (addressing information disclosure, contracts, dissolution); Second Council Directive 77/91, 1976 (EC) (addressing capitalization of public companies); Third Council Directive 78/855, 1978 (EC) (addressing mergers of public limited liability companies); Sixth Council Directive 82/891, 1982 (EC) (addressing divisions of public limited liability companies); Fourth Council Directive 78/660, 1978 (EC), Seventh Council Directive 83/349, 1983 (EC), and Eighth Council Directive 79/1072, 1979 (EC) (addressing accounts and auditing); Eleventh Council Directive 89/666, 1989 (EC) (addressing company branches and disclosure); Twelfth Council Directive 89/667, 1989 (EC) (addressing private limited liability companies).

[29] *See, e.g.*, Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744–45 (1999) (discussing "[t]he impulse to reduce diversity among the legal systems governing commerce").

[30] *See* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 515 (2001) (discussing the consequences of this particular history).

[31] *See, e.g.*, VICTORIA CURZON, THE ESSENTIALS OF ECONOMIC INTEGRATION: LESSONS OF EFTA EXPERIENCE 28–29 (1974).

> 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.

Id.

them.[32] 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.[33] The proposal was rejected in 1954, however, and future European developments continued along the more narrow path of economic integration.[34]

Each European country therefore retains far greater power to govern than the fifty U.S. states.[35] The EU, for example, holds no responsibility for the provision of social welfare, has no police, and sets no education policy.[36] 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.[37] In the corporate law area specifically,

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[32] Treaty Establishing the European Coal and Steel Community art. 99, Apr. 18, 1951, 261 U.N.T.S. 140.

[33] CURZON, *supra* note 31, at 30.

> 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").

[36] *See* Andrew Moravcsik, *Federalism in the EU: Rhetoric and Reality*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 165, 165–68 (Kalypso Nicolaïdis & Robert Howse eds., 2001).

[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

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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).

[38] *See, e.g.*, James A. Fanto, *The Role of Corporate Law in French Corporate Governance*, 31 CORNELL INT'L L.J. 31, 36 (1998); Jette Steen Knudsen, *Is the Single European Market an Illusion? Obstacles to Reform of EU Takeover Regulation*, 11 EUR. L.J. 507, 524 (2005); Antoine Rebérioux, *European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement*, 40 J. COMMON MKT. STUD. 111, 126–27 (2002); Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, 3 WASH. U. GLOBAL STUD. L. REV. 867, 869 (2004); *see also* Luca Enriques, *Company Law Harmonization Reconsidered: What Role for the EC*, *in* EUROPEAN COMPANY LAW IN ACCELERATED PROGRESS (S.M. Bartman ed., 2006).

[39] *See, e.g.*, ADRIAAN DORRESTEIJN ET AL., EUROPEAN CORPORATE LAW 40 (2d ed. 2009).

[40] Treaty Establishing the European Economic Community, Preamble, Rome, Mar. 25, 1957, 298 U.N.T.S. 15 [hereinafter Treaty of Rome].

[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.

Paul Craig, *The Evolution of the Single Market*, *in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES, *supra* note 15, at 1–2.

[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."[43]

European businesses have consistently supported European integration.[44] 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.[45] A preliminary draft of the SE statute, in 1966, utilized article 235 of the Treaty of Rome as its foundation.[46]

During the prolonged negotiation process over the SE, and in spite of increasing political ill will towards European initiatives,[47] 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.

[45] ERIC STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION 439 (1971).

[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.[48] 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.[49] The memorandum deemed cross-border business activity imperative for successful competition against the U.S. and Japan.[50]

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.[51] France sought to prevent its companies from reincoroporating 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."[52] 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.[53]

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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.*

[51] *See* McCahery & Vermeulen, *supra* note 20; David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423, 424 (1991).

[52] *See* CHRISTIAN W.A. TIMMERMANS, FIRST WALTER VAN GERVEN LECTURE: COMPANY LAW AS IUS COMMUNE? 5 (Wouter Devroe & Dimitri Droshout eds., 2002).

[53] First Council Directive 1968 O.J. SPEC. ED. (I) (disclosure of corporate data); Second Council Directive 77/91, art. 6, 1977 O.J. (L 26) 31, 1 (EC) (establishing capital minimums).

Almost no competition to attract corporate charters developed in Europe.[54] 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.[55] The principle has prevented companies from incorporating in countries with more lenient legal regimes if their businesses are focused elsewhere.[56]

A series of judgments of the European Court of Justice, beginning in 1999 with *Centros Ltd. v. Erhvervs-og Seskabsstyrelsen*,[57] 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,[58] although the ECJ's 2009 decision in *Cartesio Oktató és Szolgáltató BT*[59] may indicate that the development has now run out.

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[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.").

[56] *See, e.g.*, Inne G. F. Cath, *Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market*, *in* YEARBOOK OF EUROPEAN LAW 247, 247 (Francis G. Jacobs ed., 1988); Robert R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the 'Delaware Syndrome'*, 57 CAMBRIDGE L.J. 166, 187 (1998).

[57] Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-01459.

[58] *See* Gilson, *supra* note 54, at 351 (stating that *Centros* destabilized the equilibrium of diverse corporate regimes). *See generally* Kilian Baelz & Teresa Baldwin, *The End of the Real Seat Theory (*Sitztheorie*): The European Court of Justice Decision in* Ueberseering *of 5 November 2002 and Its Impact on German and European Company Law*, 3 GERMAN L.J. 12 (2002); Sebastian Mock, *Harmonization, Regulation and Legislative Competition in European Corporate Law*, 3 GERMAN L.J. 12 (2002); Larry E. Ribstein, *The Evolving Partnership*, 26 J. CORP. L. 819, 821 (2001); Wulf-Henning Roth, *From* Centros *to* Ueberseering*: Free Movement of Companies, Private International Law, and Community Law*, 52 INT'L & COMP. L.Q. 177 (2003).

[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.[60] They intended to establish a branch of the company in Denmark, which would carry out its principal business.[61] The Danish commercial registry, in an attempt to uphold the spirit of the national laws, refused to register the branch.[62] The ECJ reversed the decision on free establishment grounds,[63] and many legal commentators assumed that the ECJ had indicated that the real seat principle violated the right to free establishment[64] set out in the Treaty of Rome.[65]

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.[66] 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.[67] Überseering had been formed according to Dutch law, but its shareholders and principal office were located in Germany.[68] 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.[69] The ECJ overturned the decision of the German court, holding that a

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-01459.

[64] Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community arts. 43, 48, Rome, Dec. 29, 2006, 2006 O.J. (C 321) 31, 34 [hereinafter TEU].

[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 continue to recognize it as a company of its own nationality. *Id.*

[66] *See, e.g.*, Thomas Bachner, *Freedom of Establishment for Companies: A Great Leap Forward*, 62 CAMBRIDGE L.J. 47, 48–49 (2003); Baelz & Baldwin, *supra* note 58; Frank Wooldridge, Überseering*: Freedom of Establishment of Companies Affirmed*, 14 EUR. BUS. L. REV. 227, 227 (2003) (discussing *Überseering*).

[67] C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC), 2002 E.C.R. I-9919, ¶ 94.

[68] *Id.*

[69] *Id.*

foreign-incorporated company must be recognized, regardless of the location of its administrative seat.[70] In *Inspire Art*, the ECJ disallowed rules mandating the application of the laws of the host state to companies registered in other Member States.[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.[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,[73] and its references to national law have introduced a novel potential for Member States to begin competing for corporate charters.[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,[75] for example, allows Member States discretion over the legality of defensive measures against hostile bids.[76] The European Commission adopted "recommendations" rather than binding directives on directors' remuneration and the role of nonexecutive and supervisory directors.[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

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[70] *Id.*

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

[72] *See id.*

[73] SE Regulation, *supra* note 10, art. 7.

[74] *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).

[75] *See* Council Directive 2004/25/EC, 2004 O.J. (L 142) 12–13.

[76] *Id.* at 12 (concerning takeover bids).

