

EUROPEAN CORPORATE LAW AND NATIONAL DIVERGENCES: THE CASE OF TAKEOVER REGULATION

CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY. Edited by Joseph A. McCahery et al. Oxford, New York: Oxford University Press, 2002. Pp. 696.

TAKEOVER LAW IN THE EU AND THE USA: A COMPARATIVE ANALYSIS. By Christin M. Forstinger (European Monographs 41.) The Hague, London, New York: Kluwer Law International, 2002. Pp. 182.

TAKEOVERS IN ENGLISH AND GERMAN LAW. Edited by Jennifer Payne. Oxford, Portland OR: Hart Publishing, 2002. Pp. 183.

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I. INTRODUCTION

When the European Parliament (“EP”) failed to pass the carefully drafted thirteenth Directive related to Corporate Takeovers in Europe (“Takeover Directive”)¹ in July of 2001,² the European Commission

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1. See Christian Kirchner & Richard W. Painter, *Takeover Defenses under Delaware Law, the Proposed Thirteenth EU Directive and the New German Takeover Law: Comparison and Recommendations for Reform*, 50 AM. J. COMP. L. 451, 455–56 (2002) (a concise account of the legislative history of the Directive dating back to the 1974 “Pennington Report” (Doc XI/56/74) and the first Commission Proposal of 1989).

2. See Press Release, European Commission, Commission Regrets Rejection of Takeovers Directive by the European Parliament (July 4, 2001), available at http://europa.eu.int/comm/internal_market/en/company/company/news/01-943.htm (last visited Mar. 27, 2004). In this communication, the EU Internal Market Commissioner, Frits Bolkestein, said,

I am very disappointed that the European Parliament has not been able to ratify the agreement approved by its delegation last month, despite the tremendous efforts made by the

“Commission”) immediately set out to overcome the obstacles that had ultimately prevented the Directive from passing.³ On September 4, 2001, precisely two months after the Directive was defeated in the EP,⁴ the Commission established the High Level Group of Company Law Experts (“Expert Group”). The Expert Group was charged with recording and

Commission and the Council to meet the Parliament’s concerns. Twelve years of work have been wasted by today’s decision. This vote represents an important setback for achieving the targets agreed by the EU’s Heads of State and Government in Lisbon of realizing an integrated European capital market by 2005 and making Europe the most competitive economy in the world by 2010. . . . It is tragic to see how Europe’s broader interests can be frustrated by certain narrow interests.

Id.

3. See Janet Dine, *The Framework Thirteenth Directive on Takeovers—The Protection of Shareholders and the Basis of Judicial Review of the Panel*, in DEVELOPMENTS IN EUROPEAN COMPANY LAW 201 (Barry A.K. Rider & Mads Andenas eds., 1996); Klaus-Heiner Lehne, *Die 13. Richtlinie auf dem Gebiet des Gesellschaftsrechts betreffend Übernahmeangebote—gescheitert, aber dennoch richtungweisend für das künftige europäische Übernahmerecht* [The Thirteenth Directive in the Field of Corporate Law concerning Acceptance Failed, but leads in the right direction for the future of European Acceptance], in WPÜG: DAS WERTPAPIERERWERBS—UND ÜBERNAHMEGESETZ MIT ÜBERNAHMEKODEX UND CITY CODE [GERMAN TAKEOVER STATUTE WITH TAKEOVER CODE AND CITY CODE] 33 (Heribert Hirte ed., 2002) [hereinafter WPÜG] (detailing the legislative history); Sorika Pluskat, *Das Scheitern der europäischen Übernahmerrichtlinie* [The Failure of the European Takeover Directive], 55 WERTPAPIERMITTEILUNGEN 1937 (2001).

4. This failure attains almost tragic dimensions when considered in light of speculation that, had it not been for the late arrival of two British European parliamentarians, the Directive might actually have been passed on that occasion. See, e.g., Helen J. Callaghan, Paper for the 15th Annual Meeting of the Society for the Advancement of Socio-Economics, Aix-en-Provence, *Battle of the Systems of Multi-Level Game? Domestic Sources of Anglo-German Quarrels over EU Takeover Law and Worker Consultation* (June 26–28, 2003), available at http://www.sase.org/conf2003/papers/callaghan_helen.pdf (last visited Feb. 1, 2004) (describing the effect that the Directive would have had on Germany’s takeover law, an effect that Germany had tried to avoid at all costs). But see Kirchner & Painter, *supra* note 1, at 461. The authors argue that, had it not been for the European Court of Justice (ECJ) Advocate General’s (AG) statement made two days before the vote in the EP, the Directive would have passed the EP. *Id.* The AG’s role is to assess the legal merits of a case before the ECJ; the ECJ often then follows his assessment. The statement was made with regard to the pending case against Spain, Portugal and France concerning so-called “Golden Shares.” The AG criticized Golden Shares because he claimed that they would give the prior government owner of recently privatized state enterprises, in which the government continues to hold securities, veto rights in the event of a takeover attempt. *Id.* This announcement reinforced concerns that some Member States, including Germany, would be at a competitive disadvantage against France and the other Member States that permit Golden Shares. “The timing of this announcement, perhaps more than anything, sealed the fate of the Thirteenth Directive in Parliament.” *Id.* For an insightful assessment of the Court’s three “Golden Shares” decisions of June 4, 2003, see Johannes Adolff, *Turn of the Tide? The “Golden Share” Judgments of the European Court of Justice and the Liberalization of the European Capital Markets*, 3 GERMAN L.J. NO. 8 (Aug. 1, 2002), available at <http://www.germanlawjournal.com/article.php?id=170> (last visited Mar. 27, 2004). The ECJ ruled in two other cases involving “Golden Shares.” See Case C-463-00, *Commission v. Kingdom of Spain*, 2003 O.J. (C 158) 3; Case C-98/01, *Commission v. United Kingdom of Great Britain and N. Ireland*, 2003 O.J. (C 158) 4. Previously, the Commission had sent a formal request to the German government to “provide certain justifications” for its “Volkswagen law,” which gives Volkswagen’s home state of Lower Saxony favorable share voting rights in the publicly held Volkswagen AG (Mar. 19, 2003).

synthesizing the divergent takeover regimes and regulatory approaches of the Member States as a first step⁵ in the preparation of a new proposal.⁶ In light of the exhaustive diplomatic and legislative struggles leading up to the 2001 vote in the EP, in particular with regard to the question of how a European takeover regime could ensure a level playing field among Member States with very different corporate law and securities regulation systems,⁷ the Expert Group's report on takeover law was greatly anticipated. Shortly after its presentation on January 10, 2002, the Expert Group initiated a public consultation procedure regarding the Group's second task. This procedure was designed to foster well-informed discussion among interested parties from all Member States regarding a wide range of corporate law issues. The discussions would not be limited exclusively to takeover regulation.⁸

The Commission presented its second draft of the Takeover Directive on October 2, 2002.⁹ The second draft adopted many of the Expert Group's proposals, including a prohibition against any defensive measures¹⁰ taken by management without prior shareholder approval,¹¹

5. See REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON ISSUES RELATED TO TAKEOVERS, (Jan. 10, 2002), available at http://europa.eu.int/comm/internal_market/en/company/company/news/hlg01-2002.pdf (last visited Mar. 27, 2004).

6. In addition, the Expert Group, under its chairman, Jaap Winter, was asked to provide the Commission with "independent advice . . . on key priorities for modernizing company law in the European Union." *Id.* at 1. See The High Level Group of Company Law Experts, *A Modern Regulatory Approach for Company Law in Europe*, (Nov. 4, 2002), available at http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf (last visited Mar. 27, 2004).

