

25 Thoughts on European Company Law in the EU of 25

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Wind of Change

1. *Europe is an idea.* This widely quoted phrase, or notion, is also true for European jurisprudence. European legal thought has been shaped by diverse legal cultures and traditions and has accommodated different national doctrines. In the realm of company law and its legal environment, the impact of European law both enacted (directives and regulations) and judge-made (ECJ case-law) is almost ubiquitous and its importance can hardly be overestimated. Although the actual harmonisation effect frequently remains inconsistent with the intent of the European legislator,¹ the series of company law and capital market directives significantly changed the regulatory landscape of corporate Europe.²

2. At present, the European legal space is a three layer composite of genuinely European law, harmonised national laws, and national laws that are not directly affected by harmonisation. Even if one agrees that the area that has traditionally been perceived as the core of company law, namely governance structure of corporation and shareholder rights largely remained a domain of national law,³ following the failure of the draft Fifth Company Law Directive, there is a spillover effect that arises from accompanying regulatory efforts (eg, the SE-Regulation pro-

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¹ Cf H. Halbhuber, “National Doctrinal Structures And European Company Law” (2001) 38 CML Rev 1385 at p 1405–1407.

² For an up-to-date overview cf. S. Grundmann, “The Structure of European Company Law: From Crisis to Boom” (2004) 5 EBOR 601, at p 603–604.

³ Cf H. Halbhuber, *op cit* at p 1406 (2001); L. Enriques, “EC Company Law Directives and Regulations: How Trivial are They?” ECGI Working Paper N° 39/2005 (May 2005) <http://ssvn.com/abstract=730388>

moting the choice of governance regime across Europe, irrespective of pre-existing national models and constraints⁴). The latter spill-over effect both occurs in a vertical dimension (EC-national law), and in a horizontal dimension (between national laws). This spillover effect was initially triggered by an increase in inter-state regulatory competition, which followed the series of European Court of Justice decisions enforcing the Treaty freedom of cross-border establishment.⁵ Additionally, national legal concepts prompt a reverse effect by influencing EC-legislation.

3. Still, as Professor Marcus Lutter from the University of Bonn correctly remarked, “The notion of European company law stands less for a specific set of legal rules enacted by the European legislator, and more for a broader program of legal policy.”⁶ Thus to paraphrase a quotation by Professor Lutter, one can safely argue that European company law is predominantly an idea. Ideas might evolve and their evolutions show various dynamics. There are a couple of factors to name that recently have determined this dynamics. We are lucky to live in a time when the momentum for change in European company law is particularly impressive, and this after years or even decades of stagnation.⁷ In the recent time one could name four driving factors of change in European company law:

- ECJ-Case Law which enforces freedom of establishment (keyword ‘competition for incorporations’)
- The growth of equity financing and the increase in capital markets pressure (reflected inter alia in the paradigm change in the European accounting laws and enhancement of capital market disclosure)⁸
- A progression of globalization which compelled governments to become more responsive to the needs of competitive economy (keyword ‘competition for investments’⁹).
- The enlargement of the European Union.

4. The European legal space significantly expanded with the EU-Enlargement in

⁴ Cf M-A. Arlt, C. Bervoets, K. Grechenig, S. Kalss, “The Societas Europaea in Relation to the Public Corporation of Five Member States (France, Italy, Netherlands, Spain, Austria)” (2002) 3 EBOR 733, J. Winter, “EU Company Law on the Move” (2004) 31 Legal Issues of Economic Integration 97, at p 100.

⁵ Cf ECJ-Judgement of 9 March 1999 (C-212/97 – *Centros*), ECJ-Judgement of 5 November 2002 (C-208/00 – *Überseering*), ECJ-Judgement of 30 September 2003 (C-167/01 – *Inspire Art*).

⁶ Cf M. Lutter, *Europäisches Gesellschaftsrecht*, ZGR Sonderheft 1, 2. Aufl., (Walter de Gruyter, Berlin-New York 1984) at p 1 (“*Europäisches Gesellschaftsrecht bedeutet zum kleineren Teil die Summe geltender Normen europäischen Typs, zum größeren Teil ein rechtspolitisches Programm*”).