[77] Press Release, European Comm'n, Corporate Governance: Commission Urges Member States To Ensure a Strong Role for Independent Directors (Oct. 6, 2004), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1182&format=HTML&aged=1&language=EN&guiLanguage=en; Press Release, European Comm'n, Directors' Pay—Commission Sets out Guidance on Disclosure and Shareholder Control (Oct. 6, 2004), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1183&format=HTML&aged=0&language=EN&guiLanguage=en.

operates. The High Level Group expressly disavowed the substantive harmonization of corporate law through directives, stating that their lack of flexibility "petrifies" corporate structures.[78]

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[79] reflect increasing deference to the prerogatives of the Member States, especially in the areas of taxation and social rights.

The European Commission's first proposal for the SE, drafted in 1970, included more than four hundred articles, which detailed provisions for the corporation's formation, capital structure, and management structure; the rights of shareholders; accounting; liquidation; and insolvency.[80] The comprehensive rules freed European companies from citizenship in any particular country;[81] the legislation stated expressly that national development of business could "fragment markets," reducing the economic competitiveness of Europe.[82]

The final legislation, by contrast, contains only seventy articles.[83] The framework it provides refers to national law sixty-five distinct times.[84]

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

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[78] REPORT OF THE HIGH LEVEL GROUP OF EXPERTS, A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE 31 (2002).

[79] *See* Council Regulation 2157/2001, 2001 O.J. (L 294) 1 (EC).

[80] *See* Pieter Sanders, *The European Company*, 6 GA. J. INT'L & COMP. L. 367, 367 (1976); *see also Commission Proposal for a Council Regulation on the Statute for European Companies*, at 11, COM (75) 150 final (Mar. 10, 1975) [hereinafter 1975 Draft Statute].

[81] *See generally* GROUP OF EXPERTS, EUROPEAN SYSTEMS OF WORKER INVOLVEMENT (1997).

[82] *Commission Proposal for a Council Regulation Embodying a Statute for the European Company*, at 5, COM (70) 600 final (June 30, 1970) [hereinafter 1970 Draft Statute].

[83] *See* Council Regulation 2157/2001, 2001 O.J. (L 294) 1–18 (EC).

[84] 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).

offset against gains in another or whether each country could maintain its own, separate scheme.[85] The Commission's first proposal for the SE, in 1970, provided for the uniform taxation of SE companies.[86] Its next proposal, in 1989,[87] deemphasized taxation[88] but afforded companies new freedoms to offset losses among Member States.[89] The final SE legislation[90] does not include any provisions on taxation.[91]

The European Commission also struggled to craft guidelines for employee representation[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.[93] Several Member States require specific levels of employee representation for different types of companies of different sizes, while others have no equivalent systems.[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.[95] The Commission's next proposal, in 1989,[96] divided the legislation into a regulation and a directive, and relegated provisions for employee representation to the

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[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).

[86] *See* 1970 Draft Statute, *supra* note 82.

[87] 1989 O.J. (C 263) 41, COM (89) 268 final (Oct. 16, 1989); 1991 O.J. (C 138) 8, COM (1991) 174 final (May 29, 1991) [hereinafter 1991 Proposed Regulation].

[88] *Compare* 1988 Commission Memorandum, *supra* note 49, at 8–10, 21, *with* 1991 Proposed Regulation, *supra* note 87, art. 133, at 67–68.

[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.

[90] *See* Council Regulation 2157/2001, 2001 O.J. (L 294) 1 (EC).

[91] SE Regulation, *supra* note 10, recital 20.

[92] *See, e.g.*, Claire Leca, *The Participation of Employees' Representatives in the Governance Structure of the* Societas Europeae, 18 EUR. BUS. L. REV. 403, 403–04 (2007).

[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).

[94] INDUSTRIAL RELATIONS IN EUROPE 30 (European Comm'n ed., 2000).

[95] 1970 Draft Statute, *supra* note 82, arts. 62, 73, 137.

[96] 1989 O.J. (C 263) 41; COM (89) 268 final. The Commission amended this draft in 1991. *See* 1991 O.J. (C 176) 1, COM (91) 174.

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]

[97] *Proposal for a Council Regulation on the Statute for a European Company*, 1989 O.J. (C 263) 41; *Proposal for a Council Directive Supplementing the Statute for a European Company with Regard to the Involvement of Employees*, BULL. EUR. COMMUNITIES, May 1989, at 1 [hereinafter *1991 Proposed Directive*]. The provisions offered Member States three separate models of participation from which they could choose: representation on corporate boards parallel to the German model of workers' rights, representation on a separate works council according to the French system, or a negotiated arrangement for representation as suggested by Swedish practices. It also offered SE companies the ability to select between a one and two-tier board. *1991 Proposed Directive*, *supra*, art. 61, at 31.

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

[99] SE Directive, *supra* note 10, at 22, 23.

[100] *Id.*

[101] *See generally* Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Intergration in Europe*, 14 INT'L REV. L. ECON. 203 (1994).

[102] *See, e.g.*, Jaap Winter, *Thalassa! Thalassa!—The SE as a Glimpse of the Future?*, *in* THE EUROPEAN COMPANY 113, 122 (Jonathan Rickford ed., 2003); TAVARES & BILREIRO, *supra* note 8, at 11.

[103] *See, e.g.*, Leca, *supra* note 92, at 417; Cristoph Teichmann, *Restructuring Companies in Europe: A German Perspective*, 15 EUR. BUS. L. REV. 1325, 1334 (2004).

A compromise on the SE was finally reached in December 2000.[104] Following negotiations with the European Parliament, the SE came into force on October 8, 2004.[105] As of January 2008, 129 SE corporations have been established, although many of them do not yet conduct operations or employ any workers.[106]

IV. HOW ARE COMPANIES USING THE SE?

Legal commentators, beginning with Luca Enriques, predicted that the SE legislation's references to national law[107] would combine with the SE's ability to move[108] to create possibilities for Member States to compete for incorporations.[109] They forecast a new European corporate charter market.[110] 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.[111]

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).

[105] Council Regulation 2157/2001, 2001 O.J. (L 294) 1 (EC), art. 70. The SE Regulation applies directly to the Member States, but the SE Directive needed to be transposed into national law. By October 8, 2004, only Austria, Belgium, Denmark, Finland, Hungary, Iceland, the Slovak Republic, Sweden, and the United Kingdom had done so. *See* Directive 2001//86/EC–State of Implementation 1st September 2007, *available at* http://ec.europa.eu/social/BlobServlet?docId=2946&langId=en.

[106] *See infra* Part III.B.3.

[107] Council Regulation No. 2157/2001, 2001 O.J. (L 294) 1–18 (EC), arts. 4(3), 13, 15(1), 47(1), 51, 52(1)–(2), 53, 54(1)–(2), 57, 59(1), 61, 62(1)–(2).

[108] *Id.* art. 8; *see also* TAVARES & BILREIRO, *supra* note 8, at 11.

[109] Luca Enriques, *Silence Is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage* (Working Paper No. 07/2003, 2004). *But see* McCahery & Vermeulen, *supra* note 20; Bratton, McCahery & Vermeulen, *supra* note 20.

[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

[112] *See, e.g.*, Udo C. Braendle & Juergen Noll, *The Societas Europaea—A Step Towards Convergence of Corporate Governance Systems?* (2005) (discussing trends towards global convergence), *available at* http://ssrn.com/abstract=704881; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, *in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 33, 50–55 (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997). *But see* Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 329 (2001).

converted to the SE and adopted a branched structure, in order to achieve integrated regulation at the level of the parent company.[113]

As a result, the form appears to be progressing[114]: In the four years since its introduction,[115] the number of companies to convert has risen sharply.[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.

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[113] *See, e.g.*, Weatherill, *supra* note 35, at 41.

> [T]he dominant legislative preference is for a system of 'home State control', according to which harmonised rules of proper regulatory conduct are agreed at Community level but enforced at national level and pursuant to which it is assumed that 'home States' will subject firms based on their territory to the agreed Community rules while 'host States', in which target consumers of the firm are based, are excluded from actively applying not only domestic rules, but even in some circumstances the agreed Community rules. The host State's competence is pre-empted; the home State is expected to perform the job of supervision.