7. Other issues of great concern included the controversial requirement of a mandatory offer by the control-acquiring bidder to all shareholders, the disclosure of all conditions of the bid, the right of corporate management to adopt defensive measures against a hostile bid ("neutrality rule"), the participation of non-shareholder stakeholders in the decision-making process in a takeover situation, and squeeze-out and sell-out rights in situations where the bidder or those acting in concert therewith have acquired the controlling percentage of voting rights in the company. For a list of disputed issues, see Kirchner & Painter, *supra* note 1, at 458. For a comprehensive history and discussion of the Commission's attempts to develop a European takeover regime, see Theodor Baums, *Zur Harmonisierung des Rechts der Unternehmensübernahmen in der EG [Harmonizing Takeover Law in the EU]*, Universität Osnabrück, Institut für Handels- und Wirtschaftsrecht, WORKING PAPERS 03/95 (1995), available at <http://www.jura.uni-osnabrueck.de/institut/hwr/PDF/a0395.pdf> (last visited Feb. 1, 2004) [hereafter Baums, *Zur Harmonisierung*].

8. See Press Release, European Commission, A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts (Apr. 25, 2002), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/6250|RAPID&lg=EN&display= (last visited Feb. 1, 2004).

9. See Proposal for Directive of the European Parliament and of the Council on Takeover Bids, COM(02)534 final, (Oct. 2, 2002), available at http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0534en01.pdf (last visited Mar. 27, 2004) [hereinafter Draft Proposal].

10. For a brief description of the most common anti-takeover defensive measures, see Kirchner & Painter, *supra* note 1, at 452.

and regulation of mandatory bids to make all shareholders a bid at an equitable price after the bidders have obtained a qualifying amount of shares.¹² The latter regulation reflects a central point of divergence between Continental and Anglo-American approaches to takeover regulation.¹³ In addition, the Commission adopted the proposals made by both the Expert Group and the European Parliament with regard to including an “equitable price” requirement¹⁴ and regulating “squeeze-out”¹⁵ and “sell-out” procedures.¹⁶ Finally, the draft proposal established an obligation upon the management of both the bidder and the target corporation to inform employees about a bid. The draft proposal explicitly referred to Member State laws and previous EC Directives regarding worker participation and involvement.¹⁷ It invoked these rules by requiring employee involvement in deliberations regarding the possible consequences of a takeover.¹⁸

Altogether, however, the new draft, while clearly influenced by the Expert Group report, did not embrace all of its recommendations.¹⁹ This is particularly true of the “breakthrough rule” that the report suggested as a means for overcoming the obstacles that previously prevented the Directive from passing.²⁰ The breakthrough rule,²¹ which was a central and defining feature of the Expert Group’s proposal, was intended to allow a bidder, upon acquiring a qualifying majority of the target company’s

11. See Draft Proposal, *supra* note 9, at art. 9.

12. See Draft Proposal, *supra* note 9, at art. 5.

13. See Paul Davies, *The Notion of Equality in European Takeover Regulation*, in TAKEOVERS IN ENGLISH AND GERMAN LAW 9 (Jennifer Payne ed., 2002).

14. In the event that the bidder and those acting in concert with him acquire a controlling percentage of the Corporation’s voting shares, the minority shareholders must be offered an equitable price for their shares. Draft Proposal, *supra* note 9, art. 5(1). The equitable price of a share is defined as the highest price paid for such a share by the same offeror (or those acting in concert with him) over a period between six and twelve months prior to the bid. *Id.* art. 5(4).

15. A squeeze-out right is the bidder’s right, after having made a bid to all holders of the target company for all of their securities, to require the holders of the remaining securities to sell the bidder those shares at a fair price. *Id.* art. 14.

16. A sell-out right is the right of a minority shareholder to require the bidder, after a bid to all shareholders, to buy the remaining securities from the minority shareholder at a fair price. *Id.* art. 15.

17. See Council Directive 94/45/EC, 1994 O.J. (L 254) 64 (Works Councils); Council Directive 98/59/EC, 1998 (L 225) 16 (Collective Redundancies); Directive 2002/14/EC, 2002 O.J. (L 80) 29 (Employee Information and Consultation), available at http://europa.eu.int/eur-lex/en/search/search_lif.html (last visited Feb. 1, 2004).

18. See Draft Proposal, *supra* note 9, at 10.

19. A concise outline of the Commission’s approach for its new proposal can be found in its “Explanatory Memorandum.” *Id.* at 3–5.

20. See REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON ISSUES RELATED TO TAKEOVER BIDS, *supra* note 5, at 4.

21. *Id.*

stock, to override all existing defensive measures by the target's management, including any differentiation of voting rights. All Member States voiced intense criticism against this rule, which led the Commission to exclude this instrument from its latest draft proposal.²² The Commission instead adopted a "mini," or "limited" breakthrough rule²³ that blocked the transfer of certain classes of stock and prohibited voting restrictions.²⁴ In light of the emerging conflict between the Commission and the Expert Group, the EP commissioned Professors Barbara Dauner Lieb and Marco Lamandini to provide an independent assessment of these regulatory issues in June of 2002. In this assessment, particular emphasis was placed on establishing a level playing field among participating states, despite the diversity of takeover regimes in Europe and differences between Europe and the United States. The report by Dauner Lieb and Lamandini²⁵ largely embraced the Expert Group's recommendations. In particular, the report offered a critique of the draft proposal's exclusion of multiple voting rights in the regulatory context of the mini-breakthrough rule.²⁶

The last chapter of this exhausting law-making enterprise is the EP's positive vote on the new Directive proposal on December 16, 2003 and the Council's formal vote on the Directive's passage on March 30, 2004. The revised proposal, which was presented on November 27, 2003, surely signified the final attempt for the successful adoption of a Europe-wide takeover regime.²⁷ The Directive²⁸ that was signed by the Council and the EP on April 21, 2004, must be adopted by the Member States by 2006. In response to the intensive debates that have gone on over the past few years, the present Directive—in its newly inserted art. 11A—embraces an optional scheme for defensive measures that delegates a number of

22. See Erik Berglöf & Mike Burkart, *European Takeover Regulation*, ECON. POL'Y 171, 174 (2003).

23. See Barbara Dauner-Lieb, *Das Tauziehen um die Übernahmerichtlinie—eine Momentaufnahme [The Struggle over the Takeover Directive—A Snapshot]*, DEUTSCHES STEUERRECHT [GERMAN TAX LAW] 555, 556 (2003). See also Dauner-Lieb & Lamandini, Report to the European Parliament on the Commission's new proposal of a Directive on company law concerning takeover bids, STUDY NO. IV/2002/06/01 at 7, available at http://www.uni-koeln.de/jur-fak/lbrah/pdf_docs/gutachten_daunerlieb_lamandini_en.pdf (last visited Mar. 27, 2004) [hereinafter Report to the European Parliament].

24. See Draft Proposal, *supra* note 9, art. 11.

25. See Report to the European Parliament, *supra* note 23.

26. See *id.* at 42–46.

27. Proposal for a Directive of the European Parliament and of the Council on Takeover Bids, at <http://www.jura.uni-duesseldorf.de/dozenten/noack/Texte/Sonstige/TO2003.htm> (last visited May 7, 2004).