⁷ Cf P. Behrens, *Krisensymptome in der Gesellschaftsrechtsangleichung* (1996) EUZW 193.

⁸ Cf F. Kübler, “The Rules of Capital Under Pressure of the Securities Markets” [in:] K.J. Hopt, E. Wymeersch (ed), *Capital Markets and Company Law* (Oxford University Press 2003) at p 95; H. Merkt, “European Company Law Reform, Struggling for a More Liberal Approach” (2004) 1 ECFR 3; E. Wymeersch, “Factors and Trends of Change in Company Law” (2001) 21CCLJ 481 at p 485.

⁹ Cf E. Kamar, “Beyond Competition for Incorporations”, Paper downloadable from the Social Science Research Network electronic library at <http://ssrn.com/abstract=720121>.

May 2004. Subsequently, the range of formally binding European law increased. So did the variety of interests and national peculiarities; new ingredients have been poured into the European jurisdictional melting pot. However, the impact of EU-enlargement on European company law has largely been unilateral; national laws of accession countries underwent a profound reform, whereas the reverse impact remained negligible. This limited reverse impact is understandable, as EU accession requirements mandate that a candidate country adopt the *acquis communautaire*. However, aside from issues tied to accession, new member states also bring new problems into the European legal community, of which the EC-legal policy must account for and address. Fortunately, from a policy standpoint, most of the new Members States, as diverse as they are, do share some common characteristics; and these peculiarities deserve a closer look.

Corporate Law and Legal Environment Peculiarities of Accession Countries

5. Most of the new Member States, with the exception of Malta and Cyprus, are former socialist countries. Consequently, these new Member States have all undergone transition from planned economies to market economies. This transition, in turn, first required a rapid and profound political and economic reform, including the establishment of an entirely new legal and institutional framework for capital markets, as well as creating or reviving banking and financial services industries. Simultaneously, most of the new Member States have been confronted with problems of ownership restructuring by means of different privatisation methods. Another common characteristic of accession states is that most of the accession countries have experienced some sort of institutional failure.

6. Immediately after the collapse of the communism, the first step some of the accession countries made was the re-enactment of the pre-war company law legislation.¹⁰ The first available literature were also reprints of the classics from the 1930s.¹¹ In

¹⁰ Quite interesting here is the Polish experience with the Commercial Code of 1934. The Code wasn't formally abolished after 1945 and only a part of it (commercial transactions) has been repealed in 1964 by the new Civil Code. Interestingly the reason for this was the shift to the Swiss (1911) and Italian (1942) model of uniform civil law legislation, as opposed to the German or French division between civil code (*Bürgerliches Gesetzbuch*, *Code Civil*) and commercial code (*Handelsgesetzbuch*, *Code de Commerce*). The Code's part which regulated the commercial companies remained in force, although of marginal practical significance for the then almost non-existent private business. The only enterprise form that has been abolished was the limited partnership (*spółka komandytowa*) which has been restored in its pre-war form in 1991.

¹¹ Eg in Poland the Commentary of 1935 by Maurycy Allerhand came out in several editions at the beginning of the 1990s, the same pertains to the Commentary of 1936 by T. Dziurzyński, Z. Fenichel, M. Honzatko, reprinted throughout the 1990s. Another pattern, yet similar in the outcome, was true for the Czech Republic where the new handbooks published after 1990 were only narrative retyping of old, pre-war works, illegitimate assuming of the authorship by the new editors.

the course of the modernisation of law and the alignment of domestic legislation with the EU requirements, numerous foreign legal transplants were incorporated into national statutes.¹² Yet, the formal conformity of the laws might be misleading. In that, in new member states, there exists, on average, a relatively broad gap between the “law on books” and the “law in action,” which is attributable to the fact that the changes in statutory law do not always take account of path dependence issues and the domestic legal practice does not always keep pace with the rapid modification of the statutory law including the many legal institutions which are borrowed and get transplanted into national laws of transition countries. Most importantly however, the existing gap between the “law on books” and the “law in action” is tied to deficiencies in law enforcement and institutional failure. A partial remedy to this convergence problem may be achieved by extending the possibility of subjecting certain corporate law disputes to legal arbitration resolution proceedings. For instance very recently in Poland there has been adopted a new law allowing opting-in an arbitration clause for certain corporate disputes.