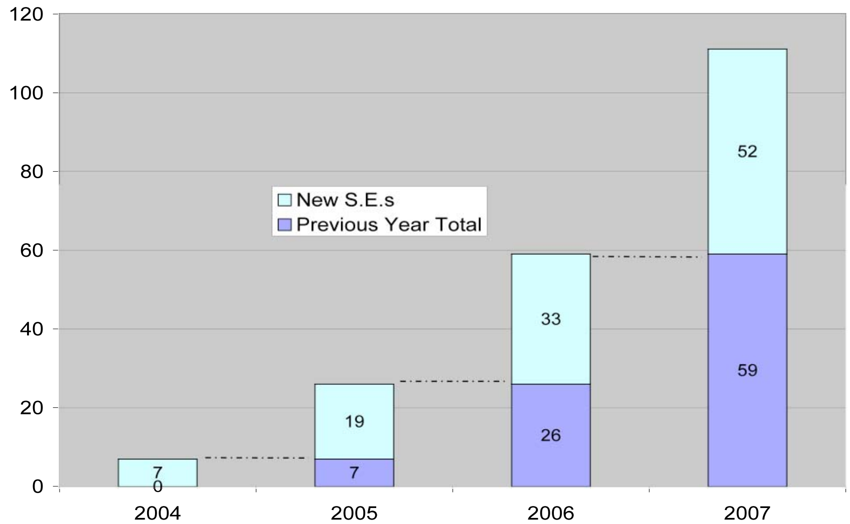
Id.

[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).

[115] It should be noted that many countries did not meet the October 8, 2004 deadline for implementing legislation. *See* ERNST & YOUNG, STUDY ON THE OPERATION AND THE IMPACTS OF THE STATUTE FOR A EUROPEAN COMPANY (SE), FINAL REPORT (2009) 55, *available at* http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf.

[116] *See infra* Figure 1.

Figure 1. Timeline[117]



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[118] and Austria,[119] may have difficulty rescuing large, vertically integrated companies that operate transnationally.[120] 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.

[119] Austria had loaned more than forty-three percent of its GDP to European customers. *Who's Next?*, ECONOMIST, Oct. 23, 2008, *available at* http://www.economist.com/node/12465279?story_id=12465279.

[120] *See* Jean Dermine & Dirk Schoenmaker, *In Banking, Is Small Beautiful?*, 19 FIN. MKTS., INSTITUTIONS & MKTS. 1, 9 (2010). *See generally* William H. Buiter &

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,[121] the SE provided the only means for companies to complete legal, international mergers.[122] The SE legislation has therefore liberated them from the costly legal contortions that had previously been necessary.[123] 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.[124] 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,

Anne Silbert, *The Icelandic Banking Crisis and What To Do About It: The Lender of Last Resort Theory of Optimal Currency Areas*, CENTRE FOR ECONOMIC POLICY RESEARCH, POLICY INSIGHT, Oct. 2008, *available at* http://www.cepr.org/pubs/policyinsights/PolicyInsight26.pdf.

[121] *See* Council Directive 2005/56/EC, 2005 O.J. (L 310) 1. *Compare* Council Directive 2005/56/EC (which took 20 years to complete), *with* Commission Proposal for a Tenth Directive of the Council Based on Article 54(3)(G) of the Treaty Concerning Cross-Border Mergers of Public Limited Companies, 1985 O.J. (C 23) 1, COM (1984) 727 final (Jan. 8, 1985) (one year between first draft and final draft).

[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]

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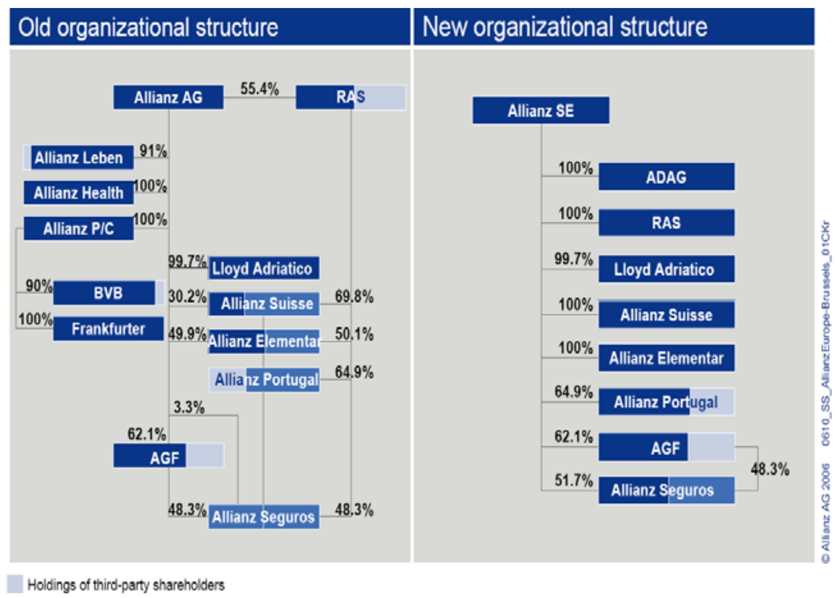
[125] Council Regulation 2157/2001, 2001 O.J. (L 294) 1 (EC).

[126] Interview with Anonymous Source No. 21, location not identified (Jan. 21, 2008) (on file with author).

[127] *See infra* Figure 2.

Figure 2. The Organizational Structure of Allianz[128]



Although conversion to the SE took more than one year, it formed a necessary step in the absorption of RAS by Allianz.[129] Without the capacity to complete a cross-border merger, Allianz could only have acquired RAS through a takeover bid.[130] 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

[128] Allianz in Europe: Transition to the Societas Europaea 7 (Oct. 16, 2006), *available at* https://www.allianz.com/static-resources/images-2006-12-13/pdf/saobj_1271040_allianz_se_presentation_md_eng2.pdf.

[129] Interview with Anonymous Source No. 3, location not identified (Dec. 3, 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. 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. 31, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 39, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 65, location not identified (Mar. 11, 2008) (on file with author).

[130] The Cross-Border Merger Directive had not yet taken effect. *See* Council Directive 2005/56/EC, 2005 O.J. (L 310).

process. National law proscribes the squeeze-out threshold; in Italy the threshold is ninety-eight percent.[131] Observers say that hold-out shareholders would have prevented Allianz from buying enough shares in RAS to complete a takeover.[132]

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,[133] branches in some sectors may report jointly to the national regulators of their parent companies.[134] The streamlined supervision that results reduces compliance costs and eliminates conflicting obligations.[135]

Case 2: Scor (France)

Scor, the French reinsurance company, created three SEs in order to take advantage of the 2005 EU Reinsurance Directives,[136] which offer combined supervision to reinsurance

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[131] *See* Christian E. Decher, *Cross Border Mergers: Traditional Structures and SE-Merger Structures*, 4 EUR. CO. & FIN. L. REV. 5, 8–10 (2007); Marco Ventoruzzo, *Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights Under Italian Law*, 4 EUR. CO. & FIN. L. REV. 47, 50–55 (2007); Eddy Wymeersch, *Do We Need a Law on Groups of Companies?*, Ghent University Financial Law Institute (2000).

[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.

[133] *See, e.g.*, Second Council Directive, 89/646, 1989 O.J. (L 386) 1 (EEC).

[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) ("[I]rrespective of the existence of a single market, the international management literature predicts that international firms will operate with a mix of branches and subsidiaries . . . .").

[136] *See* Council Directive 2005/68, 2005 O.J. (L 323) (EC) [hereinafter Reinsurance Directives]; Interview with Anonymous Source No. 20, location not

companies and their branches.[137] 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.[138] 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.[139]

By replacing its subsidiaries with branches, Scor achieved not only centralized regulation but also significant savings in compliance and corporate governance costs.[140] Branches, unlike subsidiaries, do not have to file corporate reports, convene separate boards,[141] or pay VAT taxes on transactions with their parent companies.[142]

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."[143]

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indentified (Feb. 12, 2008) (on file with author); Interview with Anonymous Source No. 45, location not identified (Feb. 15, 2008) (on file with author).

[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.

[141] *See, e.g.*, Adams v. Cape Indus., (1990) Ch. 433, 536 (A.C.) (U.K.); Case C-168/01, Bosal Holding BV v. Staatssecretaris van Financien, 2003 E.C.R. I-9409 ¶ 32; Case 6-7/73, Istituto Chemioterapico Italiano SpA v. Comm'n of European Cmtys., 1974 E.C.R. 223 ¶ 37.