28. The Directive's text is available at <http://register.consilium.eu.int/pdf/en/03/st15/st15476.en03.pdf> (last visited May 7, 2004).

strategic choices back to the corporate actors themselves.²⁹ At the same time, the Member State can choose to adopt or to reject the much-disputed neutrality rule (art. 9) and the breakthrough rule (art. 11). Companies, it should be noted, are given the freedom to opt into this regime.³⁰ In light of the quarrels that have accompanied the passage of the Directive, it is still too early to predict exactly how the Member States will react to the Directive in their transformation process.³¹ At the same time, its recent adoption appears to give testimony to what insightful observers of the European Integration have coined “reflexive harmonization.”³² Future discussion regarding the implementation of the Directive will reveal the extent to which Member States, as well as political and corporate actors, will take advantage of the potential for creative interpretation and engage in mutual learning throughout the process of transposing the Directive into national law. A brief retrospective into the history of Europe’s harmonization program will allow us to better situate the challenges and intricacies that unfolded in the context of the Takeover Directive.

II. THE ASPIRATIONS AND FRUSTRATIONS OF EUROPE’S HARMONIZATION PROGRAM

New attempts by the European Commission to pass a European takeover directive must be examined within the context of the instrument’s extensive legislative history. In 1974, the Commission requested a report from Robert Pennington³³ that was intended to “review the European

29. See Silja Maul & Danièle Muffat-Jeandet, *Die Übernahmerrichtlinie—Inhalt und Umsetzung in nationales Recht (Teil I)*, [The Takeover Directive—Contents and Transformation into National Law (Part I)] 49 AKTIENGESELLSCHAFT 221, 222 (2004); Silja Maul & Athanasios Koulouridas, *The Takeover Bids Directive*, 5 GERMAN LAW JOURNAL 355 (2004), Apr. 1, 2004, available at http://www.germanlawjournal.com/pdf/Vol05No04/PDF_Vol_05_No_04_355-366_Private_Maul_Koulouridas.pdf (last visited May 7, 2004).

30. For a concise description of the optional regime, see Maul & Koulouridas, *supra* note 29, at 356–59.

31. For an assessment of the need for legislative adaptation of the German Takeover Law, see Peter M. Wiesner, *Die neue Übernahmerrichtlinie und die Folgen*, [The New Takeover Directive and the Consequences] ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 343 (2004); Hartmut Krause, *Die EU-Übernahmerrichtlinie—Anpassungsbedarf im Wertpapiererwerbs- und Übernahmegesetz [The EU Takeover Directive—Need for Adaptation in the WpÜG (German Takeover Statute)]*, 59 BETRIEBSBERATER [BB] 113 (2004).

32. See Simon Deakin, *Regulatory Competition versus Reflexive Harmonisation in European Company Law*, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 209 (Daniel C. Esty & Damien Geradin eds., 2001).

33. EC-Commission Doc. XI/56/74. See KLAUS J. HOPT, UNIVERSITÀ DEGLI STUDI DI ROMA—LA SAPIENZA, CENTRO DI STUDI E RICERCHE DI DIRITTO COMPARATO E STRANIERO [UNIVERSITY OF ROME—LA SAPIENZA, CENTER FOR THE STUDY AND RESEARCH OF DOMESTIC AND INTERNATIONAL], COMPANY LAW IN THE EUROPEAN UNION: HARMONIZATION OR SUBSIDIARITY 7 (Rome 1998),

takeover landscape and to prepare a first draft of a proposal in respect to takeover bids.”³⁴ Fifteen years later, in 1989, the Commission presented its first draft proposal.³⁵ Although the Pennington Report failed to cull sufficient Member State support to pursue a Europe-wide installment of takeover rules at that time, the Commission’s landmark White Paper of 1985, concerning the completion of the internal market, changed this attitude.³⁶ The Commission outlined, *inter alia*, an agenda for the creation of “conditions likely to favour the development of cooperation between undertakings.”³⁷ In the White Paper, the Commission alluded to the wide variety of corporate law regimes pertaining to the regulation of takeovers among the Member States. Above all, it envisioned the creation of equal standards with regard to “the information to be given to those concerned, while it would be left to the Member State to devise procedures for monitoring such operations and to designate the authorities to which the powers of supervision were to be assigned.”³⁸ This principled approach, however, was sacrificed in part during the ensuing discussions and proposals for the directive in the years following the White Paper. The Commission, having finally presented its first draft directive in 1989, recognized the need to present a revised proposal as early as 1990,³⁹ after it received substantial criticism and numerous recommendations from both the European Community’s Economic and Social Committee (ECOSOC) and the EP.⁴⁰ In response to growing economic pressure felt by Member States during the mid- to late 1980s and the addition of the subsidiarity principle to the EC Treaty via the Maastricht Treaty of 1992 (according to which regulatory competence was deemed to rest with Member States in all fields where regulation had not explicitly been

available at <http://w3.uniroma1.it/idc/centro/publications/31hopt.pdf> (last visited Mar. 28, 2004).

34. CHRISTIN M. FORSTINGER, TAKEOVER LAW IN THE EU AND THE USA: A COMPARATIVE ANALYSIS 99 (2002).

35. See Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, 1989 O.J. (C 64) 8.

36. See Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final, available at http://europa.eu.int/comm/off/pdf/1985_0310_f_en.pdf (last visited Mar. 28, 2004).

37. *Id.* at 34. The document largely established the legislative approach eventually adopted by the Commission in its 1996 draft proposal. Proposal for a 13th European Parliament and Council Directive on Takeover Bids, 1996 O.J. (C 162) 6. This draft signified a distinctive step away from the full harmonization approach of the takeover regimes in various member states at the European level in favor of the “framework” approach of the Commission. See FORSTINGER, *supra* note 34, at 103–08 (providing a careful description of the framework approach taken in the Commission’s draft proposal).

38. COM(85)310 final, *supra* note 36, at 35.

39. See 1990 O.J. (C 240); COM(90)416 final (explanatory memorandum thereto).

40. See Draft proposal, *supra* note 9, at 2 (explanatory memorandum).

assigned to the European Community⁴¹), the Commission announced that it would prepare a revised draft proposal for a takeover directive. After numerous delays, this proposal was finally presented to the Council and the EP on February 8, 1996.⁴² This revised proposal signified a decisive turning point in what had previously been little more than a tedious and exhausting process for lawmakers and negotiators. The “framework” approach adopted by the Commission in its 1996 proposal contained general principles for a Europe-wide takeover regime that left the Member States substantial latitude for interpretation when converting the Directive into national law. Upon further recommendations from both the ECOSOC and the EP, the Commission adopted an amended proposal in November of 1997.⁴³ This amended proposal led to a common position that was unanimously accepted by the Council on June 19, 2000⁴⁴ and by the Commission on July 26, 2000. This version was a source of furious debate among Member States until it was ultimately defeated in July of 2001.⁴⁵

Until as recently as the autumn of 2003, it was difficult to predict whether and when a new directive would come to pass. The greater economic and socio-political factors, which hardly seem to be captured by the “level playing field” terminology, appeared to have successfully delayed, or even buried, all further attempts at a takeover directive that would pursue an agenda as ambitious as the Commission’s latest Proposal. Now, in May 2004, it has become obvious that the Italian proposal for an option model,⁴⁶ while immediately and sternly criticized by Internal

41. For a description and critique of the use of the subsidiarity principle with regard to the takeover Directive, see HOPT, *supra* note 33, at 9–12 (arguing that both the subsidiarity principle and the framework conception of the Commission’s Directive proposals remained too vague and could not, therefore, delineate the boundaries for Community competences); George Bermann, *Taking Subsidiarity Seriously: Federalism the European Community and the United States*, 94 COLUM. L. REV. 331 (1994) (providing a canonical comparative analysis of EU and US federalism and the role played by the subsidiarity principle herein); Patrick R Hugg, *Transnational Convergence: European Union and American Federalism*, 32 CORNELL INT’L L.J. 43, 101 (1998) (asserting that, in spite of the subsidiarity principle, the EU deepened its competences pursuant to the 1997 Amsterdam Treaty); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1636 (2002) (describing the introduction of the subsidiarity principle in the Maastricht Treaty as a response to the expansion of community competences and the ECJ’s “aggressive promotion of community law”).