7. The problem of dispute resolution and law enforcement must be considered within the broader context of the legal profession. In some Eastern European countries, there has been a shortage or at least a relatively low number of qualified (licensed) attorneys when compared to the numbers of qualified attorneys in Western Europe. This latter problem of a disparity in the number of qualified attorneys in Eastern and Western Europe, became particularly apparent in Baltic Countries in the aftermath of their accession to the EU (eg, many of the well-trained Lithuanian, Latvian and Estonian lawyers simply went to work in Brussels). Poland presents another example of the problem that Eastern Europe faces, where a very restrictive system of admission to the bar¹³ has kept the number of licensed attorneys well below the level of licensed attorneys in Western European countries.¹⁴

To make matter worse, in small nations such as the Baltic countries, the limited number of attorneys who actually received formal training did so at only one or two law schools in the country,¹⁵ which translates into the emergence of a small circle

¹² For instance Polish Code of Commercial Companies of 2000 introduced inter alia professional partnership, authorised capital, conditional capital (inspired respectively by German *genehmigtes Kapital* and *bedingtes Kapital*), and squeeze-out.

¹³ This system has recently been revised and liberalised.

¹⁴ Cf the recent comparative data available at <http://www.ccbe.org/doc/En/table_number_lawyers_2005_en.pdf>; according to this data Germany with a population slightly over twice as large as Poland's has over six times as many licensed attorneys as Poland (133.113 and 21.500 respectively). However the data provided for Poland is not quite accurate, most probably due to the fact that in Poland there are two separate bar associations. It is estimated, that in sum the number of attorneys in Poland would be 28.000 by 2002, cf. Ł. Bojarski, *Access to Legal Aid in Poland, Monitoring Report*, (Helsinki Foundation for Human Rights, Warsaw) at pp 54 et seq. (2003).

¹⁵ However, eg in Lithuania it is to note the emergence of some colleges that do not rank as universities, but teach law. The relative number of law schools actually higher in Baltic states (for instance in Lithuania 1 school per 1 million inhabitants) then in most larger European countries (eg with the population of approx. 90 million, Germany has ca. 50 law departments, in 38-million Poland

of professional “acquaintances” in the legal and managerial professions (‘everybody knows everybody’). Consequently, many legal issues in these countries tend to be settled informally, although the amount of litigations is still quite high.

8. In most of the post-socialist countries, the state continues to hold relatively large stakes in companies, although these stakes tend to decrease as privatization progresses. However, in most cases of large companies privatised by means of a share deal the dominant shareholder is usually a foreign trade (strategic) investor. In Baltic Countries, the reported managers of large companies are usually former politicians, former officials of the communist party or previous directors of state-owned enterprises.

9. The low separation of ownership and control and strong management position combined with the ‘everybody knows everybody’ phenomenon in Baltic Countries keep the number of cases of directors being held liable for corporate wrongdoing at a rather low level. Also in other Eastern European countries, such as Poland, the number of directors’ liability cases remains limited, with the exception of external liability cases for not filling the motion for opening insolvency procedure in a due time. Generally, the significance of corporate litigation in Central and Eastern Europe is less than in most Western European countries – the number of cases in any company law matters, particularly oppression of the minority cases coming up to the courts is relatively low, although increasing.