[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

[144] Council Directive 2009/138/EC, Solvency II Directive, 2009 O.J. (L 335) 1.

[145] *Id.*

[146] *See id.* (providing a formula for the calculation of solvency capital requirements); Interview with Anonymous Source No. 20, location not indentified (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.[152]

Unlike Scor, however, Sampo Life Insurance Baltic could not attain centralized regulation by transforming into a branched SE. Consumer rights remain under national supervision.[153] Sampo Life Insurance Baltic offers three different insurance products in order to comply with varying national regulations.[154]

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.[155]

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.[156]

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

[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).

[153] *See* Council Directive 1999/44, art. 4, 1999 O.J. (L 171) 12 (EC); *Green Paper on European Union Consumer Protection*, at 7, COM (2001) 531 final (Oct. 2, 2001) ("Considerable divergences exist in the laws applied to business-consumer commercial practices in the internal market, whether resulting from national specific regulations, differences in general principles or from different jurisprudence."); *Proposal for a European Parliament and Council Regulation Concerning Sales Promotions in the Internal Market*, at 7, COM (2001) 546 final (Oct. 2, 2001) (blaming low cross-border consumer demand on national-level regulation).

[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.[157] The company combined its Dutch and British subsidiaries into a British SE, moved the SE to Luxembourg, and established a German branch.[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.[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.[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.[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.[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.[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.[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

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[157] SE Regulation, *supra* note 10, art. 29.

[158] *Id.*; *see also* Interview with Anonymous Source No. 65, location not identified (Apr. 25, 2008) (on file with author).

[159] Interview with Anonymous Source No. 64.

[160] Interview with Anonymous Source No. 65.

[161] Interview with Anonymous Source No. 64; *see also* Interview with Anonymous Source No. 65.

[162] Interview with Anonymous Source No. 43, location not identified (Jan. 23, 2008) (on file with author).

[163] *Id.*

[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]

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[165] *See, e.g.*, ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950–1957 xxxiii–xxxiv (1958) (positing spillover pressure to expand authority of central institutions into neighboring policy sectors); Malcolm Gammie, *EU Taxation and the Societas Europaea—Harmless Creature or Trojan Horse?*, 44 EUR. TAX'N 35, 36 (2004).

[166] Council Directive 94/19, arts. 3–4, 1994 O.J. (L 135) (EC).

[167] For example, the Danish scheme guarantees a maximum of 300,000 Danish Krone for ordinary deposits, the Swedish scheme guarantees a maximum of 250,000 Swedish Krona, and the Norwegian scheme guarantees a maximum of 2,000,000 Norwegian Krone. IMF, FINANCIAL INTEGRATION IN THE NORDIC-BALTIC REGION: CHALLENGES FOR FINANCIAL POLICIES 52–53 (2007), *available at* http://www.imf.org/external/np/seminars/eng/2007/nordbal/pdf/0607.pdf. In Denmark, a bank makes current payments but is repaid them on withdrawal. *See generally* DANMARKS NATIONAL BANK, PAYMENT SYSTEMS IN DENMARK (2005), *available at* http://www.nationalbanken.dk/DNUK/Publications.nsf/8b8fe2a60c3a10cbc1256be50057a78e/1e8fec8f259e61ffc125706c003d4409/$FILE/kap19.html. In Finland, Norway, and Sweden, banks pay nonrefundable premiums. *See* Jean Dermine, *European Banking Integration: Don't Put the Cart Before the Horse*, 58 tbl.12 (INSEAD, Fontainebleau, Sept. 17, 2005), *available at* http://www.insead.edu/facultyresearch/faculty/personal/jdermine/research/documents/Chicago2005DermineDraftII_000.pdf.

[168] *See* JAMES K. JACKSON, ICELAND'S FINANCIAL CRISIS, CONG. RESEARCH SERV. 3–4 (Mar. 11, 2010), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA516392; John Goddard, Phil Molyneux & John O.S. Wilson, *The Financial Crisis in Europe: Evolution, Policy Responses and Lessons for the Future*, 17 J. FIN. REG. & COMPLIANCE 362, 368 (2009); Michael

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.[169] 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.[170] 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.[171] 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 gaurantee schemes.[172] 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.[173] The funds that Nordea had already invested in the other countries' systems, however, would not have flowed with the deposits to Sweden.[174] This constrained Nordea's plans, as it had already allocated substantial funds in the countries' schemes.[175] Nordea petitioned the European Commission for a harmonized, European-level system of deposit

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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).

[170] The Second Banking Directive, Directive 89/646/EEC, allows for home country supervision of foreign bank branches under a single license. Foreign bank subsidiaries continue to be regulated by their host state. *See* ALFRED LEWIS & GIOIA PESCETTO, EU AND US BANKING IN THE 1990S 12–13 (1996).

[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

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[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.[182] The suggestion that PepsiCo might buy Danone caused French politicians to retain the national "jewel" for France.[183] 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.[184] The European Commission criticized the actions of Spain to thwart the merger, and referred the case to the European Court of Justice.[185] "Europe continues to fight yesterday's battles; there is very little community of purpose," stated one policy analyst.[186]

c. Corporate Taxation

Significantly more companies would adopt the SE if it offered a system of unified taxation.[187] The deficiency in the SE legislation has energized discussions of how best to organize corporate taxation at the European level.[188] A proposal called the

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[182] Interview with Anonymous Source No. 53, location not identified (Mar. 19, 2008) (on file with author).

[183] *See generally* Gillian G.H. Garcia, *Sovereignty v. Soundness: Cross-Border/Inter-State Banking in the European Union and the United States: Similarities, Differences and Policy Issues*, 27 CONTEMP. ECON. POL'Y 109 (2009); Deborah Orr, *Danone: Not For Sale*, FORBES (July 25, 2007, 1:45 PM EST), http://www.forbes.com/2005/07/25/danone-pepsi-takeover-cz_do_0725danone.html.

[184] Carter Dougherty, *E.ON Lowers Its Sights in Bid for Endesa After Enel's Entry*, INT'L HERALD TRIB., Mar. 7, 2007, at 14.

[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,[189] and most companies interviewed in the study favor it.[190]

The absence of harmonized tax provisions has been extensively criticized,[191] including by the European Commission.[192] Operating across uncoordinated national tax regimes subjects companies to double taxation and under taxation, overly tax-driven arrangements, and extra compliance costs.[193] Currently, each country taxes companies' subsidiaries

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multinational groups, its introduction has fuelled the debate for a more tax efficient method for operating within Europe.").

> 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.

TAVARES & BILREIRO, *supra* note 8, at 176–77.

[189] EUROPEAN ECONOMIC INTEGRATION 247 (Bela Balassa ed., 1975) ("Although the Treaty of Rome does not contain specific provisions on the harmonization of [business] taxes, Article 100 of the Treaty may be interpreted as a mandate for harmonization.").

[190] *See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee*: *Towards an Internal Market Without Tax Obstacles: A Strategy for Providing Companies with a Consolidated Corporate Tax Base for Their EU-wide Activities*, COM (2001) 582 final at 15–19. "[T]he Commission has proposed testing the consolidated EU tax base with a European Company pilot programme." 1 THE EUROPEAN COMPANY 99 (Dirk van Gerven & Paul Storm eds., 2006).

[191] *See, e.g.*, Gammie, *supra* note 165; Frits Bolkestein, Commissioner *The New European Company: Opportunity in Diversity*, *in* THE EUROPEAN COMPANY, DEVELOPING A COMMUNITY LAW OF CORPORATIONS 43–44 (Jonathan Rickford ed., 2003); Celia Hampton, *European Company Law Reforms Make Uneven Progress*, EUROWATCH, Mar. 15, 2002, at 1.

[192] 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).

> 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.

Id.

[193] Marjaana Helminen, *The Tax Treatment of the Running of an SE*, 44 EUR. TAX'N 28, 30 (2004).

and branches individually, and companies have no ability to consolidate their overall profits and losses.[194]

Leaving taxation to national law, however, helped secure the passage of the SE legislation.[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 elimated their competitive advantages in regard to corporate taxation.[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.[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.[198]

3. U.S. Comparison

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

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[194] *See, e.g.*, Roderik Bouwman & Jan Werbrouck, *International Tax Aspects of the Societas Europaea*, *in* 1 THE EUROPEAN COMPANY, *supra* note 190, at 98, 102.