42. See 1996 O.J. (C 162) 5, *supra* note 37; COM(95)655 (explanatory memorandum thereto).

43. See Amended Proposal for a Thirteenth European Parliament and Council Directive on Company Law Concerning Takeover Bids, 1997 O.J. (C 378); FORTSINGER, *supra* note 34, at 101.

44. 2001 O.J. (C 23).

45. See Kirchner & Painter, *supra* note 1, at 456. Before the Draft Directive failed to gain parliamentary approval on July 4, 2001, the Conciliation Committee had carefully, and with much devotion, crafted an agreement on June 6, 2001, that led to the previously mentioned Common Position of June 19, 2000.

46. See Gerard Hertig & Joseph McCahery, *Towards a Pro-Choice EU-Takeover Bids Directive*,

Market Commissioner Frits Bolkestein,⁴⁷ did eventually open new avenues for passing a takeover directive. With the Directive finally passed by the EP, and adopted and signed by the Council in April 2004, the debate over its merits, nevertheless, appears to be far from closed. Against this background, to write or edit a book on takeover law is truly a courageous undertaking. It is also this background, however, against which we can assess a number of recent publications dealing with takeover law in particular, and with European regulatory competition in general.

III. WRITING ON A MOVING TARGET

Of the three books herein reviewed,⁴⁸ two present comparative assessments, one between the UK and Germany, and the other between the US and the EU. The third book assembles what is bound to become a classical collection of major writings on the continuing debate over the convergence or divergence of corporate governance systems.⁴⁹ All three

CTR. FOR EUR. POL'Y STUD. (Jan. 2004), *available at* http://www.ceps.be/Article.php?article_id=131& (last visited Mar. 28, 2004).

47. "A particular source of disappointment is the way in which the takeovers Directive has fallen victim to horsetrading and unholy alliances of convenience related to totally extraneous issues." Furthermore,

The Competitiveness Council says that it wants to be seen to be taking decisions. In all sincerity, I have to say that if the Council continues to take decisions like this one, the European Union will never reach its target of becoming the most competitive economy in the world by 2010. On this issue, we have actually gone a long way in reverse gear since the Council endorsed the previous takeovers Directive in June 2001, with 14 Member States in favour.

Memo/03/245, European Commission, Results of the Competitiveness Council of Ministers, (Nov. 28, 2003), *available at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/245|0|AGED&lg=EN&display= (last visited Mar. 30, 2004).

48. CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY (Joseph A. McCahery et al. eds., 2002); FORSTINGER, *supra* note 34; TAKEOVERS IN ENGLISH AND GERMAN LAW, *supra* note 13.

49. See CORPORATE GOVERNANCE REGIMES, *supra* note 48, at Pt. I. For an earlier landmark collection of papers in this relatively young debate, see COMPARATIVE CORPORATE GOVERNANCE—STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt et al. eds., 1998); Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L L. 5 (1999) [hereinafter Cheffins, *Current Trends*]; Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function?*, 49 AM. J. COMP. L. 329 (2001); Jeffrey N. Gordon, *Pathways to Corporate Governance? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219 (1999) [hereinafter Gordon, *Pathways*]; Jennifer Hill, *Introduction: Comparative Corporate Governance and Takeovers*, 24 SYDNEY L. REV. 319 (2002); Katharina Pistor et al., *The Evolution of Corporate Law: A Cross Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791 (2002); Edward Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367 (1996); Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993) [hereinafter Roe, *Some Differences*]; Detlev Vagts, *Reforming the "Modern Corporation": Perspectives from the German*, 80 HARV. L. REV. 23 (1966); Mark D. West, *The Puzzling Divergence of Corporate Law:*

volumes appeared shortly after the directive was defeated in the EP. Unfortunately, there was too little temporal distance to include all ensuing and ongoing discussions sparked by that event. Allowing more time to lapse between the directive's defeat and the publication of these volumes, however, would have had little, if any, influence on the texts. These works, particularly the volumes by Payne and Forstinger, attempt to provide a greater picture of takeover regulation by including domestic, international, and comparative perspectives. The juxtaposition of these dimensions has proven pivotal to the discussions and inquiries of both the last decade and previous decades.⁵⁰ Amidst the overwhelming amount of recent scholarship on comparative corporate governance in general,⁵¹ and takeovers in particular,⁵² these three volumes neither claim nor assume a position as proverbial leader of the pack. The host of regulatory, economic, political, historical, and cultural issues connected in one way or another with takeover regulation is so diverse that a single publication could rarely leave a reader completely satisfied.⁵³ The books under review, however, do provide us with a wide array of valuable insights into the pressing issues related to takeovers. This ultimately makes all of them very timely, interesting, and inspiring reading.

The comparative perspective on English and German takeover laws, originally assembled by Jennifer Payne for a workshop in Oxford in

Evidence and Explanations from Japan and the United States, 150 U. PA. L. REV. 527 (2001).

50. See RICHARD BUXBAUM & KLAUS J. HOPT, *LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE* (1988).

51. See Bolkstein, *supra* note 47; John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501 (2000). Another insightful analysis with comparative views on France and Germany is provided in Mary O'Sullivan, *The Political Economy of Comparative Corporate Governance*, 10 REV. INT'L POL. ECON. 23 (2003).

52. See John W. Cioffi, *Restructuring "Germany Inc.": The Politics of Corporate Governance Reform in Germany and the European Union*, 24 L. & POL'Y 355 (2002) [hereinafter Cioffi, *Restructuring "Germany Inc."*]; Simon Deakin & Giles Slinger, *Hostile Takeovers, Corporate Law, and the Theory of the Firm*, 24 J. L. & SOC'Y 124 (1997) (concise analysis and comparative approach to takeover law in Europe, with particular emphasis on the United Kingdom, the United States, and Germany).

53. For different methods for exploring these backgrounds, see MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* (2003); Roe, *Some Differences*, *supra* note 49. Much of the "Varieties of Capitalism" literature has been devoted to the exploration of comparative corporate governance, with particular emphasis on the historical trajectories and structural conditions of corporate governance systems. See Sigurt Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 337 (Peter A. Hall & David Soskice eds., 2001). For insightful approaches that reach beyond the "Varieties of Capitalism" perspectives on "comparative institutional advantages," see Callaghan, *supra*, note 4; Cioffi, *Restructuring "Germany Inc."*, *supra* note 52.

