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WHAT IS DEAD MAY NEVER DIE: THE UK'S INFLUENCE ON EU COMPANY LAW

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I. INTRODUCTION

Since the establishment of the European Economic Community in the 1960s, company law harmonization has possibly been the area of private law most affected by the EEC/EC/EU.[1] Historically, EC company law harmonization had three objectives. First, the Treaty envisioned that that the Council and the Commission would coordinate "to the extent that it is necessary and with a view to making them equivalent, the guarantees demanded in Member States from companies […] for the purpose of protecting the interests both of the members of such companies and of third parties."[2] Parties interacting with community firms should therefore be able to rely on a set of "equivalent safeguards."[3] Second, the concern that one of the Member States might es-

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1. MARCUS LUTTER, WALTER BAYER & JESSICA SCHMIDT, EUROPÄISCHES UNTERNEHMENS- UND KAPITALMARKTRECHT § 1 ¶ 2 (5th ed. 2012) (describing company law as the area of private law where harmonization has progressed most).

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 54(3)(g), 298 U.N.T.S. 11 [hereinafter EEC Treaty]; *see also* Consolidated Version of the Treaty Establishing the European Community, art. 44(2)(g), 2006 O.J. C 321 E/37, at 60 (using updated language); Consolidated Version of the Treaty on the Functioning of the European Union art. 50(2)(g), 2008 O.J. C 115/47 (using nearly identical language); Mads Andenas, *EU Company Law and the Company Laws of Europe,* 6 INT'L & COMP. CORP. L. J. 7, 9 (2008); Yves Guyon, *La coordination communautaire du droit français des sociétés*, 26 REVUE TRIMESTRIELLE DE DROIT EUROPEEN [RTDE] 241, 241, 247 (1990) (Fr.) (finding that contracting parties were the main beneficiaries of harmonization); Walter Hallstein, *Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft*, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 211, 212 (1964) (Ger).

3. A classic example is the 1st Company Law Directive, which stipulates that that contracts could not be repudiated on grounds of being *ultra vires,* and limits circumstances under which the nullity of a corporation. First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, 1968 O.J. L 65/8, art. 9-12 [hereinafter First Council Directive]. The First Council Directive has since been recast. *See* Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, 2009 O.J. L 258/11, arts. 10-13. *See also* Robert R. Drury, *Nullity of Companies, in* EUROPEAN COMPANY LAWS: A COMPARATIVE APPROACH 247, 250-253 (Robert R. Drury & Peter G. Xuereb eds. 1991); R. Houin, *Le régime juridique des sociétés dans la Communauté Economique Européenne,* 1 RTDE 11, 14 (1965)

tablish itself as a "European Delaware" existed as early as the negotiations for the Treaty of Rome.[4] Specifically, already before the accession of the United Kingdom to the European Communities, it was feared that, if given a free choice, founders of corporations would choose Dutch law, which was at that time perceived as the most permissive system[5] and was also the only Member State using the "incorporation theory" at the time.[6] Timmermans, among others, thus saw harmonization as a *quid pro quo,* i.e. something that Member States could expect as compensation for conceding that the Freedom of Establishment would be extended to companies.[7]

Thirdly, EC Company Law harmonization was intended to facilitate cross-border amalgamations of firms, given that at the time few companies in Europe operated across national borders and did not compare favorably to American firms that operated on a Continental scale.[8]

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4. *See* Christian W.A. Timmermans, *Die europäische Rechtsangleichung im Gesellschaftsrecht*, 48 RABELSZ 1, 13 (1984) (Ger.).

5. *See* Christian W.A. Timmermans, *Methods and Tools for Integration. Report*, in EUROPEAN BUSINESS LAW: LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION 129, 132 (Richard M. Buxbaum, Alain Hirsch & Klaus J. Hopt eds.1991) (pointing out French fears that the Netherlands might become the Delaware of Europe); Houin, *supra* note 3, at 16 (expressing concerns that companies might be able to opt out of protections for third parties by choosing lax laws).

6. *See* ERIC STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS 29-31 (1971); Houin, *supra* note 3, at 22.

7. Timmermans, *Rechtsangleichung*, *supra* note 4, at 12-14; Timmermans, *Methods*, *supra* note 5, at 132; *see also* Alfred F. Conard, *The European Alternative to Uniformity in Corporation Laws*, 89 MICH. L. REV. 2150, 2190 (1991) (noting that France and Germany required "equivalent safeguards" to open their markets to corporations from other member states); Krešimir Piršl, *Trends, Developments, and Mutual Influences between United States Corporate Law(s) and European Community Company Law(s),* 14 COLUM. J. EUR. L. 277, 326 (2008) (describing harmonization as "price" or "necessary compensation" required by some member states to accept freedom of establishment).

8. GUIDO COLONNA DI PALIANO, COMMUNICATION DE MONSIEUR COLONNA DI PALIANO MEMBRE DE LA COMMISSION DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE A LA XVEME "TABLE RONDE DES PROBLEMES DE L'EUROPE" SUR LE DROIT DES SOCIETES 3-5 (1965) (It.), http://aei.pitt.edu/13639; "*Legal Disparities Obstruct Intro-Community Mergers*", EUR. COM. BUL., June 1966, nr. 93, at 6-7; Jörn Pipkorn, *Zur Entwicklung des europäischen Gesellschafts- und Unternehmensrechts*, 136 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 499, 503 (1972) (Ger.).

The success of the harmonization program is, however, controversial. While some have described it as a great success story,[9] Luca Enriques, one of the most irreverent commentators of EU Company Law, has described the harmonization program as "trivial," meaning that it had hardly any impact on the way companies are run, with limited exceptions, and argued that national company law cultures were able to persist.[10]

Given the constraints of a symposium contribution, our analysis of the impact of UK law on EU company law is necessarily incomplete and will emphasize a few key areas. However, we will propose a bifurcated thesis in which we distinguish between company law issues related to capital markets and others. Areas not directly related to capital markets that were the subject of the first wave of company law harmonization attempts include board structure and legal capital. Here, the United Kingdom had a considerable impact, as it was typically on the brakes when Continental Europeans were poised to enact top-down regulation along the lines of the German company law model. The United Kingdom tended to favor freedom of choice in company law, and thus ended up as the primary "user" of the freedom of establishment for companies, which led to the fulfillment of the noble dream of this particular Freedom in spite of Continental objections and fears of a race to the bottom.

By contrast, in areas related to capital markets, the UK model became the driving force for harmonization when the issue came on the European Union's radar screen from the 2000s onwards. In areas such as takeover law and financial reporting, EU law generally adopted UK models emphasizing transparency and shareholder choice, either as mandatory law, or as a strongly encouraged model for the Member States. However, it is likely that the United Kingdom would have had the same impact without being an EU member. Thus, we can say that UK membership was ultimately irrelevant for the development of EU law.

This article is structured as follows. In Part II, we discuss the United Kingdom's unique perspective in corporate law and business regulation. In Part III, we address the United Kingdom's role in two

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9. *E.g.* SUSANNE KALSS & CHRISTOPH KLAMPFL, EUROPÄISCHES GESELLSCHAFTSRECHT ¶ 1 (2015): ("a great success story of European regulation efforts"); Lutter et al., *supra* note 1, § 1 ¶ 2.

10. Luca Enriques, *EC Company Law Directives and Regulations: How Trivial are They?,* 27 U. PA. J. INT'L ECON. L. 1, 7 (2006).

traditional areas of company law harmonization, namely the board of directors (in the failed 5th Directive and the SE) and legal capital. In Part IV, we discuss areas related to capital markets, such as takeover law and accounting (which has morphed from a "traditional" to a capital-market oriented area). Part V provides a conclusion to the preceding analysis.