> 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.

Id.

[195] *See, e.g.*, Pieter Sanders, *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.").

[196] CTR. FOR EUR. POLICY STUDIES, CORPORATE TAXATION AND THE EUROPEAN COMPANY STATUTE 23 (2008); *see also* Daniel Shaviro, *Some Observations Concerning Multijurisdictional Tax Competition*, *in* 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.").

[197] *See* Emrah Arbak, *Will the CCCTB Be Stillborn?*, CTR FOR EUR. POLICY STUDIES, Feb. 21, 2008, *available at* http://shop.ceps.eu/book/will-ccctb-be-stillborn.

[198] *See id.*

Constitutionally, states may issue laws and regulations on any topic that federal law has not preempted.[199] The federal government may also delegate the authority to implement federal regulatory programs to the states.[200]

The U.S. has centralized an increasing amount of regulatory power at the federal level.[201] 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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[199] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947). Commercial law is an area of concurrent jurisdiction. *See* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 150–52 (2001). Under the Supremacy Clause, federal law will govern when the federal government acts. *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–66 (2001). For further information about the various ways in which the federal government can preempt the states, see JOSEPH F. ZIMMERMAN, CONGRESSIONAL PREEMPTION: REGULATORY FEDERALISM (2005).

[200] *See, e.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and 'Dual Sovereignty' Doesn't*, 96 MICH. L. REV. 813, 866–68 (1998); Weiser, *supra* note 199, at 671.

[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).

> [N]ew securities rules [in the 1990s] obliterated parallel state law [by expressly preempting the states.] 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 1933[203] 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

[202] Roe, *supra* note 22, at 646.

[203] The Glass Steagall Act is the popular name for sections 16, 20, 21, and 32 of the Banking Act of 1933, which has since been repealed. It is codified as amended at 12 U.S.C. §§ 24 (seventh), 78, 377, 378(a) (2006).

[204] *See, e.g.*, JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 22–23 (1992); Lewis & Pescetto, *supra* note 170, at 73.

[205] *See, e.g.*, Jonathan Zubrow Cohen, *The Mellon Bank Order: An Unjustifiable Expansion of Banking Powers*, 8 ADMIN. L. REV. AM. U. 335, 336 n.3 (1994).

[206] 12 U.S.C. §24 (Seventh) (2006 & Supp. II).

[207] FDIC, 1 HISTORY OF THE EIGHTIES, LESSONS FOR THE FUTURE: AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S 25 (1997).

[208] *See* FRANCIS A. WALKER, U.S. CENSUS OFFICE, THE NINTH CENSUS 640 (1872).

[209] *See generally* Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (holding that the Commerce Clause requires physical presence in state for sales and use taxes); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (holding that states may

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 legislation[212] combine with the ability that it affords companies to reincorporate[213] 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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not impose taxes on corporations of other states disproportionate to their contacts with the taxing state).

[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.

[216] *See, e.g.*, Robert R. Drury, *The "Delaware Syndrome": European Fears and Reactions*, 6 J. BUS. L. 709, 723 (2005). *See generally* Heine & Kerber, *supra* note 9, at 47; RAYMOND CANNON, BUSINESS LAW OF THE EUROPEAN UNION—A PRACTICE GUIDE § 6.01(1) (1996); Alfred F. Conard, *The European Alternative to Uniformity in Corporation Laws*, 89 MICH. L. REV. 2150, 2161 (1991) ("The founders of the

of a "race" among the Member States[217] would encourage overly-permissive regulation,[218] rather than promote innovation. Most Member States have blocked companies from relocating[219] by requiring them to register in the same place in which they establish their headquarters.[220]

The SE, however, made it legal[221] for companies to reincorporate.[222] According to article 8 of the SE Regulation:

Community had no intention of letting one of the member states become the 'Delaware of Europe.' ").

[217] *See* Liggett v. Lee, 288 U.S. 517, 558–59 (1933) (noting that Justice Brandeis 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 EUR. L. REV. 57, 61 (2000).

[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 Vadis?*, 37 COMMON MKT. L. REV. 257, 269 (2000).

[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: What Role for the EC?* 5 (Univ. of Bologna, Working Paper No. 53/2005, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=850005.

[220] *See, e.g.*, ADRIAAN DORRESTEIJN ET AL., EUROPEAN CORPORATE LAW 20 (1995); Mathias Siems, *Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century*, 27 EUR. L. REV. 47, 48 (2002). *See 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."[223] 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.[224]

1. Preconditions

Article 7 of the SE Regulation discourages companies from moving.[225] It requires them to locate their registered office and head office in the same Member State, in line with the real seat principle.[226] Many companies I interviewed explained that they would have considered reincorporating if they did not also have to move their headquarters.[227]

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[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.[228] Larger companies tend to have political ties to their countries, and relocating may carry political consequences.[229] Moving a head office can also attract negative publicity.[230] A representative of a Finnish company stated that it considered moving its headquarters to avoid lenient mandatory bidding requirements in Finland[231] but decided not to because "headquarters are political."[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

location not identified (Feb. 19, 2008) (on file with author); Interview with Anonymous Source No. 74, location not identified (Apr. 28, 2008) (on file with author). *But see* Enriques, *supra* note 16, at 80 ("The provision requiring the SE's registered office to be located in the same Member State as its central administration . . . should be no serious obstacle to using the SE as a vehicle for company law shopping.").

[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.").

[229] *See, e.g.*, Stith, *supra* note 20, at 1611.

[230] *See, e.g.*, Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 129 (1999) (discussing "sources of path dependence in a country's patterns of corporate ownership structure").

[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.

[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).

[234] *See* Council Regulation 2157/2001, art. 8(1), 2001 O.J. (L 294) 1, 4.

[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 wounded 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).

[237] *See* Einkommensteuergesetz [EStG] [Income Tax Act], Oct. 19, 2002, BGBI. I at 4210, § 95 (Ger.), *available at* http://www.bundesrecht.juris.de/bundesrecht/estg/gesamt.pdf.

[238] *See* INT'L BUREAU OF FISCAL DOCUMENTATION, SURVEY ON THE SOCIETAS EUROPAEA 26 (2003), *available at* http://ec.europa.eu/taxation_customs/resources/documents/survey.pdf.

A 2005 European directive,[239] however, allows companies that maintain a presence to which their assets can be attributed for continuing taxation to defer their payment of capital gains.[240]

Case Study 7: Prosafe (Norway)

Prosafe, the Norwegian shipping company, found it expensive to use the SE to reincorporate.[241] The company moved to Cyprus to avoid changes to the national tonnage tax system in Norway.[242] In 1996, Norway adopted a permissive scheme of tonnage taxation to enable the country to develop as a competitive shipping base.[243] It did not tax the operating profits of companies unless they paid taxable dividends to shareholders or moved their assets out of the country.[244] 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.[245]

Prosafe paid the full amount of its deferred tax liabilities when it left Norway.[246] Since the reincorporation, Norway has

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[239] Directive 2005/19/EC, amending Council Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different Member States. Directive 2005/19/EC, 2005 O.J. (L 58) 19.

[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).

[245] *See* Press Release, Ministry of Finance, Proposed Amendments to the Norwegian Special Tax Regime for Shipping Companies (Oct. 9, 2007).

[246] Interview with Anonymous Source No. 52.

passed additional legislation taxing exiting companies as if their full valuation has been realized.[247] Odjfell, another Norwegian shipping company, converted to the SE in order to leave Norway but so far remains incorporated there.[248]

The SE legislation also authorizes Member States to adopt procedures for compensating shareholders who oppose reincorporation and to establish protections for creditors.[249] The

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[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.

KPMG, TAX FACTS NORWAY 2009: A SURVEY OF THE NORWEGIAN TAX SYSTEM 20, *available at* http://www.kpmg.no/arch/_img/9484126.pdf.

[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]

For example, under SE-Ausfuhrungsgestz [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.*

[256] *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").

[257] *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

> [T]he 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.*

[261] *See, e.g.*, Simon Deakin, *Regulatory Competition Versus Harmonisation in European Company Law* 1–3 (ESRC Centre for Bus. Research, Working Paper No. 163, 2000) (questioning whether regulatory competition strengthens diversity or leads to convergence).