September of 2001, unfolds in a particularly useful manner. Despite the drastic differences between the structural economic foundations of the two countries, hardly any other country's takeover laws have left as significant an imprint on Germany's takeover legislation over the years as those of the United Kingdom.⁵⁴ Germany has recently undergone a veritable *tour de force* with regard to adapting both its securities and corporate law to the radical pressures of globalized capital markets.⁵⁵ Germany continues to find itself under conflicting pressures, as market players and the government undertake substantial efforts to bring into line Germany's notoriously dense network of closely-held corporations, strong cross-holdings among major industrial players and financial institutions. German stock corporations' two-tiered board of managers and supervisors are also to be brought in line with the capital market demands of international investors.⁵⁶ The conversion from bank-centered, long-term financing relationships between large German firms and financial institutions to conditions that make Germany attractive to foreign investment has been a lengthy, ongoing struggle. This process has ultimately spurred a fundamental debate over the merits of historically-grown corporate law structures. The British-German comparison taken up by the authors in Payne's collection is remarkably helpful for addressing the structural elements that naturally came under pressure when Germany tackled its system of Rhenish capitalism,⁵⁷ most notably through the passage of the Transparency Act in 1998.⁵⁸ In light of the ensuing European developments concerning a takeover directive that would eliminate

54. A good comparative view on Germany and the UK is given by Paul L. Davies, *Shareholder Value, Company Law, and Securities Markets Law: A British View*, in CAPITAL MARKETS AND COMPANY LAW 261 (Klaus J. Hopt & Eddy Wymeersch eds., 2003); Paul L. Davies, *Struktur der Unternehmensführung in Großbritannien und in Deutschland: Konvergenz oder fortbestehende Divergenz?* [Structure of Corporate Governance in the UK and Germany: Convergence or Persisting Divergence?], 30 Z.G.R. 269 (2001); Gregory Jackson, *Comparative Corporate Governance: Sociological Perspectives*, in THE POLITICAL ECONOMY OF THE COMPANY 265 (John Parkinson et al. eds., 2000); Vitols, *supra* note 53.

55. See Theodor Baums, *Company Law Reform in Germany*, 3 J. CORP. STUD. 181 (2003) [hereinafter Baums, *Company Law Reform*].

56. See, e.g., Klaus J. Hopt, *Takeovers, Secrecy, and Conflicts of Interest: Problems for Boards and Banks*, in TAKEOVERS IN ENGLISH AND GERMAN LAW, *supra* note 13, at 33; Thorsten Pötzsch, *Regulatory Structures*, in TAKEOVERS IN ENGLISH AND GERMAN LAW, *supra* note 13, at 75; see also Klaus J. Hopt, *Common Principles of Corporate Governance in Europe*, in CORPORATE GOVERNANCE REGIMES, *supra* note 48, at 176-81 (describing the differences between the one-tiered and two-tiered board systems in Great Britain, the United States, and Germany).

57. See MICHEL ALBERT, CAPITALISME CONTRE CAPITALISME [CAPITALISM VS. CAPITALISM] (1991) (classical assessment of so-called "Rhenish capitalism").

58. Gesetz zur Kontrolle und Transparenz im Unternehmensbereich [Law Regarding Corporate Control and Transparency] April 27, 1998 (BGBl. I p.786).

managerial discretion when launching defensive measures against hostile bids and would work toward a European market for corporate control, the passage of the Act now seems like a watershed moment. Meanwhile, it has become clear that the Act exposed German companies to dangers that had not been fully anticipated,⁵⁹ by weakening German companies' defenses against takeover bids. Takeover bids were largely unknown in Germany until recently. The headline-making takeover of the German industrial giant Mannesmann by the British Telecommunications firm Vodafone in 1999–2000⁶⁰ was a wake-up call for German lawmakers, which forced them to seriously reconsider the future avenues they would utilize to restructure German corporate and securities law. Realistic methods had to be assessed in light of both an increased demand by German companies for foreign capital, as well as widespread fear surrounding the replacement of Germany's long-tested forms of internal control of company boards through the supervisory board complemented with various, market-based forms of outside control through the stock market.⁶¹ An intimate American observer of German corporate governance, Jeffrey Gordon, recently observed:

In the years that the 13th Directive was debated, Germany moved from a closed to a more open system of corporate control; many of its extra-board barriers came down. This took place through significant corporate law changes, for example, the end of capped voting and new limitations on bank exercise of customer proxies. Also important was a tax law change, the phase out in January 2002 of the capital gains tax on the sale of corporate shareholdings, that would eliminate the financial lock-in of corporate cross-shareholdings. There were also ownership structure changes that produced over the 1990's a significant increase in the number of firms with dispersed ownership without a large blockholder. . . .

59. See Cioffi, *Restructuring "Germany, Inc."*, *supra* note 52 (careful reconstruction of the political process leading up to the Transparency Act and the German government's attempts to re-establish protective walls in negotiating the European Takeover Directive).

60. See Martin Höpner & Gregory Jackson, *Entsteht ein Markt für Unternehmenskontrolle? Der Fall Mannesmann [Is There a Market for Corporate Control? The Case of Mannesmann]*, in ALLE MACHT DEM MARKT? STUDIEN ZUR ABWICKLUNG DER DEUTSCHLAND AG [ALL POWER TO THE MARKET? STUDIES OF GROWTH IN GERMAN CORPORATIONS] 147 (Wolfgang Streeck & Martin Höpner eds., 2003)

61. See Jeffrey N. Gordon, *An American Perspective on the New German Anti-Takeover Law, Die Aktiengesellschaft*, vol. 12, at 4 (Dec. 2002), available at <http://ssrn.com/abstract=336420> [hereinafter Gordon, *An American Perspective*]. The different ownership and control structures of American, English, German, and other European companies is described in great detail in FORSTINGER, *supra* note 34, at 48–56.

Germany had opened itself to the market for corporate control to a much greater extent than its EU partners, except for the UK, and, not unreasonably in my view, was concerned about potential harms from economic nationalism potentiated by an incompletely liberalized cross-border regime.⁶²

IV. COMPARATIVE PERSPECTIVES ON LAWMAKING

These events clearly show that an ongoing comparative dialogue is needed.⁶³ At the beginning of his presentation at the 2001 workshop in Oxford, Klaus Hopt remarked on the irony of a German corporate law scholar speaking in England about takeover law.⁶⁴ While Germany had not historically experienced many takeovers, England's experience with both takeovers and takeover regulation was very rich. The City Code on Takeovers and Mergers, adopted as a self-regulatory instrument in 1992, served as a primary model for Germany's first attempt to create a takeover code in 1996: the *Übernahmekodex*.⁶⁵ Unfortunately, the Code's full regulatory potential was never realized because many large companies did not adhere to it. A remarkable development later ensued: German

62. Gordon, *An American Perspective*, *supra* note 61, at 4. For an assessment of the changed conditions of the role of banks in German companies, see Hopt, *Common Principles of Corporate Governance in Europe?*, in CORPORATE GOVERNANCE REGIMES, *supra* note 48, at 186–88; Peter O. Mühlbert, *Bank Equity Holdings in Non-Financial Firms and Corporate Governance: The Case of German Universal Banks*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 49, at 445.

63. See Cheffins, *Current Trends*, *supra* note 49, at 5–6.

The topic should not be studied in isolation within any one country. Instead, corporate governance is becoming an important issue in all industrial economies, and students of the topic need to be aware of what is occurring outside their respective countries. As trade barriers fall, markets expand, information flows improve, and restrictions on investment disappear, it will become progressively easier for investors of one country to invest in corporations in another. Movement towards a worldwide capital market could in turn have a substantial impact on corporate governance in individual countries. In a world with intense competition for global savings, sophisticated investors will be attracted to jurisdictions in which investment structures serve shareholders' interests. Since the attractiveness of a particular locality will depend on its system of corporate governance, local norms may be adjusted to make domestic markets more accommodating to global trends.