10. In many post-socialist countries, there is a crisis of legal thought in the field of corporate law scholarship. For instance in Poland high quality of legal scholarship does not necessarily and not directly translate into scholar’s recognition and academic position, including appointments, promotion etc. (writing→position). What is even worse, the same problem manifests itself in the reverse direction (position→writing). Many of the established law professors tend to be overcommitted and devote themselves to many activities outside of their immediate academic interests. Consequently, the concepts developed by emerging scholars who are outside of the established academic circles have limited penetration into the critical decision-maker circles, and therefore a modest impact on legal policy and legislation. This is not to be meant as generalising, but even among prolific authors, there are also some who lack real understanding of modern company law and its economic foundations. Those commentaries that lack critical insight are written according to the rule “where the problem begins, there the commentary ends.” Subsequently, a “market for lemons” emerges, where products of critical thinking are pushed out by legal writings and scholarly contributions produced at a “lower

there are 18 law schools, including private colleges). On peculiarities and problems of legal education in transitional economic f. H. Blomquist, “Legal Education, Profession and Society Transition: Reform of Lithuanian Legal Education” (2004) 29 *Review of Central and East European Law* 35–95.

intellectual cost". Yet, the wide spread *argumentum ad auctoritatem*-approach taken by the demand side ensures them a high impact-factor and market success irrespective of the actual conceptual quality of the intellectual product.

The New Geography of Corporate Europe

11. Currently, the EU consists of 25 Member States and there are further membership candidates just before the door with the next accession of countries (Bulgaria, Romania) into the EU, which is scheduled for 2007. There is a high level of national diversity as reflected by the 20 official languages of the EU.

If one considers that on average every jurisdiction offers 2–3 corporate forms along with 3–4 partnership forms, the result is that there are variety of different forms of business organisations, so it is correct to speak about a true *pluralism* in the European Company Law.¹⁶

12. If one looks at the new contours of "Corporate Europe" one will notice that the balance between different legal traditions has shifted after the Enlargement. This shift in legal traditions might be relevant for the perspectives of the future European harmonisation. Why is that? That is because in the realm of company law too, to quote Professor Wolfgang Schön, 'alliances are formed, strategies are tested, countries are occupied and markets are conquered'.¹⁷

13. How has this view of "Corporate Europe" changed as of May 2004? Undoubtedly, the enlargement entailed the strengthening of the Germanic model and German influence in Corporate Europe, as most of the new Member States, including Poland, Czech Republic, Slovakia,¹⁸ Slovenia, (as well as the candidate country Croatia) and to a lesser extent, also Baltic Countries¹⁹ have traditions of borrowing corporate structural and governance models from Germany and Austria. In contrast, the Anglo-Saxon corporate models influence the corporate landscape and culture of Malta and Cyprus. Germanic influence manifests itself in the following features:

¹⁶ Cf H. Merkt, *Die Pluralisierung des europäischen Gesellschaftsrechts*, Recht der Internationalen Wirtschaft, p 1 (2004).

¹⁷ Cf W. Schön, "The Future of Legal Capital" (2004) 5 EBOR 429 at p 430.

¹⁸ Cf B. Havel, "The Influence of European Contract Law on Czech Private Law – a Sketch on Irrationality" [in:] A. Vaquer, (ed), *La Tercera Parte de los Principios de Derecho Contractual Europeo /The Principles of European Contract Law Part III.* (Valencia, Universita de Lleida: Tirant lo Blach 2005) at pp 591 et seq.

¹⁹ This applies mostly to Latvia with its commercial code modeled after the German *Handelsgesetzbuch*. In contrast Lithuanian law, although not untouched, lacks some important features of German model – ie two-tier board system and workers' codetermination.

- A system of capital protection, by means of legal capital, usually applicable both to public and private companies;²⁰
- Workers' codetermination (*Mitbestimmung* – although in a weaker form than in Germany²¹), which is sometimes introduced with privatization and limited to formerly state-owned enterprises that were subject to privatization;²²
- In limited number of cases the German-like law on groups of companies (*Konzernrecht*);²³
- A prevalent use of real seat theory; and
- Two-tier board structures.

14. It is, however, important to note that this formal similarity of Central and Eastern European Companies Acts and Statutes to their German and Austrian models is to some extent mitigated by the existence of a relatively broader gap between “law on books” and “law in action” observable in the new Member States. Additionally, the prevalence of multinational, Anglo-Saxon law firms also affects the legal practice in these countries.