II. THE UK'S UNIQUE PERSPECTIVE

In terms of economic policy and business law, the United Kingdom is often thought to have a very different perspective from the majority of Continental Europe. Economists espousing the "legal origins" theory have emphasized the difference between the common law the civil law tradition and proposed that it explains many differences in legal rules and regulations in many areas, which consequently have considerable economic and social impact.[11]

A different literature, the socio-economic theory of different varieties of capitalism, suggests that the UK's particular perspective might be rooted in its adherence to a different "variety of capitalism" than much of the rest of the European Union, in particular its strong orientation toward markets, standing in contrast to other Member States that fall into a different category. This literature posits that different countries have developed different packages of socioeconomic and political institutions that – by providing a particular set of institutional complementarities – have helped the respective jurisdiction to be competitive.[12] In other words, capitalist institutions do not necessarily have to be the same everywhere to make a country economically successful, but there are different strategies to achieve economic success.[13] Within the Western world, this literature distinguishes between market-based

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11. Rafeal La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins,* 46 J. ECON. LIT. 285 (2008). Many studies in the "legal origins" area have been subject to intense critique. *See* Holger Spamann, *Legal Origin, Civil Procedure, and the Quality of Contract Enforcement,* 166 J. INST. & THEO. ECON. 149 (2010); Holger Spamann, *The "Antidirector Rights Index" Revisited,* 63 REV. FIN. STUD. 467 (2010).

12. Orfeo Fioretos, *Sources of Multilateral Preferences*, *in* VARIETIES OF CAPITALISM 213, 228 (Peter A. Hall & David Soskice eds. 2001).

13. For an application of the theory to law, see CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM 36-38, 182-192 (2008).

and coordinated capitalist systems. While the former describes a system based on individual market transactions, the latter is based on large-scale coordination through aggregated interest groups such as unions and employer associations relying on collective bargaining.[14] For example, specific human capital is thought to be more important in a coordinated system, whereas human capital in market-based systems is thought to be more transferable.[15]

Relatedly, the literature on financial systems distinguishes between "arm's length" or "outsider" financial systems on the one hand, and "control-oriented" or "insider" financial systems on the other.[16] While in an insider system, firms tend to receive needed finance through stock and bond markets, insider systems rely more on bank-finance as well as large, strategic shareholders.[17] This is, again, linked to the observation that publicly-traded firms in the United Kingdom, somewhat like those in the United States, have a more dispersed ownership structure than Continental European countries.[18]

This particular perspective informs our subsequent discussion of the role of the United Kingdom within UK company law. As the examples in the following sections will show, we can look at how the UK model has (or has not) pushed the European Union toward a greater capital-market orientation in the vein of a market-oriented capitalist system. EU company law often developed out of the juxtaposition of United Kingdom with German company law traditions. These are informed in turn by different styles of capitalism, which are often expressed in specific company law and corporate governance institutions.

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14. RICHARD W. CARNEY, CONTESTED CAPITALISM 3 (2010); Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism, in* VARIETIES OF CAPITALISM, *supra* note 12, at 1, 8-9.

15. *E.g.* Margariata Estevez-Abe, Torben Iversen & David Soskice, *Social Protection and the Formation of Skills: A Reinterpretation of the Welfare State, in* VARIETIES OF CAPITALISM, *supra* note 12, at 145, 146-147, 154.

16. *See* Erik Berglöf, *A Note on the Typology of Financial Systems, in* COMPARATIVE CORPORATE GOVERNANCE 151, 159-164 (Klaus J. Hopt & Eddy Wymeersch eds. 1997); ALAN DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE 43-44 (2009).

17. *See id*.

18. *E.g.* Marco Becht & Alisa Roëll, *Blockholdings in Europe: An International Comparison,* 43 EUR. ECON. REV. 1049 (1999); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. OF FIN. 471-517 (1999).

For example, the United Kingdom and Germany are often considered to differ greatly in the question of the fundamental orientation of company law. The typical belief is that the United Kingdom is strongly committed to the maximization of the welfare of shareholders; by contrast, German corporate law is typically thought to pursue wider objective that caters to the interests of a broader spectrum of "stakeholders." One major example is of course German codetermination, i.e. the representation of employees on the supervisory board.[19] Another difference, which belabored without limits in the comparative corporate governance literature, is of course different ownerships structures. While the United Kingdom has long been characterized by dispersed ownership mainly by institutional investors, Germany and other Continental European countries traditionally exhibit more concentrated forms of share ownership.

Thus, the entrenched interests dominating the national position in positions in European negotiations reflect the prevailing powers, which are more often institutional investors in the United Kingdom, and labor interests, blockholders, and a multiplicity of other players on the Continent.[20] Consequently, the United Kingdom has tended to oppose mandatory substantive regulation of corporate law intended to protect creditors and employees in particular. The UK model has, however, been congenial with a vision of more transparency and freedom of contract that informed shareholders operating in an arm's length market could use.

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19. *See* Martin Gelter, *Comparative Corporate Governance: Old and New*, *in* UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE AND THEORY 37, 42-44 (Barnali Choudhury & Martin Petrin eds. 2017).

20. *See also* John Armour & Wolf-Georg Ringe, *European Company Law 1999-2010: Renaissance and Crisis*, 48 COMMON MKT. L. REV. 125, 128-129 (2010) (suggesting that different entrenched interests explain resistance to harmonization efforts).

III. BOARD STRUCTURE AND CAPITAL STRUCTURE: THE UK AS AN IMPEDIMENT TO HARMONIZATION

A. The Boards of Directors: The 5th Directive and the European Company Statute

Over the course of several decades, the EC toyed with the possibility of harmonizing the organization structure of public companies. This project had two aspects. First, starting in 1959[21] academics had vented the plan to pass a European Company Statute,[22] which would provide a unitary legal form for public companies across Member States, and would provide an option available everywhere in addition to the public company under the respective State's law. The first attempts were followed by a Proposal for a regulation in 1970 and an amended Proposal in 1975.[23] The European Company Statute was passed in 2001,[24] and since then the *Societas Europaea* ("SE") has been available as an additional legal form throughout the European Union, even if it is used mainly in particular Member States.[25]

Second, the original harmonization plan for company law also included a 5th Directive or "Structure Directive" that would have mandated a particular board structure, and a distribution of competences between different corporate bodies. A draft for this Directive, which also addressed the powers and obligations of corporate bodies, was first

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21. The French Government proposed the creation of a European stock corporation to the Council of Ministers in 1965. In 1975, an amended proposal for a regulation was presented. See RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE 244 (1988).

22. Pieter Sanders, *Vers une société anonyme européenne?* 1959 RIVISTA DELLE SOCIETÀ 1163-1176. *See* for the History of the discussion Johan de Bruycker, *EC Company Law - The European Company v. The European Economic Interest Grouping and the Harmonization of the National Company Laws*, 21 GA. J. INT'L & COMP. L. 191 199 et seq. (1991). For an early statement from an EEC commissioner, *see* COLONNA DI PALIANO*, supra* note 8, at 9.

23. Caspar Rose, *The New Corporate Vehicle Societas Europaea (SE): consequences for European corporate governance*, 15 CORP. GOV. 112, 113 (2007) ("Both drafts were heavily influenced by the German Company law legislation, which was considered somehow problematic from the perspective of some of the member states.")

24. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. L 294/1.

25. *See* 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 (2009).

proposed in 1972[26], amended in 1983[27] and again in 1990.[28] It never came into being and the third draft was ultimately withdrawn by the Commission in 2001.[29] A few aspects of the 5th Directive were incorporated in the Shareholder Rights Directive of 2007[30] and the new Audit Directive of 2014.[31]

The first drafts for the SE and the 5th Directive[32] were rigidly Germanic in their approach. In particular, they required a two-tier board structure (consisting of a management and supervisory board) and employee representation modeled on German codetermination. Among the original Member States besides Germany, the Netherlands required employee participation, but not France and Italy.[33] The two-tier board structure has been available as an option in France since 1966, but

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26. Commission of the European Communities, Proposal for a Fifth Directive to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, as regards the structure of sociétés anonymes and the powers and obligations of their organs, COM (72) 887 final, (Oct. 1972) [hereinafter Fifth Directive First Draft].