[262] *See* Osakeyhtiölaki [Limited Liability Companies Act] (624/2006) ch. 3, § 5(2), (3) (Fin.), *available at* http://www.finlex.fi/en/laki/kaannokset/2006/en20060624.pdf (unofficial translation) [hereinafter LLCA].

[263] *See* Loi du 10 août 1915 Concernant Les Societes Commerciales, modifié avec effet 31 déc. 2006 [Law of Aug. 10, 1915 Concerning Commercial Companies, amended with effect Dec. 31, 2006], SERVICE CENTRAL DE LEGISLATION (Lux.).

[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.[267]

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.[268] The company also had to pause negotiations while some countries drafted laws establishing a process for selecting employee representatives.[269] The SE legislation required them to be elected pursuant to national legislation.[270]

3. Limits

Although the SE has made reincorporation legal, in the absence of a U.S.-style internal affairs doctrine,[271] 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,[272] following the recent case law of the ECJ.[273]

Most European business and labor regulations apply based on where a company operates, not where it incorporates.[274] Many aspects of the securities laws pertain to where shares are traded,[275] and a company pays taxes everywhere it earns income.[276]

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[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *See supra* text accompanying note 100.

[272] *See infra* Figure 3.

[273] *See generally* Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-01459; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10155; C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC), 2002 E.C.R. I-9919, ¶ 94.

[274] *See, e.g.*, BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE, AND OPERATION 435–36 (1997).

[275] *See, e.g.*, Deakin, *supra* note 261, at 23. *But see* Prospectus Directive 2003/71, 2003 O.J. (L 345) 64 (EC).

[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

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each company engaged in cross-border activities in the EU Single Market must comply with a large number of different national tax regimes.").

[277] *See* ETUI, Established SEs Fact Sheet Overview, *supra* note 18.

[278] *See, e.g.*, Beiten Burkhardt, *Beiten Burkhardt Establishes Its Own European PLC* (2005), http://www.bblaw.com/uploads/media/European_PLC.pdf.

[279] *See* Interview with Anonymous Source No. 27, location not identified (Feb. 25, 2008) (on file with author); Interview with Anonymous Source No. 55, location not identifies (Feb. 28, 2008) (on file with author); Interview with Anonymous Source No. 74, location not identified (Apr. 28, 2008) (on file with author).

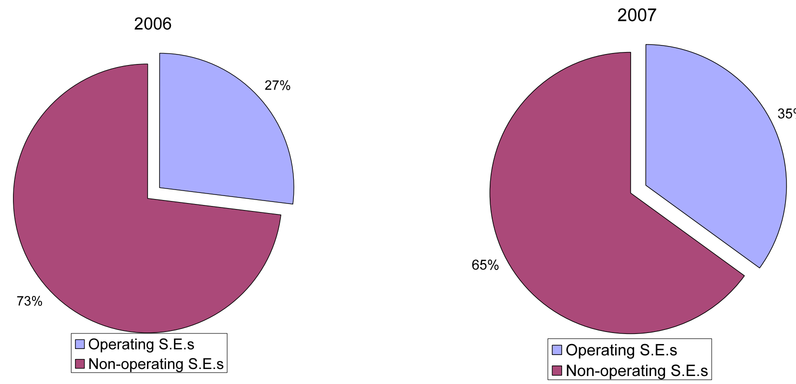
[280] Atrium Erste Europaische VV SE became Convergence CT SE, Atrium Funfte Europaische VV SE became Donata Holding SE, Pro-Jura 0407 SE became Orchestra Service SE, *see* ERNST & YOUNG, *SOCIETE D'AVOCATS*, STUDY ON THE OPERATION AND THE IMPACTS OF THE STATUTE FOR A EUROPEAN COMPANY appx. 2 (2009), and Sarpedon 2006/01 Vermogensverwaltungs became Max Boegl International SE. *See generally* SEEUROPE, SES IN EUROPE (2008), *available at* http://www.worker-participation.eu/content/download/1818/14558/.

[281] *See, e.g.*, CTR. FOR EUROPEAN POLICY STUDIES, CORPORATE TAXATION AND THE EUROPEAN COMPANY STATUTE, CEPS TASK FORCE REPORT 2 (2008); Interview with Anonymous Source No. 9, location not identified (Dec. 11, 2008) (on file with author); Interview with Anonymous Source No. 15, location not identified (Feb. 7, 2008) (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. 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. 33, location not identified (Feb. 4, 2008) (on file with author); Interview with Anonymous Source No. 43, location not identified (Jan. 23, 2008) (on file with author).

[282] *See infra* Figure 3.

and activated at any time, suggesting the potential for future relocations.[283]

Figure 3. Operating vs. Non-operating SEs[284]



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.

[285] Marco Becht, Colin Mayer & Hannes F. Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry* 2 (ECGI, Working Paper No. 70/2006, 2007), *available at* http://ssrn.com/abstract=906066.

[286] *See* Volker Triebel & Christopher Horton, *Will More English PLCs Take Off in Germany?*, INT'L FIN. L. REV., July 2006, at 34, 36.

[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,[288] Spain,[289] Germany,[290] and the Netherlands[291] have all recently eliminated or lowered their minimum capital requirements to match the UK's more lenient standards.[292] The Dutch and German consultation documents explicitly reference the need to compete with the UK.[293] Germany has also begun to allow new companies to establish themselves according to the same terms the UK offers,[294] and the Dutch Parliament has launched a review of its private limited company law.[295]

4. U.S. Comparison

In the U.S., although the Commerce Clause of the Constitution provides for federal authority over matters of corporate law,[296] an informal understanding, the "internal affairs doctrine," assigns to state law matters that pertain to the "internal affairs" of corporations.[297] The "internal affairs" include the relationships among directors, officers, and investors.[298]

[288] *See* Loi 2003-721 du 1 août 2003 pour l'initiative économique [Law No. 2003-721 of August 1, 2003 Economic Initiative], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2003, p. 13464.

[289] *See* Ulrich Seibert, *Close Corporations—Reforming Private Company Law: European and International Perspectives*, 8 EUR. BUS. ORG. L. REV. 83, 87 (2007).

[290] Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Neuregelung des Mindestkapitals der GmbH [MindestkapG] [Draft Bill of the Government, Draft Law on the Reform of the Minimum Capital of the Limited Company] (2005) [hereinafter Draft Reform Law], *available at* http://www.bmj.de/media/archive/950.pdf.

[291] *See* Hylda Boschma et al., *The Reform of Dutch Private Company Law: New Rules for the Protection of Creditors*, 8 EUR. BUS. ORG. L. REV. 567, 569 n. 1 (2007); Final Report of the Expert Group, *Simplification of Company (BV) Law,* May 6, 2004, *available at* http://english.ez.nl/english/Subjects/Simplification_of_Company_BV_Law.htm.

[292] *See* Seibert, *supra* note 289.

[293] *See* Draft Reform Law, *supra* note 288.

[294] *See* Entwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen [MoMiG] [Limited Liability Company Law and Abuse of Modernization Struggle Act] May 23, 2007, § A, *available at* http://www.bmj.bund.de/files/-/2109/MoMiG-RegE%2023%C2005%2007.pdf; *see also* Patrick C. Leyens, *German Company Law: Recent Developments and Future Challenges*, 6 GERMAN L.J. 1407, 1412–13 (2005).

[295] *See supra* note 291.

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

[297] Edgar v. Mite Corp., 457 U.S. 624, 645 (1982).

[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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prescribe their powers, and to define the rights that are acquired by purchasing their shares."); *Edgar*, 457 U.S. at 645 ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands."); Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29, 30–32 (1987); Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 162 (1985); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1162 (2000) ("In the United States, the law of a corporation's state of incorporation almost always governs its management and control arrangements.").

[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).

[301] *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1061 (2000).