15. There are many explanations for the penetration of Germanic legal thought in Central and Eastern Europe. First, one has to keep in mind the historical ties; at the time when modern company law originated in the second half of 19th Century, the Austro-Hungarian Empire encompassed all of the contemporary Czech Republic, Slovakia, Slovenia, and Hungary.²⁴ At the same time, Poland was partially under both German and Austrian occupation. The influence and exchange of legal thought between Germany and Baltic states – contemporary Estonia and Latvia are even much older (keyword: ‘Hansa’). More recent influence dates back to 1920’s and 1930’s, when Central and Eastern European Countries broadly borrowed from German and Austrian legal models. For instance the Polish Commercial Code of 1934 was strongly influenced by German legislation. The same is true, although

²⁰ For instance in Hungary it was considered to abolish minimum capital requirement for closely held companies, however the recent draft of the new act still provides for minimum initial capital.

²¹ According to the Slovenian Workers’ Participation Act (Ur.l. RS, Nos. 42/93, 61/2000), at least a third of supervisory board members, but not more than a half of supervisory board members have to be workers’ representatives, moreover if a company has more than 500 employees it has to have a workers’ director as a member of the management board, cf. P. Koncar, “Employee Involvement in Slovenia” p 20 [in:] M. Weiss, M. Seweryński, *Handbook on Employee Involvement in Europe* (Kluwer Law International 2004 (loose-leaf)).

²² The Polish Act on Commercialisation and Privatisation (1996) provides for different number of workers’ representatives in the supervisory board depending on the total number of board members; additionally, if the company employs over 500 persons, employees have also the right to appoint one member of the management board, cf. M. Seweryński, *Employee Involvement in Poland*, p 17 [in:] M. Weiss, M. Seweryński, *Handbook on Employee Involvement in Europe* (Kluwer Law International 2004 (loose-leaf)).

²³ Slovenia and candidate Croatia both have codified rules on affiliated companies.

²⁴ Cf K. Pistor, “Patterns of Legal Change: Shareholder and Creditor Rights in Transition Economies” (2000) 1 EBOR 59 at p 67.

to a lesser degree for the current Polish Code of Commercial Companies of 2000. Apart from historical ties, there are also other, more contemporary influences and exchanges between Germany and Central and Eastern Europe. For instance, if one looks into the backgrounds of the drafters of new codes, in particular, where the drafters studied as graduate or PhD-students. Not surprisingly, drafters of the codes are inclined to borrow from legal systems they are familiar with when they construct or revive legal codes. This was apparent in the recent insolvency law reform in the Czech Republic, where two “competing” acts were drafted – one based on German Insolvency Law and the other modelled on American bankruptcy law. Among law professors in Central and Eastern Europe, particularly the older generation, German language is often more popular than English. This academic preference for and usage of German is changing now that more and more students tend to go to UK and US, or attend English-language LL.M. programs in the Netherlands or Belgium. Also in Central and Eastern Europe there have been some institutions established offering training with English as the language of instruction.²⁵ Foreign technical assistance programs, providing expert consultation also contributed to the conveyance of certain legal patterns and doctrines.²⁶

Three Asymmetries

16. If one looks at the European legal scholarship in the post-enlargement era, there are certain imbalances and unilateralism regarding the flow of ideas, academic exchange, knowledge of foreign law, and the very presence in the international discussion. If one takes a closer look at the landscapes of post-enlargement Europe, one will quickly identify the existence of a threefold asymmetry, (a) asymmetric impact on EU legal policy ($W \rightarrow EU \leftarrow E$), (b) asymmetry between Eastern and Western Europe in mutual understanding and awareness of each others’ law and business environment ($W \leftarrow E$), and (c) asymmetry in the orientation and academic exchange of Central and East European legal scholars and practitioners, which is clearly and presently, pro-Western in principle ($W \leftrightarrow E \leftrightarrow E$).

17. After many years of stagnation in Eastern European countries, we are “witnessing” a fascinating and rapid change in the development and dynamics of European Company Law. I use the term “witnessing,” as it not only means *living in a certain era*, but because it also indicates some *passivity*. This passivity is inexcusable, particularly if one takes into consideration the current *modus operandi* adopted by the

²⁵ Eg Central European University in Budapest, Riga Graduate School of Law in Latvia. But there is also one German language university in Budapest – the Andrassy Gyula Universitat. There are also numerous intensive foreign law&language crash courses offered at many Polish law schools, particularly in Krakow and Warsaw.