27. Commission of the European Communities, Amended Proposal for a Fifth Directive Founded on Article 54(3)(g) of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of their Organs, COM (83) 185 final (Aug. 1983) [hereinafter Fifth Directive Second Draft].

28. Second Amendment to the Proposal for a Fifth Council Directive Based on Article 54 of the EEC Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligations of their Organs, COM (90) 629 final (Dec. 1990) [hereinafter Fifth Directive Third Draft].

29. Communication from the Commission, Withdrawal of Commission Proposals which are no longer topical, COM (2001) 763 final (Dec. 2001) [hereinafter Fifth Directive Withdrawal].

30. Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, 2007 O.J. L 184/17.

31. *See* Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, 2014 O.J. L 158/196, art. 37 (requiring a shareholder vote for the appointment of the auditor).

32. The first draft of the Fifth Company Law Directive was issued in 1972. Fifth Directive First Draft, *supra* note 25. The second draft was issued in 1983. Fifth Directive Second Draft, *supra* note 26. The third and final draft was issued in 1990. Fifth Directive Third Draft, *supra* note 27. The Proposal was officially withdrawn by the Commission in 2001. Fifth Directive Withdrawal, *supra* note 28.

33. *See* Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 204-205 (1994).

never became particularly popular.[34] Thus, the requirement of a German-style board structure for the entire Community may have been a doomed project from the very beginning.

With the accession of the United Kingdom in 1973, the one-tier faction was further strengthened. The United Kingdom in fact toyed with the idea of employee participation during the 1970s, when a Labour government commissioned the "Bullock Report", which recommended an employee participation system modeled on German and Swedish law.[35] However, since the unions were lackluster about the prospect of sitting on boards, the project already lay dormant when Margaret Thatcher came into power in 1980.[36] Subsequently, British support for labor representation was unthinkable.

The SE was passed only as a watered-down compromise in 2001, which required Member States to permit a choice between one-tier and two-tier boards and set up a complex negotiation mechanism for employee representation in merged companies.[37] In this case, the third goal of company law harmonization – facilitating cross-border business combination – thus prevailed over the first two – creating minimum standards and preventing regulatory arbitrage. In the end, the SE might have been enacted earlier if the United Kingdom had not been an EC/EU member, and the 5th Directive might at least have been within the realm of realistic possibilities without UK membership, given that the United Kingdom supported the third goal, but not former two with respect to this aspect of company law. The resistance particularly against employee participation seems to have been the main reason for

34. Klaus J Hopt & Patrick Leyens, *Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, 2004 EUR. COMP. & FIN. L. REV. 135, 156.

35. LORD ALAN BULLOCK, REPORT OF THE COMMITTEE OF INQUIRY ON INDUSTRIAL DEMOCRACY (1977); *see generally* Walter Kolvenbach, *EEC Company Law Harmonization and Worker Participation*, 11 U. PA. J. INT'L L. 709 (1990) (discussing employee participation across Europe).

36. *See* K.W. WEDDERBURN, THE WORKER AND THE LAW 837 (3d ed. 1986); David Marsh & Gareth Locksley, *Capital in Britain: Its Structural Power and Influence Over Policy,* W. EUR. POL., Mar. 1983, at 36, 50.

37. Interestingly, the SE is used mainly in jurisdictions that have laws requiring employee representation on corporate boards. *See* Eidenmüller et al., *supra* note 24.

the failure the 5th Directive.[38] Still, with Brexit looming, we should not expect EU lawmaking on either issue in the coming years.

It is interesting to note, however, that employee participation seems to be on the ascendancy again. During the high period of "convergence in corporate governance" toward an "end of history for corporate law" characterized by shareholder wealth maximization it was considered a vestige from the bad old days.[39] The increased economic protectionism of recent years seems to have brought it back. On the one hand, France, a longstanding abstainer from the practice, introduced a moderate form of it in 2013, although the effects and impact are not yet clear. On the other hand the Czech Republic passed a law in March 2012 allowing companies to instate a one-tier board structure and abolished the existing law on codetermination.[40] The United Kingdom, which was its most fervent opponent during the 1980s throughout the 2000s, seems to be considering it again, as noticed in the recent Green Paper on Company Law, which was published in 2016 in the wake of the Brexit referendum.[41]

It would be almost ironic if a future UK government were to introduce some form of employee participation. This would constitute what one could call a "Roe moment." Mark Roe, in an influential body of scholarship, suggested that pro-employee mechanisms that distract from shareholder orientation typically need to be introduced for an economy to get back on the tracks in times of social upheaval. "Before a society can produce, it must achieve social peace."[42] Brexit, which

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38. *See* Janet Dine, *Implications for the United Kingdom of the EC Fifth Directive*, 38 INT'L & COMP. L.Q. 547 (1989); Daniel T. Murphy, *The Amended Proposal for a Fifth Company Law Directive—Nihil Novum*, 7 HOUS. J. INT'L. L. 215 (1984); Steven Schneebaum, *The Company Law Harmonization Program of the European Community*,14 L. & POL'Y INT'L BUS. 293, 308-317 (1982); J. Temple Lang, *The Fifth Directive on the Harmonization of Company Law*, 12 COMMON MKT. L. REV. 345 (1975).

39. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law,* 89 GEO. L. J. 439 (2001).

40. In January 2017, the Czech Commercial Code was amended to re-assert obligatory representation of employees on supervisory boards, but only for joint-stock companies with more than 500 employees. On the development of Czech law, see Jan Lasák, *With Love from the Heart of Europe: New Rules for Czech Joint-Stock Companies,* 18 EUR. BUS. ORG. L. REV. 85, 93 (2017).

41. DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY, CORPORATE GOVERNANCE REFORM, 2016 (UK).

42. MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 1 (2003).

may entail a severe reorientation of the British economy, create a situation where a readjusted social compact is required for the country to move forward.

B. Legal capital and the freedom of establishment: A transient victory

Another area in which the United Kingdom had a considerable impact was – rather indirectly than directly – legal capital, whose development is linked to the freedom of establishment for companies. As part of the original company law harmonization program, the 2nd Directive[43] established a system of minimum capital requirements (set at EUR 25,000) as well as capital maintenance rules for public companies. At least on much of the Continent, the legal capital regime was long considered a cornerstone of the law of corporations that was absolutely necessary to protect creditors, and to allow companies to operate across borders within the internal market. Still, in open contradiction to this idea, the 2nd Directive applied only to public companies and was never extended to private ones. Some Member States, such as the United Kingdom, Ireland and the Netherlands, only created a clear distinction between private and public companies arguably in order to limit the application of the Directive.[44] Before the implementation of the Directive in the United Kingdom, Ireland and the Netherlands, these two types of limited liability companies were not considered

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43. Second Council Directive 77/91/EEC of 13 December 1976 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies within the Meaning of the Second Paragraph if Article 58 of the Treaty, in Respect of the Formation of Public Limited Companies and the Maintenance and Alteration of their Capital, with a View to Making Such Safeguards Equivalent, 1977 O.J. L 26/1 [hereinafter Second Directive]. The Directive was recodified in 2012. *See* Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 54 of the Treaty on the Functioning of the European Union, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, with a View to Making such Safeguards Equivalent, 2012 O.J. L 315/74 [hereinafter Directive 2012/30/EU].

