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EUROPEANISATION VERSUS REGULATORY COMPETITION: THE CASE OF BUSINESS ENTITIES

1. Introduction

The opposing phenomenon of harmonisation and regulatory competition involved the Business Entities since the European Community foundation, trying to photograph the political, historical and normative reality that accompanied the "European corporate law".

The aim of this essay is to describe the harmonisation and competition process, starting from the reconstruction of the different legal basis and giving an account of the present direction which seems to emerge into Europe with 27 States.

Preliminary, it's necessary to mark the field of research with a close definition, trough the specification at EC level, of the "Business Entities" case in point.

It can read the definition of "Business Entities" into the article 54 of the Treaty on the Functioning of the European Union (TFEU), previously article 48 TEC, compared to which the formulation is remained unaltered.

The article declaims that "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making

By the read of the article's test it deduces that the lemma of Business Entities assumes an improper and wide meaning. In fact, it refers to all forms of business with a lucrative purpose, including among them also cooperatives and the business entities with no legal personality, such could be individual business in Italy or the OHG (*Offene Handelsgesellschaft*) in Germany, but provided of an adequate autonomy form their partners, forming, so, an independent allocation centre of legal subjective positions, both substantive also processual [1, p. 50].

Furthermore, companies have to be in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union. In this way the businesses, such economic subject operating in the internal market, were equalized to

the persons so to ensure also to them the same freedom of establishment and movements, guaranteed by the Rome Treaty to persons and capitals [1, p.52].

The equating of businesses entities to the persons and the subsequent recognition to the first ones of the freedom of establishment is the paradigm on which is developed the whole construction of the European Company Law [2, p. 6-10].

2. The present circumstances

Although the legal basis remained essentially unchanged after the 2012 Action Plan, there were no new Corporate Action Plans (except for the Capital Markets Union Action Plan of 2015 and a specific focus for SMEs) [3, p.5].

It's advisable to explore the possible causes of this process: continuing difficulty of obtaining the political consensus needed, due to growing influence of liberal doctrines and the progressive enlargement of the Union to other countries with different legal and historical traditions; a brake on the process of harmonisation was put by the introduction of the principles of subsidiarity and proportionality with the 1992 Maastricht Treaty (now article 5 TEU); the increased tendency towards regulatory competition, whose emergence was born under uniform rules of private international law, in favour of the law of incorporation, and freedom of choice of the law of incorporation as a corollary of freedom of establishment (a palpable example is provided by the case law of the Court of Justice with Centros [4] and Uberseeing [5]) [3, p.9; 6, p.10].

After the crisis of the Welfare State, a series of liberal doctrines came into being, echoing Adam Smith's theories, they considered it appropriate to entrust market regulation to the operators themselves.

With the economic crisis, all this has inevitably led to a rethinking of the full freedom of the self-regulatory market [6, p.12].

Moreover, the progressive enlargement of the Union to other countries with different legal and historical traditions gas led to complexity of the legal landscape, as the European Union has had to face the harmonisation of very fragmented realities between them.

3. The principles of subsidiarity and proportionality

The principle of subsidiarity, art. 5, par. 3, TEU claims that "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

The principle of proportionality, art. 5, par. 4, TEU states that "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

Both principles are used to identify the legal basis and the ratio of harmonisation, to direct the action of the European legislator. About this field, there are a lot of examples: directive 2004/25/EC, about the takeover bids, 25 whereas "Since the objectives of the action envisaged… cannot be sufficiently achieved by the Member States… and can therefore… be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty."; formula that is found in the directive 2005/56/EC, about cross-border mergers of limited liability companies, 15 whereas, and in the directive 2007/36/EC, on the exercise of certain rights of shareholders in listed companies, 14 whereas.

At the same time, these principles represented the brake on the evolution of harmonisation in the European society, following the change of political will [7, p. 3].

Even though some of the efforts have been successful, there are two areas of company law that would appear to be totally impervious to harmonisation: corporate governance and the regulation of corporate groups; by abandoning these projects can be coherent with the principle of subsidiarity in European law, despite the number and volume of green papers, action plans, reflection groups' reports and advisory groups' studies [8, p.10].

4. The increased tendency towards regulatory competition

First of all, to understand the regulatory competition, it is important to talk about the phenomenon of convergence of national laws. There are three ways: a) the first is unilateral amendment, whereby one state adopts a law already in force in another jurisdiction. Such a choice usually stems from a comparative study of law and requires no cooperation with the country that originated the rule: we can call this "non-cooperative adaptation"; b) a second path to legal convergence is harmonisation: two or more Member States transfer part of their sovereignty to a supranational body, enabling it to lay down binding principles for the drafting of national legislation (an example of harmonisation is EU directives); c) the third approach is unification, whereby a multilateral treaty or a supranational body establish a single, detailed rule applicable in all the jurisdictions. Unification may result from an international treaty or directly from legislation by a supranational authority. This is typically the case of European regulations [9].

The unification and harmonisation processes involve proposed or aborted European legal entity types, by corresponding to companies:

- The European Company [10]
- The European Cooperative Society [11]
- The European Private Company [12]

- The Single Member Company [13]

The European Economic Interest Grouping lies outside the perimeter of this study.