²⁶ Cf K. Pistor, “Patterns of Legal Change: Shareholder and Creditor Rights in Transition Economies” (2000) 1 EBOR 59 at p 60.

European Commission in the legislative process: every policy decision is preceded by public debate and shaped by expert opinions delivered by multinational consulting groups. In all these consultations and deliberations, contributions from Central and Eastern Europe have been modest – again, this refers to a policy asymmetry: (W→EU←E).²⁷ Given the common experiences and similar problems faced by the majority of the new Member States, there is a clear case for stronger representation of the CEE-position in the European-wide discussion. This policy imbalance suggests a reason to integrate the legal community of the new Member States and create a platform that will ultimately help make the voice of Central and Eastern Europe more powerful in Europe (read *infra* about the *C-Law.org* initiative).

18. Looking at mutual understanding between EU member states and the state of awareness of each others' law and legal practice there is a remarkable level of asymmetry between old and new Member States (W←E). Western Europe's knowledge of the CEE-legal systems is much more modest than the other way around. This imbalance of knowledge is not a surprise as it corresponds to economic power, exchange of ideas, and language barriers. However, it may be interesting to take a look into the company law legislation recently adopted by the post-socialist countries as their enactment was usually preceded by comparative studies (keyword 'cherry picking').²⁸

19. New member states perceived the accession to the European Union as the (re)integration with the West. Another dimension, the integration within and in Central and Eastern Europe, has been widely omitted in the discussion. However it should be noted that for countries like Poland, Hungary, Slovakia or Cyprus, the accession to the EU not only opened new relationships eg with Germany, France or Spain, but also created new relationships with the Czech Republic, Slovenia, Lithuania, and other accession countries. Here again, there is remarkable asymmetry. Most legal scholar in the accession countries are west-oriented and remain entirely ignorant about developments in the neighbouring CEE-countries (W↔E↔E). Academic exchange and cooperation exist in most cases on the East-West-axis only. This asymmetry it corresponds with, and co-determines the other two identified asymmetries.

²⁷ Cf B. Havel, "The Influence of European Contract Law on Czech Private Law – a Sketch on Irrationality" [in:] A. Vaquer, (ed), *La Tercera Parte de los Principios de Derecho Contractual Europeo / The Principles of European Contract Law Part III.*, op cit, at pp 591 et seq. (2005), who is sceptical about the ability of CEE legal scholarship to contribute to the European discussion on development of private law, at least in the next 10 years.

²⁸ Eg even though German legislation heavily influenced the Polish Code on Commercial Companies, Polish code drafters incorporated squeeze-out provisions long before Germany introduced them along with its 2001 takeover law; see. A. Wowerka, *Zwangsverkauf von Aktien nach polnischem Recht*, *Recht der Internationalen Wirtschaft*, p 89 (2004); A. Radwan, "Aktualna i przyszła regulacja przymusowego wykupu akcji drobnych akcjonariuszy w polskim i europejskim prawie spółek" *Przegląd Legislacyjny* No 6/2003, p 29, at p 32–35.

**Integrating Legal Scholars and Practitioners into New Europe:
The *C-Law.org* Initiative**

20. To rectify the abovementioned asymmetries (policy, legislative, information, etc.), action must be taken. C-Law.org was envisioned to embark upon measures to help remedy this asymmetry problem. In March 2004 with the then approaching EU-enlargement as a direct trigger, a bottom-up initiative was started to capture the opportunity for change that the historic enlargement moment would provide. Upon reflection on our own ignorance about the situation in neighbouring CEE-countries, and the new dynamics of change observable in European company law, we were inspired to initiate the *C-Law.org*-project.