44. *See* VANESSA EDWARDS, EC COMPANY LAW 53 (1999); STEFAN GRUNDMANN, EUROPEAN COMPANY LAW 207 (2nd ed. 2012); DEPARTMENT OF TRADE, IMPLEMENTATION OF THE SECOND EEC DIRECTIVE ON COMPANY LAW 6 (1977) (discussing the directive's requirement of separate designations for public and private companies); Clive M. Schmitthoff, *The Second EEC Directive on Company Law,* 15 COMMON MKT. L. REV. 43, 45-46 (1978).

clearly distinct as legal forms.[45] Most Member States initially had a similar legal capital system (including minimum capital) in place for both types of firms, without being explicitly required to do so. However, while retaining a legal capital system in principle, the United Kingdom never introduced a minimum capital for private limited companies.

The Commission presented the Proposal for the 2nd Directive in 1970[46], but due to the accession of the United Kingdom, Ireland and Denmark, the Directive was not adopted until 1976 in light of the new Members request for changes. It has to be pointed out that the draft of the 2nd Directive was in part – and in comparison to the 1st Directive – considerably influenced by British and Irish company law experts. Especially in regards to the provisions concerning financial aid for a company wanting to purchase its own shares (Art 23) and redemption of shares (Art 39), the European instrument mirrors existing UK legislation (Companies Act 1948).[47]

An extension to private limited companies was contemplated during the preparation of the Directive in 1970,[48] and the commission formally studied the issue in 1993.[49] German scholars, not surprisingly,

45. For the United Kingdom, *compare* Companies Act 1948, 11 & 12 Geo. 6 c. 38, § 28(1) (defining those companies as "private" that fulfill certain criteria in their articles and leaving public companies as the residual category) *with* COMPANIES ACT 1985, c. 6, § 1(3) *and* COMPANIES ACT 2006, c. 46 § 4(2) (both defining public companies as those identified as public companies in the articles and having been founded as public companies under the special requirements of the act). *See* Paul Davies, *The Legal Capital in Private Companies in Great Britain*, 43 DIE AKTIENGESELLSCHAFT 346, 346 (1998) (noting that under the 1985 Act the two legal forms are clearly distinct); GRUNDMANN, *supra* note 43, at 40; *see also* Clive M. Schmitthoff, *New Concepts in Company Law,* 1973 J. BUS. L. 312, 313-316 (discussing how the European directives will necessitate a reform of British law).

46. Proposition d'une deuxième directive du Conseil tendant à coordonner, en vue de les rendre équivalentes, les garanties qui sont exigées, dans les États membres, des sociétés au sens de l'article 58 alinéa 2 du traité pour protéger les intérêts tant des associés que des tiers en ce qui concerne la constitution de la société anonyme ainsi que le maintien et les modifications de son capital, 1970 O.J. C 48/5 (Fr.), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1970:048:TOC.

47. *See* EDWARDS, *supra* note 43, at 51.

48. *See* GRUNDMANN, *supra* note 43, at 208.

49. COMMISSION OF THE EUROPEAN COMMUNITIES, STUDY ON SECOND DIRECTIVE'S EXTENSION TO OTHER TYPES OF COMPANIES (1993); *see also* BODEN DE BANDT DE BRAUW JEANTET & URIA, REPORT ON POSSIBLE EXTENSION OF THE SECOND COMPANY LAW DIRECTIVE TO PRIVATE LIMITED COMPANIES AND LIMITED PARTNERSHIPS WITH SHARES (1992).

often criticized the inconsistency and argued for the extension.[50] The gap in coverage was probably the primary reason why many Continental Member States were reluctant to give up the "real seat theory" in the conflict of laws treatment of foreign corporations, thus effectively forcing individuals doing business in one Member State to use the company forms of that state.[51] This open subversion of the freedom of establishment for companies lasted until the *Centros-Überseering-Inspire Art* triad of cases between 1999 and 2003.[52] After *Inspire Art,* however, English Private Limited Companies began to flood at least some parts of the Continent for a few years. The number of pseudo-English firms decreased both in Germany and Austria in 2006, most likely precipitated by certain changes in the application of English law. The most important reason appears to have been that the Companies House began to strike companies from the register that failed to submit financial statements twice.[53] However, in recent years the number of pseudo-English firms has seemingly started to increase again.[54]

Even if the jurisdiction within the United Kingdom called "England and Wales" did not establish itself as the European Delaware, it was instrumental for bringing about changes in the company law of other Member States: A number of them began to tweak their laws to salvage the attractiveness of their own corporate forms and engaged in what is now known as "defensive regulatory competition."[55] Most conspicuously, even in the early 2000s a number of Member States began

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50. *See* EDWARDS, *supra* note 43, at 54-55; GRUNDMANN, *supra* note 28, at 208; Marcus Lutter, *A Mini-Directive on Legal Capital*, *in* THE EUROPEAN PRIVATE COMPANY? 201, 207 (Harm-Jan De Kluiver & Walter Van Gerven eds. 1995).

51. Under the real seat theory, a corporation must be incorporated in the jurisdiction where its "real seat" is located to ensure its legal personality is recognized. *See, e.g.* CARSTEN GERNER-BEUERLE, ET AL., STUDY ON THE LAW APPLICABLE TO COMPANIES 27-28 (2016).

52. Martin Gelter, *Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law*, *in* EU LAW STORIES 309, 322-30 (Fernanda Nicola & Bill Davies eds., 2017).

53. Wolf-Georg Ringe, *Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition,* 2013 EUR. COMP. & FIN. L. REV. 230, 262.

54. GERNER-BEUERLE ET AL., *supra* note 50, at 51.

55. Luca Enriques & Martin Gelter, *How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law,* 81 TUL. L. REV. 577, 589-590 (2007); Ringe, *supra* note 52, at 243-44.

to establish private company forms without a minimum capital.[56] Even without actively attempting to attract foreign incorporations, the combination of the UK's liberal approach toward legal capital with the European case law thus had a transformative impact on the law of private companies elsewhere.

In this context, it is interesting to note that the UK approach to private companies cannot be described as entirely deregulatory across the board: The United Kingdom did not traditionally give as much weight to legal capital, which some of the continentals often saw as the price of limited liability. In the English perspective, accounting disclosure (rather than) legal capital is seen as the "price" for limited liability.[57] The 1st Directive has required the disclosure of financial information of all limited liability entities since 1968.[58] This requirement faced considerable resistance specifically in Germany, which seems to have come to compliance only in recent years.[59] The United Kingdom became an EC member only in 1973 and hardly made any changes in their respective national law in regard to the disclosure provisions of the Directive as the Companies Act of 1967 exceeded and therefore complied with the standards set out in the Directive.[60] British seriousness in enforcing the requirement against companies incorporated in

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56. *E.g.* Eva-Maria Kieninger, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared*, 6 GERMAN L.J. 741, 768-770 (2004); Enriques & Gelter, *supra* note 54, at 600-602.

57. On the idea of publicity as a price or collateral for limited liability, see EDWARDS, *supra* note 43, at 123 n. 41; Jonathan Rickford, *Fundamentals, Developments and Trends in British Company Law–Some Wider Reflections*, 2004 EUR. COMP. & FIN. L. REV. 391, 408; Wolfgang Schön, *Corporate Disclosure in a Competitive Environment—The Quest for a European Framework on Mandatory Disclosure*, 6 J. CORP. L. STUD. 259, 264 (2006).

58. First Council Directive, *supra* note 3, at Art 2(1)(f).

59. On resistance against mandatory disclosure, see EDWARDS, *supra* note 43, at 22-23; Enriques, *supra* note 10, at 14; Schön, *supra* note 54, at 260-262. The ECJ found that German law did not effectively implement European disclosure requirements. *See* Verband deutscher Daihatsu-Händler eV v. Daihatsu Deutschland GmbH, Case C-97/96, [1997] E.C.R. I-6843; Commission v. Germany, Case C-191/95, [1998] E.C.R. I-5449. Moreover, in another case arising out of Germany, the court dismissed the argument that company disclosure of financial information constituted a violation of fundamental rights. *See* Axel Springer AG v Zeitungsverlag Niederrhein GmbH & Co. Essen KG & Hans-Jürgen Weske, Joined Cases C-435/02 & 103/03, [2004] E.C.R. I-8667.