Id. (footnotes omitted).

64. TAKEOVERS IN ENGLISH AND GERMAN LAW, *supra* note 48, at 3. "To talk in England about takeovers and takeover regulation is, to quote the Romans, 'carrying owls to Athens.'" *Id.*

65. See Patrick Drayton, *Regulatory Structures*, in TAKEOVERS IN ENGLISH AND GERMAN LAW, *supra* note 48, at 65 (2002) (concise assessment of the Takeover Code and its application to the Takeover Panel, the Financial Services Authority, and the courts); Tobias A. Heinrich, *Bedeutung und Regelungsprogramm des englischen City Code und der Rules Governing Substantial Acquisitions of Shares [Meaning and Regulations of the English City Code and the Rules Governing Substantial Acquisitions of Shares]*, in WPÜG, *supra* note 3, at 45.

lawmakers prepared a legislative takeover statute in a climate characterized by both a widespread belief that such a statute was indeed needed and a deep-rooted skepticism about its possible regulatory scope. This development is concisely depicted in Hopt's chapter in Payne's collection.⁶⁶ Corporations in Germany had come under pressure as a result of the developments described above and, in the meanwhile, the legislature resumed active engagement in conceptualizing and preparing a federal takeover statute in 1997, twenty-two years after its first attempts in 1975.⁶⁷ One of the most striking developments that followed the European Takeover Directive's defeat in the summer of 2001 was the passage of a national takeover statute by the German parliament during December of that year, taking effect on January 1, 2002.⁶⁸ This statute, the scope of which is well worth a number of subsequent discussions among the authors of the volumes considered here, has inspired substantial commentary, both critical and affirmative.⁶⁹ Rendering the story of European takeover law even more open-ended, the German legislature granted the management of target companies the right to adopt defensive measures against hostile bids without prior approval from the general shareholder assembly.⁷⁰ This formula reflects the legislature's belief in the competence of management to decide on takeover bids, without the need for authorization from the shareholder assembly.⁷¹

66. TAKEOVERS IN ENGLISH AND GERMAN LAW, *supra* note 13, at 33.

67. See Theodor Baums, *Vorschlag eines Gesetzes zu öffentlichen Übernahmeangeboten* [Proposal for a Public Take-Over Bids Law], ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1310 (1997).

68. Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren und Unternehmensübernahmen [Law to Regulate Public Takeover Offers Through Securities Acquisition and Takeovers], Dec. 20, 2001 (BGBl. I p.3822).

69. See Cioffi, *Restructuring "Germany Inc."*, *supra* note 52; Gordon, *An American Perspective*, *supra* note 61; Kirchner & Painter, *supra* note 1; Frank Wooldridge, *The New German Takeover Act*, 14 EUR. BUS. L. REV. 75 (2003). For comprehensive, practice-oriented commentary published since the Statute's passage, see GERMAN TAKEOVER LAW—A COMMENTARY (Gabriele Apfelbacher et al. eds., 2002); JOHANNES ADOLFF ET AL., PUBLIC COMPANY TAKEOVERS IN GERMANY (2002); WPÜG, *supra* note 3; RUDOLF NÖRR & ALFRED STIEFENHOFER, TAKEOVER LAW IN GERMANY (2003).

70. Takeover Code § 33(1) reads

After publication of the decision to make a bid until the publication of the result in accordance with § 23 para. 1 sentence 1 no. 2, the management board of the target company may not take any action which could prevent the bid being successful. This does not apply to actions which would also have been taken in the course of due and diligent management of a company which is not affected by a takeover bid, seeking a competitive bid or to actions to which the supervisory board of the target company has agreed.

Takeover Code § 33(1), translated in NÖRR & STIEFENHOFER, *supra* note 69, at 176.

71. See Takeover Act § 33(1), translated in NÖRR & STIEFENHOFER, *supra* note 69, at 176 (emphasis added). While a board "may not take any action which could prevent the bid being successful," those actions "which would also have been taken in the course of due and diligent

While the discussion on takeover regulation continues,⁷² it is important to bear in mind that an adequate assessment of the regulatory context and the political economy, from which any takeover regulation arises, must be built upon careful consideration of the different historical developments and political decisions that have shaped various regulatory regimes.⁷³ The works herein reviewed clearly reflect this awareness. This is particularly important in light of the fact that the international debate over convergence and divergence of corporate governance regimes, to which the volume edited by McCahery et al., provides an excellent contribution, develops in at least two other critical dimensions that have yet to achieve sufficient recognition within mainstream scholarship on corporate law. These dimensions concern the changes taking place with regard to the evolution of corporate law through a combination of private norm-generation through different methods of self-regulation and formal legislation.⁷⁴ The radical changes to the process of lawmaking, through the emergence of corporate governance codes, codes of conduct, and recommendations of best practice that have recently evolved in Germany⁷⁵ and in many other countries,⁷⁶ as well as in international institutions,⁷⁷ have an important

management of a company which is not affected by a takeover bid, seeking a competitive bid" or "which the supervisory board of the target company has agreed" are excluded. *Id.*

72. See Gordon, *An American Perspective*, *supra* note 61; Kirchner & Painter, *supra* note 1.

73. See Lucian Ayre Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Governance and Ownership*, 52 STAN. L. REV. 127 (1999); Helmut Kohl, *Path Dependence and German Corporate Law: Some Skeptical Remarks from the Sidelines*, 5 COLUM. J. EUR. L. 189 (1999); Mark J. Roe, *Path Dependence, Political Options and Governance Systems*, in *COMPARATIVE CORPORATE GOVERNANCE: ESSAYS AND MATERIALS* 165 (Klaus J. Hopt & Eddy Wymeersch eds., 1997).

74. An important example is the German Corporate Governance Code, which was conceptualized and prepared by two government commissions between 2000 and 2002. This code provides corporate actors with a concise account and description of German corporate governance and offers recommendations for corporate behavior. German Corporate Governance Code, <http://www.corporate-governance-code.de/index-e.html> (last visited Mar. 28, 2004); see Theodor Baums, *Interview: Reforming German Corporate Governance: Inside a Law Making Process of a very new nature*, 2 GERMAN L.J. No. 12 (July 2001), available at http://www.germanlawjournal.com/past_issues.php?id=43 [hereinafter Baums, *Interview*]; Baums, *Company Law Reform*, *supra* note 56.

75. See Baums, *Interview*, *supra* note 74; *Bericht der Regierungskommission Corporate Governance—Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts [Report of the Government Commission Corporate Governance—Management of Enterprises—Modernization of the Stock Corporation Law]*, Drucksache-Bundesrat 14/7515, Aug. 14, 2001; Peer Zumbansen, *The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation*, JURIDIKUM 136 (2002).

76. An instructive assessment of the UK is provided in BRIAN R. CHEFFINS, *COMPANY LAW, THEORY, STRUCTURE AND OPERATION* 346 (1997). For theoretical background, see Rob Baggott, *Regulatory Reform in Britain: The Changing Face of Self-Regulation*, 67 PUB. ADMIN. 435 (1989); Julia Black, *Constitutionalising Self-Regulation*, 59 MOD. L. REV. 24 (1996).