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.[302]

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.[303] A relocating company must pay filing charges and hold a shareholder meeting for approval of the move.[304] Privately-held companies reincorporate by merging with a shell corporation registered in Delaware.[305] Any shareholder who votes against the merger can exercise appraisal rights and receive the full cash value of his shares.[306]

The preeminence of Delaware also remains subject to the threat of federal preemption and other mechanisms of federal control.[307] Although the U.S. has no federal statute for corporate law,[308] from the Securities Act of 1933[309] to the Sarbanes-Oxley

[302] Early proponents of these opposing views were William Cary and Ralph Winter. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1–40 (1991); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). Others have made efficiency arguments against charter competition. *See, e.g.*, Lucian Arye Bebchuck, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442–43 (1992). Some have emphasized the interest groups involved in the competition. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 469–70 (1987).

[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,[310] 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.[311] 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.[312]

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[313] and renegotiate employee representation,[314] raising concerns that they will adopt the form to arbitrage around national standards for workers' rights.[315] 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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federal incorporation law). The Depression brought renewed calls for a federal corporations law. President Franklin D. Roosevelt and SEC Chairman William O. Douglas attempted unsuccessfully to persuade Congress to pass a law instituting federal incorporation during Roosevelt's second term. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 205 (3d ed. 2003). Congress, instead, introduced the Federal Securities Acts. Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860–62 (2003). It should also be noted that *Erie Railrod Co. v. Tompkins*, 304 U.S. 64, 80–81 (1938), overturned Justice Story's *Swift v. Tyson*, 41 U.S. 1 (1842), holding that federal courts could apply rules of general commercial law.

[309] Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)).

[310] Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

[311] *See, e.g.*, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280–81 (1987).

[312] *See Legal Diversity*, *supra* note 19, at 14–15.

[313] SE Regulation, *supra* note 10, art. 38.

[314] *See* Council Directive 2001/86/EC, § II, 2001 O.J. (L 294) 24–27; Leca, *supra* note 92, at 417; Teichmann, *supra* note 103, at 1333.

[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,[316] rather than focusing solely on the maximization of shareholder wealth.[317]

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.[318] 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.[319] In Hungary, any company with more than two-hundred employees must appoint employee representatives to one-third of the seats on the supervisory

[316] *See, e.g.*, Friedrich Kübler, *A Shifting Paradigm of European Company Law?*, 11 COLUM. J. EUR. L. 219, 219–20 (2005) (discussing the stakeholder philosophy).

[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.

[319] *See* Österreichischer Corporate Governance Kodex (Austrian Code of Corporate Governance) art. 59 (2009), *translated at* http://www.wienerborse.at/corporate/pdf/CG_Code_engl_2009draft_tr_fin.pdf.

board.[320] 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

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[320] *See* Norbert Kluge, *Europeanisation and Organised Labor: An Unsolved Dilemma* 10 (Warwick Univ., Nov. 18–19, 2005), *available at* http://www.docstoc.com/docs/70565273/European-Company-Representation-Agreement.

[321] *See* Gesetz uber die Mitbestimmung der Arbeignehmer [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.

[322] The German Ministry of Economics and Labour has legislated codetermination in one-tier SE companies. *See* Gesetz der Implementierung der Regelung [SE-Ausführungsgesetz] [SEAG] [SE Implementation Act] § 6, Dec. 22, 2004, BGBl I at 3675, *available at* http://bundesrecht.juris.de.

[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.[325] Their managing directors previously served on the Supervisory Board of Plansee and could therefore control Plansee's managing director.[326] With the new, one-tier SE, all of the managing directors sit on the same level in all three companies.[327] Plansee's lawyers and officers say that the new organization appears more understandable to potential foreign investors and venture partners.[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.[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.[330] The owner can more easily pass initiatives he proposes under the new arrangement.[331]

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

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[325] Interview with Anonymous Source No. 59, company lawyers and officers, location not indentified (Mar. 10, 2008) (on file with author).

[326] *Id.*

[327] *Id.*

[328] Interview with Anonymous Source No. 53; Interview with Anonymous Source No. 59.

[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).

[330] Interview with Anonymous Source No. 55; Interview with Anonymous Source No. 58.

[331] Interview with Anonymous Source No. 55; Interview with Anonymous Source No. 58.

[332] *See, e.g.*, Mathias M. Siems, *The Impact of the European Company (SE) on Legal Culture*, 30 EUR. L. REV. 431, 435 (2005). For a theoretical analysis of what it means to give legal expression to identity, see Hans Lindahl, *European Integration: Popular Sovereignty and a Politics of Boundaries*, 6 EUR. L.J. 239, 240–44 (2000).

[333] Interview with Anonymous Source No. 55.

German corporate ownership threatens Polish employment.[334] It has eagerly embraced the European status that the SE confers.[335]

2. Survivability of Stakeholder Models

While all German companies with employee representation have retained their two-tier boards after converting to the SE,[336] many of them have changed the size and composition of their supervisory boards.[337] 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.[338] 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.[339] 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).

[339] *See* Hanns-William Mülsch & Sven Piegsa, *Excursus: Societas Europaea ("S.E.")*, *in* EUROPEAN CORPORATE LAW 371, 372 (Karel Van Hulle & Harald Gesell eds., 2006). For Friedrich Kübler's description of the process of using the SE to eliminate codetermination entirely, see Kübler, *supra* note 316, at 232–33.

> 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.[340] While more concentrated governance makes it faster for companies to make choices and implement them, codetermination facilitates consensus and defuses conflict.[341] 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;[342] companies with more than 2,000 employees must offer one half of the positions.[343] In the latter case, not only employee codetermination but also the size of the supervisory board is fixed by mandatory law.[344] As a result, German companies with fewer than 2,000 employees have converted to the SE in order to hold the proportion of employee

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

Id. (internal citations omitted).

[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 (Apr. 28, 2008) (on file with author).

[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 uber die Mitbestimmung der Arbeignehmer [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 employees[349] 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

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[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) ("[I]nformation 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).

[349] *See* Agreement Concerning the Participation of Employees in Allianz SE, Sept. 21, 2006, *available at* http://www.allianz.com/en/investor_relations/transactions/allianz_se/index1.html.

[350] Statutes of Allianz SE, Nov. 2007, § 6.1.

came from Germany, the new supervisory board includes a French and a British employee.[351]

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.[352] Allianz paid a total of €95 million to transform into an SE.[353] The negotiation process can also pose challenges.[354] 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.[355] 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"[356] fallback principle has blocked any adjustments, despite what they have paid to initiate the process.[357]

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.[358] Other legal commentators, however, have suggested that the size of the supervisory board can itself be

[351] 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.

[352] Interview with Anonymous Source No. 28, location not identified (Feb. 21, 2008) (on file with author).

[353] Statutes of Allianz SE, Nov. 2007, § 18.1.

[354] *See, e.g.*, Christoph Teichmann, *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.").

[355] Interview with Anonymous Source No. 29.

[356] SE Directive, *supra* note 10, recital 18.

[357] SE Regulation, *supra* note 10, recital 18.

[358] 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).

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")

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[359] Hartmut Oetker, *Unternehmensmitbestimmung in der SE Kraft Vereinbarung*, 27 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1113 (2006); Interview with Anonymous Source No. 29.

[360] Man Diesel SE, for example, also reduced its Supervisory Board from twenty to ten and internationalized its employee representatives. *See* MAN Diesel, http://www.manbw.com/category_000449.html (last visited Oct. 20, 2010).

[361] 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, 2008) (on file with author); Interview with Anonymous Source No. 12, location not identified (Dec. 11, 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. 35, location not identified (Feb. 5, 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. 41, location not identified (Feb. 7, 2008) (on file with author).

[362] Interview with Anonymous Source No. 10, location not identified (Dec. 7, 2007) (on file with author); Interview with Anonymous Source No. 14, location not identified (Jan. 28, 2008) (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. 27, location not identified (Feb. 5, 2008) (on file with author); Interview with Anonymous Source No. 31, location not identified (Feb. 22, 2008) (on file with author); Interview with Anonymous Source No. 37, location not identified (Jan. 22, 2008) (on file with author).

[363] Interview with Anonymous Source No. 74, location not identified (Apr. 28, 2008) (on file with author); *see also* EUROPEAN BUSINESS LAW: LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION 48 (Richard M. Buxbaum et al. eds., 1991) (discussing the "national organizing vision" of American labor unions and the likelihood that "the emergence of vigorous competition across

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

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national borders within the European Community will turn the attention of European labor leaders to the Community level").

[364] Interview with Anonymous Source No. 38; Interview with Anonymous Source No. 41.