60. The First Directive was applicable in Great Britain not upon entry in the EEC but six months later, to allow enough time to adjust the British legal provisions only in regard to the Directives second topic, namely the validity of commitments made on behalf of the company.

England and Wales was apparently a major factor why it did not ultimately become a haven for pseudo-foreign incorporations.

IV. CAPITAL MARKET ORIENTATION

A. Takeovers: UK takeover regulation as a soft unifying force

Let us now turn at a model where the United Kingdom took the lead, namely takeover law. By and large, in comparative corporate law, we can identify the United States and the United Kingdom as two polar opposite lead jurisdictions. They contrast mainly in two points, namely the issue of whether boards may defend against hostile bids, and whether a "market rule" or "equal opportunity rule" applies. First, in most situations, boards of directors in the United States can defend against takeovers as long as defenses satisfy the proportionality test set up in *Unocal v. Mesa Petroleum Co.*[61] By contrast, UK takeover law, which was developed not by the courts but by the originally private Panel on Mergers of Takeovers in the so-called City Code, has since 1968 required that management refrains from "any action that may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits."[62] The only thing directors in the United Kingdom are legitimately allowed to do is try to persuade shareholders not to trade into the tender offer. This legal principle is known as the "non-frustration rule", "passivity rule", or "neutrality rule."[63]

Second, takeover law in the United States differs from that in the United Kingdom in the fact that so-called market rule applies, meaning

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Hans Claudius Ficker, *The EEC Directives on Company Law Harmonisation*, *in* THE HARMONISATION OF EUROPEAN COMPANY LAW 66, 72, 75 (Clive M. Schmitthoff ed., 1973).

61. 493 A.2d 946 (Del. 1985).

62. PANEL ON TAKEOVERS AND MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS, at R. 21.1(a) (8th. Ed. 2006). Before the 2006 amendments to the Code, this general clause was not part of Rule 21, but General Principle 7 of the Code. For a discussion of these amendments, see Geoffrey K. Morse, *Proposed Amendments to the Takeovers Code to Implement the 13th EC Directive,* 2006 J. BUS. L. 242 (2006); *see also* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation,* 95 GEO. L. J. 1727, 1760 (2007) (discussing the historical context of the enactment of the Takeover Code).

63. *See, e.g.* Matteo Gatti, *Optionality Arrangements and Reciprocity in the European Takeover Directive*, 5 EUR. BUS. ORG. L. REV. 553, 555-57 (2005).

that the acquisition of control does not trigger any particular duties of the buyer. By contrast, in situations of acquisition of control, the United Kingdom applies something like an "equal opportunity" rule, meaning that the acquirer must offer non-connected shareholders to buy out their shares at the same price that was previously paid during a reference period prior to acquiring control.[64] This so-called "mandatory bid" implies that anyone acquiring control over a publicly traded firm must make an offer to buy out the remaining shareholders at the same price as paid prior to the acquisition of a controlling block.[65]

Overall, the United Kingdom has been more successful in exporting its model to the rest of the world, including to the European Union.[66] Admittedly, the United Kingdom did not explicitly push for a takeover law modeled on the City Code. In fact, many in the United Kingdom were not too enthusiastic about subjecting the privately organized takeover panel to a statutory basis.[67] Moreover, European takeover law was a top-down project that the commission – with a view toward creating a more coherent capital market – had pursued since the 1970s.[68] However, the City Code was the main model for the 13th Company Law Directive (or Takeover Directive)[69], which replicates some of its rules and structure. The European Court of Justice's (ECJ's) case

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64. *See* Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Control,* 109 Q. J. ECON. 957 (1994).

65. *E.g.* Armour & Skeel, *supra* note 62, at 1734-38.

66. *See* John Armour, Jack B. Jacobs & Curtis Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework,* 52 HARV. INT'L L. J. 221, 280 (2011) (noting that in several emerging economies "the overall scheme of these regimes ostensibly follows global 'best practices' modeled on the U.K. Takeover Code," which catering to local vested interests).

67. *See* Blanaid Clarke, *Takeover Regulation– through the Regulatory Looking Glass*, 8 GER. L. J. 381, 384 (2007).

68. *See* Klaus J. Hopt, *Takeover regulation in Europe — The battle for the 13th directive on takeovers,* 15 AUSTL. J. CORP. L. 1, 8-9 (2002) (surveying the history and prehistory of the Takeover Directive).

69. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, 2004 O.J. L 142/12 [hereinafter Takeover Directive].

law on Golden Shares[70] during the late 1990s made the need for a coherent takeover law appear more pressing,[71] and the Takeover Directive was also a centerpiece of the 1999 Financial Services Action Plan.[72]

The final compromise can be considered to be watered-down version of UK takeover law. In particular, the implementation of the mandatory bid rule (Art 5 (1)) was obligatory for the Member States.[73] However, the deliberations over the Directive extended over many years until it was finally passed in 2004. In 2001 the European Parliament rejected a proposal by one vote after a number of heated debates.[74] There was a lot of resistance,[75] particularly against the neutrality principle, which ultimately was included only as a Member State option. Some of the fiercest resistance came from Germany[76], whose representatives were afraid that its corporations would become particularly exposed to takeovers. The resulting compromise made the neutrality rule – as well as the little-used breakthrough rule – optional, and allowed

70. *See, e.g.* Commission v. France, Case C-483/99, [2002] E.C.R. I-4785; Case C-503/99, Commission v. Belgium, Case C-503/99, [2002] E.C.R. I-4812 (only case upholding the national measure, which provided merely for a veto in specific circumstances); Commission v. Portugal, Case C-367/98, [2002] E.C.R. I-4756; *see also* Commission v. Germany, Case C-112/05, [2005] E.C.R. I-9020.

71. Hopt, *supra* note 68, at 13-14.

72. Commission of the European Communities, Implementing the Framework for Financial Markets: Action Plan, COM (1999) 232 final (May 1999).

73. Luca Enriques, *The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?*, 1 EUR. COMPANY & FIN. L. REV. 440, 443-44 (2004) (discussing the mandatory bid rule and Member States' level of discretion in implementing it).

74. *See* European Parliament Debate, Takeover bids (12 Dec. 2000) [hereinafter Takeover Directive Debates], http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20001212&secondRef=ITEM-014&format=XML&language=EN.

75. Moreover, the managements of leading German companies such as DaimlerChrysler, Volkswagen, and BASF opposed the Directive. JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER 162 (2010).

76. *See* Peter Hommelhoff, Christoph Teichmann & Carl-Heinz Witt, *Corporate and Business Law in the European Union: Status and Perspectives 2004*, *in* TOWARDS A EUROPEAN CIVIL CODE 814 (Arthur Hartkamp et al. eds., 2004); ANDREW JOHNSTON, EC REGULATION OF CORPORATE GOVERNANCE 278-280 (2009); *id.,* at 161-167; DIGNAM & GALANIS, *supra* note 16, at 335-336; GRUNDMANN, *supra* note 43, at 736.