77. See, e.g., the Corporate Governance Principles issued by the OECD, available at <http://www.oecd.org>; see also Carolin F. Hillemanns, *UN Norms on the Responsibilities of*

bearing on our future assessment of corporate law from a comparative perspective. The constant and increasing export of established, albeit constantly evolving,⁷⁸ systems of law into the unstable and developing markets of post-crisis regions or transformation states⁷⁹ sounds an urgent call for reflection. Conducting comparative assessments of the conditions under which export or transplantation of substantive law takes place, as well as of how our law making procedures continue to change and unfold, can provide a valuable insight into how certain models have formed and into their resulting consequences. This contemplative process is particularly important with regard to the export of widespread corporate governance codes, best practice recommendations,⁸⁰ and other market-based, self-regulatory frameworks into countries undergoing dramatic restructuring of formerly state-run industries and economic infrastructures.⁸¹

The second, crucial dimension, ripe for review by contemporary corporate governance scholars, deals with the economic pressure experienced by mature industrial and post-industrial states to develop innovative means for economic and corporate growth. While this need may seem almost painfully commonplace,⁸² its realization, in the context of radically interconnected markets and immense pressure on local and transnational spheres of production,⁸³ constitutes a pivotal issue for contemporary comparative scholars working with corporate governance.⁸⁴

Transnational Corporations and other Business Enterprises with regard to Human Rights, 4 GERMAN L.J. 1065 (2003) (for a development in international corporate social responsibility), available at http://www.germanlawjournal.com/pdf/Vol04No10/PDF_Vol_04_No_10_1065-1080_European_Hillemanns.pdf (last visited Oct. 4, 2003).

78. See Pistor et al., *supra* note 49.

79. See, e.g., Katharina Pistor, *Of Legal Transplants, Legal Irritants, and Economic Development*, in CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY 347 (Peter Cornelius & Bruce Kogut eds., 2003); Erich Schanze, *Legislating for System Change: The Russian Company Acts of 1995 and 1998*, 156 J. INST. & THEORETICAL ECON. 19 (2000); Frederick Schauer, *Legal Development and the Problem of Systemic Transition*, 13 J. CONTEMP. LEGAL ISSUES 261 (2003).

80. See Country List, European Corporate Governance Institute, at http://www.ecgi.org/codes/all_codes.htm (last visited Mar. 28, 2004).

81. See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING. LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002).

82. See *Reinventing Europe: Innovation: With so much of its industrial base ageing and resistant to change, how can Europe close the research and development gap with America?*, THE ECONOMIST TECHNOLOGY QUARTERLY, Sept. 6, 2003, at 28, available at 2003 WL 58583964.

83. See J. Rogers Hollingsworth, *New Perspectives on the Spatial Dimensions of Economic Coordination: Tensions Between Globalization and Social Systems of Production*, 5 REV. INT'L POL. ECON. 482 (1998); Kathryn Ibatana-Arens, *The Comparative Political Economy of Innovation*, 10 REV. INT'L POL. ECON. 147 (2003).

84. See Mary O'Sullivan, *The Innovative Enterprise and Corporate Governance*, 24 CAMBRIDGE

V. TOWARD A NEW PARADIGM IN EUROPEAN CORPORATE LAW

Against this background, this review develops an assessment of the comparative dialogues presented in Payne's collection, as well as the books by Forstinger and the McCahery volume. Forstinger presents us with a detailed reconstruction of state-based regulation of corporate law and federal securities regulation in the United States as a means for comparing the American conditions for a market for corporate control with those existing in Europe.⁸⁵ Meanwhile, the contributions in the volume edited by McCahery et al. supply a rich collection of insightful, often critical, assessments of the arguments made in the course of international debate over corporate governance. Forstinger's work is well-structured, and her comparative assessment of the development of a market for corporate control and the contrastingly few opportunities for creating an equivalent market in the European Union is quite informative. At the same time, Forstinger does not limit herself to an extensive treatment of the legislative and jurisprudential elements that mark the evolution of both markets. Instead, while descriptive in her treatment of the material used for her study, she leads the reader toward an inspiring outlook on the future development of European takeover regulation. Although Forstinger does not speculate regarding successful passage of the Commission's badly wounded takeover directive in the near future,⁸⁶ she has a sound basis for rejection of the notion that "full regulatory competition" will overcome the deadlock.⁸⁷

J. ECON. 393 (2000); Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in *THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE* 33 (Paul Dimaggio ed., 2001); PEER ZUMBANSEN, *INNOVATION UND PFADABHÄNGIGKEIT. DAS RECHT DER UNTERNEHMENSVERFASSUNG IN DER WISSENSGESELLSCHAFT* [Innovation & Path-Dependence. The Constitution of the Firm in the Knowledge Society] (completed book manuscript, University of Frankfurt, forthcoming 2004/2005).

85. FORSTINGER, *supra* note 34, at 1 n.1. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *YALE L.J.* 663 (1974); *contra* ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *HARV. L. REV.* 1437 (1982); Lucian Ayre Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 *COLUM L. REV.* 1168 (1999); Lucian Ayre Bebchuk & Allen Ferrell, *On Takeover Law and Regulatory Competition*, 57 *BUS. LAW.* 1047 (2002); David Charny, *Competition among Jurisdictions in Formulating Corporate Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 *HARV. INT'L L.J.* 423 (1991).

86. See FORSTINGER, *supra* note 34, at 154: "The rejection of the amended proposed takeover Directive has diminished a European framework for the regulation of takeovers, at least for the very near future." *Id.*

87. *Id.* at 156. See also Baums, *Zur Harmonisierung*, *supra* note 7, at 14; Theodor Baums, *Das Ende der Deutschland AG? Unternehmensrechtsreform in Deutschland* [*The End of Germany Inc.? Corporate Law Reform in Germany*], in *KAPITALMARKT DEUTSCHLAND: ERFOLGE UND*

While conditions ripe for competitive federalism in Europe might still seem unattainable, the European Court of Justice's recent *Inspire Art* ruling on September 30, 2003,⁸⁸ as well as those preceding it, namely *Centros* and *Überseering*, might have dramatically altered this situation.⁸⁹ These cases go a long way toward resolving the struggle⁹⁰ between those European corporate law regimes applying domestic law to corporations based in these countries (the “*siege reel*,” or “real seat” doctrine), and those embracing the dominant US model of state competition for incorporation (“incorporation doctrine”).⁹¹ Forstinger concludes her study with an intriguing reconsideration of the aforementioned 1985 White Paper that accommodated different interests within the framework of a single legal measure.⁹² In light of the persisting differences among EU Member States' systems of corporate law, Forstinger takes up the recent and far-reaching observations of Simon Deakin⁹³ and argues that “[m]inimum standards are seeking to promote diverse, local-level approaches to regulatory problems by creating a space for autonomous

ENTWICKLUNGEN [GERMAN CAPITAL MARKET: RESULTS AND CHANGES] WHITE PAPER 39 (Deutsche Börse Group ed., 2003).

88. Case C-167/01, *Kamer van Koophandel en Fabriken voor Amsterdam v. Inspire Art Ltd.*, 2003 O.J. (C 275) 10, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=62001J0167&model=guichett (last visited Mar. 31, 2004); see Kersting & Schindler, *The ECJ's Inspire Art Decision of 30 September and Its Effects on Practice*, in 4 GERMAN L.J. No. 12, 1277–91 (2003), available at <http://www.germanlawjournal.com/article.php?id=344> (last visited Mar. 31, 2004).