[365] Interview with Anonymous Source No. 26; Interview with Anonymous Source No. 38; Interview with Anonymous Source No. 41; Interview with Anonymous Source No. 74, location not identified (Apr. 28, 2008) (on file with author).

[366] Interview with Anonymous Source No. 38; Interview with Anonymous Source No. 41.

[367] THE EUROPEAN COMPANY—PROSPECTS FOR WORKER BOARD-LEVEL PARTICIPATION IN THE ENLARGED EU 64–65 (Norbert Kluge & Michael Stollt eds., 2006).

[368] SE Directive, *supra* note 10, art. 3(2)(a)–(b).

[369] Interview with Anonymous Source No. 6, location not identified (Dec. 6, 2007) (on file with author); Interview with Anonymous Source No. 7, location not identified (Feb. 1, 2008) (on file with author); Interview with Anonymous Source No. 26; Interview with Anonymous Source No. 38; Interview with Anonymous Source No. 41; Interview with Anonymous Source No. 43, location not identified (Jan. 23, 2008) (on file with author); Interview with Anonymous Source No. 56, location not identified (Mar. 3, 2008) (on file with author); Interview with Anonymous Source No. 57, location not identified (Apr. 28, 2008) (on file with author); Interview with Anonymous Source No. 63, location not identified (Mar. 7, 2008) (on file with author); Interview with Anonymous Source No. 74.

companies with more than twenty-five employees must appoint workers to their boards.[370] 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.[371] Only its Polish subsidiary had a trade union.[372] The NFU received a grant from the European Union to conduct a series of meetings at the subsidiaries, and Nordea's directors participated.[373] According to the directors, developing reliable employee contacts would benefit the company.[374]

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.[375] Following Enron and other corporate scandals,[376] 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).

[373] Interview with Anonymous Source No. 7; Interview with Anonymous Source No. 8.

[374] Interview with Anonymous Source No. 7; Interview with Anonymous Source No. 8. *See generally* Nordea Annual Report 2006, at 7, *available at* http://www.finansforbundet.dk/images/unioninnordea/Generelt/union%20nordea%20 annual%20report%20endelig.pdf; Ammattiliiitto Suora, *EU Promotes Employee Influence in the European Company Nordea SE* (Nov. 26, 2004), *available at* http://www.suora.fi/Resource.phx/sivut/uutiset/u2004/eupromote.htx (discussing the Nordea SE Project).

[375] *Cf.* American Law Institute, *Functions and Powers of the Board of Directors*, *in* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02, at 86–87 (1994). *See generally* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468 (2007) (discussing the historical developments of independent directors in the United States).

[376] *See, e.g.*, John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid*," 57 BUS. L. 1403, 1403 (2002); Jeffrey N. Gordon, *Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley*, 35 CONN. L. REV. 1125, 1125 (2003); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1234 (2002); Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP. 3, 4 (2003); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J. L. BUS. & FIN. 9, 9 (2002).

with independent directors.[377] The Sarbanes-Oxley Act of 2002[378] also requires independent directors to serve on the audit committees of company boards.[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.[380] Independent directors served in the majority of board positions at Enron.[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.[382] Nearly thirty-five percent of employees of companies that issued stock owned its shares.[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[384] than the rest of the country.[385] Most labor unions belong to national umbrella

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[377] Order Approving Proposed Rule Changes, Exchange Act Release No. 34-48745, 81 SEC Docket 1586 (Nov. 4, 2003).

[378] Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) [hereinafter SOX].

[379] *Id*. § 301, 116 Stat. at 775–77 (codified as amended at 15 U.S.C. §§ 78j–*l*(m) (2006)).

[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.").

[381] *See, e.g.*, Jeffrey N. Gordon, *Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley* 3 (Harvard Law Sch., Ctr. for Law, Econ., and Bus., Discussion Paper No. 416, 2003).

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

[383] *See id.* (stating the results of the 2006 General Social Survey).

[384] *See* AFL-CIO, *Facts and Statistics: United States, Union Membership*, *available at* http://www.aflcio.org/issues/factsstats/factsstats.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.*

[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.[386] 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[387] since 1935.[388] An array of federal[389] and state law[390] governs public-sector unions;[391] state labor boards primarily oversee their operations.[392]

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

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Statistics: Union Membership by Industry, 2005, *avaliable at* www.bls.gov/opub/ted/2006/jan/wk4/art02.htm (last visited Oct. 20, 2010).

[386] The Service Employees International Union, the International Brotherhood of Teamsters, the United Food and Commercial Workers, and the United Farm Workers of America comprise Change to Win. Change to Win, About Us, http://www.changetowin.org/about-us.html (last visited Oct. 20, 2010).

[387] Section 152 excludes "the United States or any wholly owned Government corporation." 29 U.S.C. § 152(2) (2006). The Civil Service Reform Act, 5 U.S.C. §§ 7101–35 (2006), enacted in 1978, provides federal public employees the right to collective bargaining.

[388] National Labor Relations Act (NLRA) of 1935, Pub. L. No. 74–198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69).

[389] Title 29 of the C.F.R. enforces Federal labor laws. *See, e.g.*, 29 C.F.R. § 1.1 (2010). The Department of Labor enforces more than 180 employment and labor laws. The Office of Labor-Management Standards of the U.S. Department of Labor enforces the Labor-Management Reporting and Disclosure Act of 1959. *See* 29 U.S.C. § 435; 29 C.F.R. § 70.53. The Civil Service Reform Act and its implementing regulations cover unions representing federal employees. *See* 5 U.S.C. § 7101.

[390] Wisconsin became the first state to pass a statute protecting the rights of public employees to engage in collective bargaining in 1959. *See* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 158 (2004).

[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 preemption[396] to

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[393] Interview with Anonymous Source No. 16, location not identified (Dec. 12, 2007) (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. 70, location not identified (Mar. 17, 2008) (on file with author); *see also* A. Claire Cutler, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL ECONOMY (2003); Filip De Ly, *Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation*, *in* RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 159 (Richard P. Appelbaum et al. eds., 2001); Jean-Phillippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, *in* GLOBAL LAW WITHOUT A STATE 45, 68–71 (G. Teubner ed., 1997) (discussing globalization of business and aspirations to keep it form national regulatory restraints). *But see* Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

[394] *See, e.g.*, Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 820 (2004) ("[T]he dominant tendency in U.S. jurisprudence has been to view the projects of federal and state governance as essentially distinct and to solve intergovernmental conflicts by trying to establish clear boundaries between the two."); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1236–52 (2003).

[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.[397] 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.[398] 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.[399] 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.[400] Lacking

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) ("[F]ederal 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).

397 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.

398 *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).

399 *See, e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1528, 1543–44 (2005).

400 *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.,[401] and reflecting its nature as a composite union of mature nations, its approach has been more indirect and subtle[402]: 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.[403] 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

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[401] *See* 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").

[402] *See, e.g.*, Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMMON MKT. STUD. 343, 344 (1994); Eric Stein, *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/rusk_oc/2 ("Georg Ress calls the [European] Council the Kremlin of the West."). *See also generally* OPENNESS AND TRANSPARENCY IN THE EUROPEAN UNION (Veerle Deckmyn & Ian Thomson eds., 1998).

[403] *See, e.g.*, Christian Joerges, *'Deliberative Supranationalism'—Two Defences*, 8 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").

ante 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,"[404] provides a useful building block for U.S. cross-border regulatory efforts, in areas where international agreement is impossible.[405] Pressure to transcend national boundaries and address emerging transatlantic challenges has intensified in the U.S.[406] 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 xviii.

> 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.

[406] *See, e.g.*, REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES, *supra* note 15, at x ("[T]he push toward open markets and higher degrees of international economic interdependence seems inexorable"). On the internationalization of securities markets and the resulting legal interdependence, see, for example, Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563, 564 (1998).

international regulatory techniques, as securitization and globalization carry business activities farther across national frontiers.[407] 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 intergrated markets, to improve their position by reducing costs and gaining regulatory predictability. The companies are several steps ahead of the Member Sates 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

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[407] *See, e.g.*, Vivien A. Schmidt, *Democracy and Discourse in an Integrating Europe and a Globalising World*, 6 EUR. L.J. 277, 277 (2000).

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.