Member States to make its application to any particular company contingent on reciprocity.[77]

For purposes of the symposium, a number of observations need to be made. First, while the UK law was clearly the model, its success was limited because of the extensive optionality arrangements. Second, the limitation is even more striking when one looks at the actual impact of the Directive. As Ventoruzzo points out, a considerable number of Member States had already, prior to the implementation of the Directive, passed a UK-inspired takeover law.[78] The effects in these Continental European countries were, however, often quite different because they generally had concentrated ownership structures.[79] With concentrated ownership, the neutrality rule was largely irrelevant; a potential bidder would need to persuade the significant shareholders of the firm to take control. Moreover, the mandatory bid rule has very different effects in a concentrated ownership system. In a dispersed ownership company, it will generally force the bidder to share the private benefits of control with small investors by offering them a particular price. Under concentrated ownership, it will more frequently have the effect of inhibiting a takeover by making it too expensive to be viable.[80] Thus, UK-inspired takeover law tends to serve to entrench existing large shareholders in Continental Europe. Consequently, the adoption of UK-inspired rules most likely predominantly served the purpose of window-dressing and complying with a set of "best practices" considered good law, but without actually upsetting local structures of economic power.

Third, it is not clear at first glance how well takeover law fits well into liberal capitalist model that supposedly relies on outside finance and capital markets. Notably, the United States has not espoused the UK model, in spite of arguably being even more reliant on financial

77. I.e. a firm applying neutrality and reciprocity would be subject to the neutrality rule only when the hostile bidder itself is subject to neutrality. *See* Takeover Directive, *supra* note 69, art. 12(3); Gatti, *supra* note 63, at 572-575.

78. Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe,* 11 U. PA. J. BUS. L. 135, 145-50 (2008).

79. *Supra* note 17 and accompanying text. For a general analysis of how blockholders captures ostensibly investor-oriented corporate law reforms, see Fabio Bulfone, *Insider job: corporate reforms and power resources in France, Italy and Spain,* 15 SOCIO-ECON. REV. 435-359 (2017).

80. Ventoruzzo, *supra* note 78, at 157.

markets than the United Kingdom. This first impression, however, is likely deceptive. Comparing the United States and United Kingdom corporate governance systems, the latter is, in a variety of ways, more shareholder-oriented than the former, at least in giving shareholders more control.[81] US takeover law is more board-centric, as is US corporate law in general. Shareholder disempowerment is historically connected to the corporate welfare state, where employers were (and still are) to a much larger extent responsible for workers' health care and retirement savings than in the United Kingdom.[82] The United Kingdom has historically left these functions to the government, which allowed corporate law to be more unambiguously shareholder-oriented. Over the past 30 years, US corporate governance has moved farther in the direction of shareholder orientation, but takeover law (and the rest of Delaware corporate law) remains a holdout of managerialism.[83] When we look at corporate *law* only, the UK is clearly the most market-oriented (or liberal). Takeover law, extracted to the Continent, does not provide a particularly good match, but should probably be seen as an isolated legal transplant in a host that is not fully receptive.

B. Accounting: "True and fair view" and the (partial) victory of IFRS

Accounting was another subject included in the EU company law harmonization project. The disclosure of financial information is quite obviously one of the areas affecting the interests of third parties inter-

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81. *See, e.g.*, ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY LAW 303 (2010).

82. *See* Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation*, 50 VA. J. INT'L L. 579 (2010); Martin Gelter, *The Pension System and the Rise of Shareholder Primacy,* 43 SETON HALL L. REV. 909 (2013).

83. Gelter, *supra* note 18, at 50-52 (describing the transition to shareholder-centrism as a practical rather than legal development). While the doctrine developed during the 1980s has remained firmly in place, arguably, the justification for the "substantive coercion" component of *Unocal* is much less strong than it once was, given that with a higher percentage of institutional (as opposed to retail) investors it is becoming harder to see why the board would needed to protect shareholders from a substantively inadequate offer. *See, e.g.,* Myron T. Steele, *Lecture: Continuity and Change in Delaware Corporate Law Jurisprudence,* 20 FORDHAM J. CORP. & FIN. L. 352, 361-362 (2015) (former Delaware Chief Justice predicting that the Delaware courts will eventually abandon the doctrine).

acting with companies from various Member States. While the 1st Company law Directive already required all limited-liability entities to disclose a set of financial statements after an amendment in 1972,[84] the harmonization of substantive accounting standards had to wait for the 4th Directive (Accounting Directive) of 1978[85] and the 7th Directive (Group Accounting Directive) of 1983.[86] The accession of the United Kingdom (alongside with Ireland and Denmark) in 1973 had a noticeable impact on the development of these directives, since agreement on a number of issues required a greater number of compromises. While the earlier drafts for the directives had relied mainly on Continental, particularly German and French accounting traditions,[87] the British tradition influenced the final directives in many aspects. The most famous example is the "true and fair view" standard,[88] which had its origins in

84. First Council Directive, *supra* note 3.

85. Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, 1978 O.J. L 222/11 [hereinafter Fourth Directive] (discussing the reasons for enacting the accounting standards). Regarding the relationship between the First and Fourth Directive, see EDWARDS, *supra* note 43, at 118 ("The Fourth Directive has its roots in the discussions leading up to the First Directive . . . .").

86. Seventh Council Directive of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, 1983 O.J. L 193/1. In 2013, both directive were integrated into a combined Accounting Directive. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. L 182/19 [hereinafter Accounting Directive].

87. Brigitte Eierle, *Differential Reporting in Germany—A Historical Analysis,* 15 ACCT. BUS. & FIN. HIST. 279, 290 (2005) (noting strong German influence on the Fourth Directive); EDWARDS, *supra* note 43, at 118–21 (discussing the Elemendorff report of 1966, the first proposal of 1969, and the subsequent effect of the United Kingdom and other new Member States).

88. Fourth Directive, *supra* note 85, at art. 2(3)–(6).

the Companies Act of 1948.[89] While this lofty goal for financial statements was relatively harmless, the so-called "overriding principle"[90] caused considerable controversy. Under this provision, reporting firms must, "in exceptional cases" depart from specific accounting rules where they would be incompatible with the "true and fair view" as defined in the Directive. A number of Member States simply did not implement this provision. In particular, Germany and Denmark did not include the provision, as well as later additions to the Union such as Austria, Sweden and Finland.[91] Furthermore the significance of the provision has remained unclear in countries that implemented it as well, including France.[92]

One reason for the resistance against "true and fair view" and other aspects of the European directives was that accounting was traditionally understood to have different purposes in Continental European than in the English-speaking world.[93] Accounting profits were seen as limiting the distributions firms could make in the form of dividends,

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89. *See* Lawrence E. Cunningham, *Semiotics, Hermeneutics, and Cash: An Essay on the True and Fair View,* 28 N.C.J. INT'L L. & COM. REG. 893, 904 (2003) ("[I]n Britain, the goal is producing financial statements giving a 'true and fair view' of business condition and results. These concepts . . . were utterly alien to non-Dutch Europe until the "true and fair" view was sanctioned by the Fourth Directive in 1978, driven by the United Kingdom's recent admission to the European Union."); *see also* Dieter Ordelheide, *True and Fair View: A European and a German Perspective,* 2 EUR. ACCT. REV. 81, 82 (1993) (describing how it was "Great Britain, which argued for bringing the true and fair view principle into Art. 2 of the Fourth Directive . . . "); Jonathan Rickford, *Legal Approaches to Restricting Distributions to Shareholders: Balance Sheet Tests and Solvency Tests,* 7 EUR. BUS. ORG. L. REV. 135, 147 (2006) ("At a relatively late stage in the negotiation of the [Fourth] Directive, the Anglo-Irish concept of the overriding principle of the 'true and fair view' . . . was added.").