21. As an expert network which covers all of “New Europe” gradually emerges and expands, C-Law.org’s initially informal network was given a more formal structure: *C-Law.org* formed as a non-profit International Association and obtained legal personality under the Polish Act of 7 April 1989, Law on Associations (*Prawo o stowarzyszeniach*). Today the *European Center for Comparative Commercial & Company Law* (*Europejskie Centrum Porównawczego Prawa Gospodarczego i Prawa Spółek* / *Europäisches Zentrum für Vergleichendes Wirtschafts- und Gesellschaftsrecht – C-Law.org*) stands an expert think tank which aims to assemble legal scholars and practitioners from all the new Member States of the European Union as well as short-listed Membership Candidates while remaining open for experts from old Member States. Thus, with respect to scope and coverage, the *c-law* network is an unprecedented initiative which fills an important and immediate niche.

22. The mission of *C-Law.org* is to contribute to the improvement of legislation and legal practice in the areas of commercial and company law, as well as to promote standards of best practice in Corporate Governance in Europe, with a particular emphasis on New Member States of the European Union and Associated Countries. *C-Law.org* seeks to achieve its institutional goals through independent scientific research, academic exchange, interdisciplinary dialogue and related activities. These experiences and accumulated resources that C-Law gathers will be utilized to promote institutional development and growth of human capital in countries whose economies are in a state of transition (eg membership countries of the Commonwealth of Independent States). *C-Law.org* will also make efforts to integrate within its structure, and obtain support from, institutions that express a concern with the continuous improvement of business legislation and development of capital markets.

23. To date, *C-Law.org* members have already met a few times in a scientific, formal setting: At the *C-Law.org* conference ‘Post-enlargement European Company Law: convergence or divergence in the age of competition for corporate charters?’ (Cracow, January 6–8 2005)²⁹ and at a conference organised by the *British Insti-*

²⁹ For details please refer to <<http://c-law.org/conferences/2005/krakow/program.php>>.

tute of International and Comparative Law 'New European Company Law and Corporate Governance – The UK and the New Member States' (London, March 18 2005).³⁰ Most recently C-Law.org acted as an European official partner of the EU-China Symposium on Corporate Governance of state owned and state holding enterprises.³¹

Outlook

24. Now that the European Union consists of 25 members, it means that it will feature greater diversity (ideologically, politically, and socio-economically) and more views, which will inevitably have an impact on the lawmaking process. The latter input on the law making process is easily conceivable if we for instance consider that the First Company Law Directive was subject to negotiation for almost ten years before it was finally adopted in 1968, although those days the compromise had to be reached among six Member States only, as that was the then number of the EEC-Members.³² So what are the prospects for negotiations among 25 more Member States in the future? The examples of the decades-long working on Thirteenth Company Law Directive and the SE-Regulation are discouraging.

25. Currently, the increased differences among the 25 national company law systems, and the particular problems faced by some of those national systems, serve to undermine the one-size-fits-all-approach characterising of the centralised lawmaking. This is especially evident in the preference to rely more either on rules or on standards, as they have different enforcement mechanisms. A country's choice is likely to be influenced by existing institutional framework and inherited legal tradition, as for instance the application of standards strategy requires having a strong court system and sophisticated judges, who by defining open-ended standards produce case-law and in that way get involved in the lawmaking process.³³ The new Member States however often do struggle with some form of institutional failure. Therefore – to accommodate the increased diversity of legal traditions and environments – future harmonisation efforts shall be undertaken only on a case-sensitive basis, ie in the areas that have been identified to be crucial for the functioning of the internal market.³⁴ This would be also in line with the recently increasingly fashionable notion of regulatory competition in European company law as well as with the subsidiarity principle.

³⁰ More information under <http://www.biiicl.org/admin/book/18_03_05_Programme.pdf>.

³¹ Cf <<http://c-law.org/conferences/2005/chongqing/index.php>>.

³² Cf M. Habersack, *Europäisches Gesellschaftsrecht*, 2. Aufl. München 2003, p 62.

³³ H Hansmann and R Kraakman, "The End of History for Corporate Law" in R Kraakman et al. (eds), *The Anatomy of Corporate Law* (Oxford: OUP 2004) at 24.

³⁴ Cf Communication from the Commission to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, COM (2003) 284 final, (Brussels, 21.5.2003).