89. See Kilian Baelz & Teresa Baldwin, *The End of the Real Seat Theory (Sitztheorie): The European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, in 3 GERMAN L.J. No.12 (2002), available at http://www.germanlawjournal.com/current_issue.php?id=214 (discussing the Court's later ruling in *Überseering* and the subsequent decisions on the development of regulatory competition in Europe); Simon Deakin, *Regulatory Competition versus Reflexive Harmonisation in European Company Law*, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 190 (Daniel C. Esty & Damien Geradin eds., 2001) (assessing the European corporate law scene after the court's 1999 *Centros* judgment); Sebastian Mock, *Harmonization, Regulation and Legislative Competition in European Corporate Law*, 3 GERMAN L.J. No. 12 (2002), available at http://www.germanlawjournal.com/current_issue.php?id=216 (last visited Oct. 3, 2003) (dealing with regulatory competition in the field of European Corporate law); Frank Wooldridge, *Überseering: Freedom of Establishment of Companies Affirmed*, 14 EUR. BUS. L. REV. 227 (2003).

90. For an analysis of Case C-212/97, *Centros Ltd. v. Erhvervs-Org.*, 1999 O.J. (C 136) 3, see FORSTINGER, *supra* note 34, at 41 (providing an extensive discussion of the doctrinal conflict over this issue); Daniel Zimmer, *Mysterium Centros—Von der schwierigen Suche nach der Bedeutung eines Urteils des Europäischen Gerichtshofes [The Mystery of Centros: The Difficult Search for the Meaning of the ECJ's Decision]*, 164 Z.H.R. 23 (2000).

91. See FORSTINGER, *supra* note 34, at 41–48; Werner F. Ebke, *Centros—Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623 (2000).

92. FORSTINGER, *supra* note 34, at 158.

93. Deakin, *supra* note 89, at 211.

solutions to emerge.”⁹⁴ Beyond this assessment, which is reflected in parallel discussions regarding future prospects of European harmonization programs,⁹⁵ lies a subtle theoretical appraisal of the harmonization processes that ties this debate back to issues of legal transplantation and system change. The paradigm of reflexive law, originally developed in response to regulatory deadlock resulting from political pressure against juridification in the 1970s and early 1980s,⁹⁶ has received increased recognition in present international debates. This recognition has occurred in the context of European integration⁹⁷ and corporate law regulation,⁹⁸ as well as that of international environmental protection and sustainable development.⁹⁹ At present, reflexive law unfolds in an even more intricate manner, as comparative views on legal transplantation often fail to capture the co-evolutionary processes that unfold in a given legal, social, and political order when legal transplantation takes place. Rather than a mere integration into another legal order, what actually takes place is a sophisticated process of interaction and confrontation between the imported instrument and other areas and regulatory spheres within the receiving system. As an imported legal standard is introduced into the receiving legal order, the connected social systems (including industrial relations, insurance, financing, and production regimes), each with its own

94. FORSTINGER, *supra* note 34, at 159.

95. Michael Dougan, *Minimum Harmonization and the Internal Market*, 37 COMMON MKT. L. REV. 853, 858 (2000) (describing the move from Single Market harmonization policy to the integration of more policy objectives through consecutive treaties since 1986).

96. See Klaus Günther, *Der Wandel der Staatsaufgaben und die Krise des regulativen Rechts* [Changing State Functions and the Crisis of Regulatory Law], in WACHSENDE STAATSAUFGABEN—SINKENDE STEUERUNGSFÄHIGKEIT DES RECHTS [INCREASING STATE FUNCTIONS—SINKING REGULATORY ABILITY OF THE LAW] 51 (Dieter Grimm ed., 1990); Gunther Teubner, *Juridification—Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES 3 (Gunther Teubner ed., 1987); Gunther Teubner, *Reflexives Recht*, 68 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 13 (1982); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in DILEMMAS OF LAW IN THE WELFARE STATE 221 (Gunther Teubner ed., 1986).

97. See Michael Dougan, *Vive la Différence? Exploring the Legal Framework for Reflexive Harmonisation Within the Single European Market*, in THE ANNUAL OF GERMAN & EUROPEAN LAW (Russell A. Miller & Peer Zumbansen ed., forthcoming 2004).

98. Deakin, *supra* note 89, at 211–13; FORSTINGER, *supra* note 34, at 158–69. Forsinger states: “This approach uses both centralized regulation of minimum standards to overcome market failures, existing specifically in the area of takeovers, and some degree of self-regulation to preserve space for autonomous governance at member state level.” *Id.* at 158. He continues, “The aim of reflexive harmonization is to protect the diversity of national legal systems, while at the same time seeking to channel the process of evolutionary adaption of rules at state level.” *Id.* at 160.

99. See Peter Cornelius & Bruce Kogut, *Creating the Responsible Firm: In Search for a New Corporate Governance Paradigm*, 4 GERMAN L.J. 45 (2003), available at http://www.germanlawjournal.com/pdf/Vol04No01/PDF_Vol_04_No_01_45-52_Private_Cornelius_Kogut.pdf (last visited Oct. 5, 2003).

internal dynamics, will likely be aggravated by this import.¹⁰⁰ This perspective ultimately illuminates the tenacity displayed by different systems during the process of European integration while, at the same time, helping us better understand the complex interplay of legal reform, political decisions, and embedded cultural and social systems. Regarding the earlier allusion to widespread emergence of self-regulation in the context of corporate law and other fields,¹⁰¹ a reflexive law approach that considers the co-evolutionary processes of minimum harmonization and ongoing processes of self-regulation and adaptation in the Member States might prove particularly helpful because it facilitates ongoing deliberation and mutual education.¹⁰² In this respect, the legislative aftermath of the Takeover Directive, along with the passage of a German Takeover Act, might prove enormously helpful to the continuing search for an adequate European takeover regime, a search that will ultimately be a learning process.

100. Gunther Teubner, *Legal Irritants: How Unifying Law Ends Up In New Divergences*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 417 (Peter A. Hall & David Soskice eds., 2001).

101. See Mark Bevir & R.A.W. Rhodes, *Searching for Civil Society: Changing Patterns of Governance in Britain*, 81 PUB. ADMIN. 41 (2003); Robert Elgie, *Governance Traditions and Narratives in Public Sector Reform in Contemporary France*, 81 PUB. ADMIN. 141 (2003); Richard J. Stillman II, *Twenty-First Century United States Governance: Statecraft and the Peculiar Governing Paradox it Perpetuates*, 81 PUB. ADMIN. 19 (2003).

102. This point is adequately stressed by FORSTINGER, *supra* note 34, at 155, 160–62; cf. Baums, *Zur Harmonisierung*, *supra* note 7, at 14. The conceptual background for the establishment of governance schemes on the European level that allow for mutual learning among the different Member States, developed by means of the Open Method of Coordination ('OMC'), was presented at the EU's Lisbon Council in 2000. See Joanne Scott & David Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002) (assessing the OMC). "Unlike the [classical community method], which is designed to create law at the Union level, the OMC aims to coordinate the actions of the several Member States in a given policy domain and to create conditions for *mutual learning* that hopefully will induce some degree of voluntary policy convergence." *Id.* at 4 (emphasis added). See also Diamond Ashiagbor, *SOFT HARMONISATION: LABOUR LAW, ECONOMIC THEORY AND THE EUROPEAN EMPLOYMENT STRATEGY* 226 (2002); PHIL SYRPIS, *LEGITIMISING EUROPEAN GOVERNANCE: TAKING SUBSIDIARITY SERIOUSLY WITHIN THE OPEN METHOD OF COORDINATION* (2002); Dougan, *Vive la Différence?*, *supra* note 97; Dermot Hodson & Imelda Maher, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Coordination*, 39 J. COMMON MKT. STUD. 719 (2001).