90. Fourth Directive, *supra* note 84, Art. 2(5).

91. David Alexander & Eva Eberhartinger, *The True and Fair View in the European Union,* 18 EUR. ACCT. REV. 571, 572 (2009); David Alexander & Eva Jermakowicz, *A True and Fair View of the Principles/Rules Debate,* 42 ABACUS 132, 139 (2006) (reporting that Germany, Austria and Sweden refused to implement the overriding principle); Cunningham, *supra* note 89, at 910–11. Austria explicitly implemented the provision in 2015. *See* RECHNUNGSLEGUNGS-ÄNDERUNGSGESETZ 2014 [RÄG 2014] [Accounting Amendment Act of 2014] BUNDESGESETZBLATT [BGBL] I No. 22/2015 (Austria).

92. *See* Code de Commerce [C. Com.][Commercial Code] art. L123-14, ¶ 3 (Fr.); CHRISTIAN DE LAUZAINGHEIN, JEAN-LOUIS NAVARRO & DOMINIQUE NECHELIS, DROIT COMPTABLE ¶ 361 (3d ed. 2004) (noting that "after twenty years the notion is still unclear").

93. *But see, e.g.*, Lisa Evans & Christopher Nobes, *Some Mysteries Relating to the Prudence Principle in the Fourth Directive and in German and British Law,* 5 EUR. ACCT. REV. 361 (1996).

which is why they were often thought to be linked to the regulation of legal capital under the 2nd Directive.[94] At least in the traditional view, this purpose trumped the goal of providing information to outside investors. Laws establishing accounting standards were thus often interpreted in light of the purpose of protecting creditors by limiting distributions, thus mitigating in favor of a later realization of profits and casting distributions constraints as the primary purpose of financial statements[95] that often even trumped the provision of useful information.[96]

Relatedly, book-tax conformity tends to be stronger in Continental Europe than in the Anglo-Saxon world.[97] A close link between financial accounting and taxation means that firms sometimes have to exercise accounting options in ways that have an impact on the provision of information if they want to minimize the tax load.[98] In practice, sometimes tax purposes dominate financial reporting purposes.[99]

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94. Second Directive, *supra* note 42; Directive 2012/30/EU, *supra* note 42.

95. *See* Christian Leuz & Jens Wüstemann, *The Role of Accounting in the German Financial System, in* THE GERMAN FINANCIAL SYSTEM 450, 459 (Jan Pieter Krahnen & Reinhard H. Schmidt eds., 2004); Axel Haller, *International Accounting Harmonization: American Hegemony or Mutual Recognition with benchmarks? Comments and Additional Notes from a German Perspective,* 4 EUR. ACCT. REV. 235, 236 (1995).

96. Matthias Schmidt, *On the Legitimacy of Accounting Standard Setting by Privately Organised Institutions in Germany and Europe,* 54 SCHMALENBACH BUS. REV. 171, 176 (2002).

97. *See, e.g.* EINKOMMENSTEUERGESETZ [ESTG] [INCOME TAX ACT], § 5(1) (Ger.) (requiring "merchants" to use their bookkeeping under the commercial law requirements as the basis of their tax returns); Peter Essers & Ronald Russo, *The Precious Relationship Between IAS/IFRS, National Tax Accounting Systems and the CCCTB,* in THE INFLUENCE OF IAS/IFRS ON THE CCCTB, TAX ACCOUNTING, DISCLOSURE AND CORPORATE LAW ACCOUNTING CONCEPTS 29, 33 (Peter Essers et al. eds., 2009); Christian Nowotny, *Taxation, Accounting and Transparency: The Missing Trinity of Corporate Life, in* TAX AND CORPORATE GOVERNANCE 101, 105 (Wolfgang Schön ed., 2008); A. Frydlender & D. Pham, *Relationships Between Accounting and Taxation in France*, 5 EUR. ACCT. REV. SUPPLEMENT 845, 845–46 (1996).

98. For a closer look at Germany's accounting and tax principles, see Dieter Pfaff & Thomas Schröer, *The Relationship Between Financial and Tax Accounting in Germany—The Authoritativeness and Reverse Authoritativeness Principle*, 5 EUR. ACCT. REV. SUPPLEMENT 963, 967–69 (1996). For the accounting and tax principles of France, see DE LAUZAINGHEIN ET AL., *supra* note 92, ¶ 29.

99. *E.g.*, Pfaff & Schröer, *supra* note 98, at 970–72 (discussing the reverse authoritative effect of tax law). Arguably, directors may even be required to minimize the firm's tax burden under their duty of care, which creates some obvious tension with truthfulness in accounting. Wolfgang Schön, *Tax and Corporate Governance: A Legal Approach, in* TAX & CORP. GOV-

As a consequence of the attempt to reconcile several accounting cultures into a single harmonization project, the Fourth and Seventh Directive have often been considered a failure. They were frequently criticized for providing too many options to both the Member States and the reporting firms.[100] In effect the Member States thus maintained accounting traditions.[101]

Widespread dissatisfaction with Continental European accounting and European harmonization in the capital markets[102] paved the way for the adoption of International Financial Reporting Standards ("IFRS") for the consolidated accounts of publicly traded firms in the 2002 IFRS Regulation, which came into effect in 2005.[103] During the late 1990s and early 2000, a debate about convergence of corporate governance toward Anglo-American standards emerged, and the internationalization of accounting was very much part of it.[104] The International Accounting Standards Board ("IASB") – the body that develops IFRS – is of course based in London, but it is less well-known that the establishment of its predecessor body, the International Accounting Standards Committee ("IASC"), in 1973 was a reaction to EC accounting harmonization efforts. Fearing that the British accounting tradition

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ERNANCE 31, 46-47 (Wolfgang Schön ed., 2008); Reginald Hansen, *Assessing and Tax Accounting Principles in the German Civil and Commercial Code and the Impact on Tax Compliance*, 7 EUR. J. L. & ECON. 15, 34 (1998); Frydlender & Pham, *supra* note 97, at 856.

100. *E.g.*, RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE 235 (1988); Enriques, *supra* note 10, at 26–27 .

101. *E.g.*, Werner F. Ebke, *Accounting, Auditing and Global Capital Markets*, *in* THEODOR BAUMS ET AL., CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUXBAUM 113, 119–20 (2000).

102. *See* John Flower, *The Future Shape of Harmonization: The EU Versus the IASC Versus the SEC*, 6 EUR. ACCT. REV. 281, 285 (1997); Stephen A. Zeff, *The Evolution of the IASC into the IASB, and the Challenges It Faces*, 87 ACCT. REV. 807, 817 (2012); Eierle, *supra* note 87, at 291.

103. Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards, art. 5, 2002 O.J. (L 243) 1, 6; *see also* Leo van der Tas & Peter van der Zanden, *The International Financial Reporting Standards, in* THE INFLUENCE OF IAS/IFRS ON THE CCCTB, TAX ACCOUNTING, DISCLOSURE AND CORPORATE LAW ACCOUNTING CONCEPTS 1, 8 (Peter Essers et al. eds., 2009).

104. *See* Yuri Biondi, *What do Shareholders Do? Accounting, Ownership and the Theory of the Firm: Implications for Corporate Governance and Reporting*, 2 ACCT. ECON & L. 1, 3, 18 (2012); Yuan Ding et al., *Towards an Understanding of the Phases of Goodwill Accounting in Four Western Capitalist Countries: From Stakeholder Model to Shareholder Model,* 33 ACCT. ORG. & SOC. 718, 739–46 (2008); Hansmann & Kraakman, *supra* note 38, at 443.

of private standard setting would be swept away by more statutory Continental approach,[105] prominent British accountants took the lead in setting up an international, private body that would eventually evolve in the world's accounting standard setter.[106] While representatives from many countries were involved from the beginning, IASC was dominated by accountants socialized in the large accounting firms and immersed in an Anglo-American accounting culture geared toward capital markets.[107]

With the IFRS regulation, an Anglo-American accounting culture has won in the European Union, at least on a superficial level. Many Member States continue to require or permit their national accounting laws and standards to be used by non-listed firms and in the individual accounts of all firms.[108] But in the stock markets IFRS have become *de rigeur*. It would be wrong to say, however, that the United Kingdom pushed for the IFRS Regulation in the European Union. In fact, the pressure came from large firms themselves that increasingly sought to avail themselves of stock markets, for which purpose IFRS and US generally accepted accounting principles ("GAAP") are the financial *linguae francae*. However, we can say that the UK's passive resistance to Continental-dominated harmonization, both by requiring compromises in the directives and by setting up IASC, sowed the seed from which the tree of Anglo-Saxon style financial reporting in the European Union ultimately grew. With or without the United Kingdom in the Union, the wheel will not be turned back on accounting.

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105. *See* Anthony G. Hopwood, *Some Reflections on 'The Harmonization of Accounting Within the EU,* 3 EUR. ACCT. REV. 241, 243 (1994); Flower, *supra* note 102, at 288; Zeff, *supra* note 102, at 809–10.

106. *See* Flower, *supra* note 102, at 288; Zeff, *supra* note 102, at 809.

107. *See* Gordon L. Clark et al., *Emergent Frameworks in Global Finance: Accounting Standards and German Supplementary Pensions,* 77 ECON. GEOGRAPHY 250, 255 (2001); Jane Fuller, *The Continent's Largest Companies Are Gearing Up for Change that Should Reduce the Need to Reconcile Accounts to Different Rules. But the Relevance and Reliability of the Measures is Open to Question*, FIN. TIMES, Nov. 23, 2004, at 17; Flower, *supra* note 102, at 288–89; Haller, *supra* note 95, at 238.

108. For a comparison of IFRS implementation across Member States, see the table in Martin Gelter & Zehra Kavame Eroglu, *Whose Trojan Horse? The Dynamics of Resistance Against IFRS*, 36 U. PA J. INT'L L. 89, 153-56 (2014).

C. Corporate Governance geared to capital markets: The irrelevance of UK membership

As we have seen, the UK model has achieved dominance relating to takeovers and accounting, with pockets of resistance remaining, even if the United Kingdom did not necessarily promote the export of its model to the Continent itself. For purposes of the symposium, this raises two questions. First, did it matter that the United Kingdom was an EU member? In other words, would the law have developed similarly without the United Kingdom? Second, is the departure of the United Kingdom from the European Union likely to result in any change?

In both cases, the answer is no. Countries that modeled their takeover law on the UK's did so in part before being required to do so by the European Union, while others managed to use the directive's optional arrangement to avoid it (e.g. Germany with respect to takeover defenses). Similarly, in the late 1990s, some Member States were already beginning to permit their publicly traded firms to use US GAAP and IFRS,[109] even if the compatibility of these standards with the directives was questionable. In the case of takeover law, Member States claimed that they wanted to improve their capital markets.[110] In the case of accounting, firms seeking access to international markets were putting pressure on their governments.[111] The United Kingdom became the most frequently imitated jurisdiction in corporate law not because it was an EU Member and it influenced EU law to conform to its own standard. Rather, as the leading capital market it was increasingly seen as a paragon of good corporate governance during this period, which is why other countries (within and outside of the European Union) saw it

109. *E.g.* HGB (Ger.) § 292a (1998), as introduced by the GESETZ ZUR VERBESSERUNG DER WETTBEWERBSFÄHIGKEIT DEUTSCHER KONZERNE AN KAPITALMÄRKTEN UND ZUR ERLEICHTERUNG DER AUFNAHME VON GESELLSCHAFTERDARLEHEN (KAPITALAUFNAHMEERLEICHTERUNGSGESETZ – KAPAEG), April 20, 1998, BGBL I S. 707. *See also* Eierle, *supra* note 87, at 291-292; GRUNDMANN, *supra* note 43, at 427 n.14.

110. *See* Ventoruzzo, supra note 49; Takeover Directive Debates, *supra* note 74.

111. *See* Gelter & Kavame Eroglu, *supra* note 108, at 150.

as a model to emulate, in particular with a view to the ascendant shareholder primacy paradigm.[112] Corporate governance codes are a similar example: The UK model of the "Combined Code" was adopted everywhere in Europe in the late 1990s and early 2000s, without any pressure from the European Union.[113] Adoption of all of these elements should rather be seen as an element of a general convergence trend in corporate governance at that time.

While the shareholder corporate governance model may have lost some of its sparkle since the financial crisis, the reforms are here to stay. There is no movement to abandon them, given that they ultimately have not turned out to be particularly burdensome on any relevant interest group. If a decision is made to amend any of these legal instruments in the future to move away from the UK-inspired requirements, it will not matter much whether the United Kingdom is an European union member or not; the Member States would need to see a strong need for change.

V. CONCLUSION: BRINGING BACK THE OLD WAY

We have seen two countervailing trends in the relationship between the United Kingdom and the European Union in company law, which can be summarized under the headings of "importance" and "irrelevance." It is possible that both reflect individualistic economic tendencies inherent in the UK's particular variety of capitalism.

The United Kingdom was important for issues not directly related to capital markets, in particular board structure and legal capital. While we can see the United Kingdom's handwriting in EU Company Law, it mainly served as a roadblock against harmonization along German lines. True, not every element of German corporate law would have found the approval of a majority of the other Continental Member

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112. *E.g.* MATHIAS M. SIEMS, CONVERGENCE IN SHAREHOLDER LAW 56-59 (2008); Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance,* 17 CORP. GOV. 376, 377-379 (2009).

113. Only later was the Accounting Directive amended to require a disclosure whether a company adhered to a code. Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, 2006 O.J. L 224/1 (introducing art. 46a regarding corporate governance codes into the Fourth Directive). The successor provision is article 20 of the recast Accounting Directive. Accounting Directive, *supra* note 86, art. 20.

States, but at least on the margins harmonization would have been more likely. The United Kingdom, with its tradition of not quite rugged, but civilized individualism favored free choice by companies and the individuals founding them and planning their structure. A mandatory two-tier system and a supervisory board soiled with Union influence would have been unacceptable to a Thatcherite and post-Thatcherite Britain, as would have been the impediment to entrepreneurship created by an expanded legal capital scheme.

Counterintuitively, the UK's membership in the EU can be described as irrelevant for harmonization in areas related capital markets. In these fields of law, the United Kingdom tends to favor informed investors able to avail themselves of transparent accounting information, who are treated fairly in takeover law relative to the sellers of controlling blocks, and who do not need management to tell them whether to accept a takeover bid or not. Consequently, in these areas the UK model actually sometimes endorses mandatory law as long as it advances the interests of informed shareholders making investment decisions. Thus, the United Kingdom came to be seen as the model jurisdiction of good corporate governance during the 1990s and 2000s. Of course, speculating about a counterfactual history, we cannot know if United Kingdom had solidified its position as a leading capital market without EU membership. Given the long history of UK markets, it is likely that it would have found a way. Thus, even without EU membership, it might have achieved this position, and European harmonization might have followed suit. Thus, we can probably say that the UK's membership was likely irrelevant for the development of company law in this area, given that market forces would pushed the Union into the same direction.

In light of this assessment, if the United Kingdom returns to the old way of "splendid isolation" and "divide and rule" by abandoning the Union, will it have an impact on either area of EU company law? Most likely not. While capital markets no longer shine as they did twenty years ago, we will not go back to the post-war decades when Continental European markets largely lay dormant. Even after the financial crisis has eroded the confidence in "good corporate governance," Europe is unlikely to retreat from transparent accounting and takeover law. If anything, the plans set forth by the commission, such as the 2012 Action Plan[114] and the 2017 amendments to the Shareholder Rights Directive,[115] continue the trajectory of the past two decades. Traditional continental harmonization projects – related to issues such as board structure and capital – are unlikely to relaunch.

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114. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final.

115. Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, 2017 O.J. L 132/1.