5. The European legal entity types

It is time to start speaking about the European legal entity types, by dealing with the structure and the legal framework [2]. By beginning with the European Company, the discussion on the statute for a European company (*Societas Europaea, or SE*) lasted for decades. It should have become the 'flagship' of European company law; but after a long legislative 'skimming' exercise the structure of the SE emerged significantly 'trimmed down'. About the structure of SE regulation, it is possible to outline the following considerations. First are the common rules, which have been unified and apply to all SEs regardless of the Member State in which they are incorporated: e.g. the rules on company name, share capital, legal personality and currency, the formation of the company and fundamental governance arrangements, in which Member States can choose between a one-tier and a two-tier board structure. The Regulation also calls for the application of important national provisions that were previously harmonised by directives, such as rules on capital formation, mergers, and annual accounts. There is also extensive reference to national rules that did not undergo any harmonisation, such as directors' liability, the possibility for a company or for another legal entity to be a member of one of the corporate bodies, the matters for which the general meeting is competent, and the procedure for amending the by-laws. These issues, like the rules on liquidation and insolvency proceedings, are subject to significantly different provisions in different Member States. Under the SE Regulation, countries also retain significant scope for adapting some other rules, such as identifying the categories of transactions that require authorisation by the strategic oversight body in the two-tier system or an express decision by the board of directors in the one-tier system, while shareholders enjoy significant freedom to design the articles of association [10; 3, p.275 and next].

Just few reflections about the European Cooperative Company and its legal structure: the statute of the European Cooperative Company (*Societas Cooperativa Europaea, or SCE*) was a 'socio-political tag-along' to the SE; maybe this is why it did not engender much debate. In any event, the consequence is that many of the problems pointed up in our analysis of the SE are present in the SCE, which also has the dual Regulation-Directive structure and whose articles are patterned closely on those of the SE statute. The main differences are designed to serve the peculiar needs of the cooperative company [11; 3, p.224 and next].

By moving on the European Private Company, it is important to claim that the proposal for a European Private Company (*Societas Privata Europaea, or SPE*) was seen as offering an opportunity to facilitate the growth of small and medium-sized enterprises, and it was studied in depth. The first SPE Proposal aspired to independence from national company law: its statute was supposed to be 'uniform and definitive' and to 'dispense with references to national law'. This idea is in accord with the concept of legal unification and appears clearly in the Commission's language, with the reference to uniformity, legal certainty and flexibility. But the proposal was heavily amended, the last compromise version being released in May 2011 (the SPE Compromise). While the original Proposal allowed the SPE to have its registered and head offices in different Member States, as amended it made national law applicable, so as to 'ensure that SPEs are not used for the purpose of evading the SPEs' obligations in the territory of the Member State where they are established'. A second important point is the minimum legal capital requirement. The first draft put it at one euro and prohibited Member States from instituting any higher threshold. The final compromise version allowed countries to raise the legal minimum to 8,000 euros but required the Commission to revise this provision within two years from the adoption of the Regulation. The third controversial element of the draft SPE Regulation was worker participation. The original version simply referred to the law of the State of incorporation, thus dropping the prospect of pure unification. This solution did not prove to be viable, and although a complex new draft was proposed, the matter was too controversial for agreement. Arguably it was these three elements that led to the project's demise, but it must be admitted that in its first draft the SPE Regulation came closer than other EU company types to legal unification and could have been a viable instrument for small and medium-sized enterprises [12; 14; 15; 16].

To conclude, it is necessary to analyse the Single Member Company. The Commission saw that the failure of the SPE project was not due to lack of demand for a unified legal form for small companies and so put forward a new proposal for a *Societas Unius Personae*. Two public consultations and an impact assessment have been carried out, so we cannot argue that the difficulties facing unification stem from lack of commitment or resources.

The SUP directive requires a minimum legal capital of one euro, exactly as in the first SPE draft, but also requires Member States to allow online company formation and the free separation of registered and head offices, while protecting creditors through a balance-sheet test and a solvency statement. The articles of association are standardised and governance is simplified, with a prohibition on forming a company with more than one member [13].

Concisely, the probable causes of the failure of these European forms of company would be: the role of interest groups; the possibility of inappropriate incentives; enforcement, perhaps the greatest weakness of today's European Company Forms; the cost impact of regulation.

6. The regulatory competition

Competition between the rules consists of the different phenomenon of the attitude of the states in the face of the possibility that companies choose a particular applicable law. A different phenomenon is the regulatory arbitrage: it's only the possibility to choose the applicable rules and regulations. Entrepreneurs in every nation can choose freely between national and foreign company forms. Faced with the possibility of regulatory arbitrage by companies, states can remain indifferent or react. The reaction can take several modes: try to prevent regulatory arbitrage through harmonisation; or by applying "public order" exception or similar exceptions. Therefore, also by having regard to the possibility of arbitration, to seek to attract new societies or transfers of existing companies (competition) or at least not to lose it (defensive competition) [17, p.8].

When an order decides to compete, it can propose efficient rules or, instead, rules that only aim to benefit people who are able to influence the choice of applicable law. In the first case, there would be a race to the top, towards the best corporate law; in the second a race to the bottom, towards the more favourable right to those who enforce the choice of applicable law, because it would be supposed to be less protective to those who undergo the choice.

For there to be an active competition among regulations - where states compete to attract new companies - a number of preconditions are required, some of which have only recently begun to be verified in the European Union [17, p.10; 18, p.4].

7. The relationship and potential interaction between national legislatures in shaping national company forms

Regulatory convergence among member States can be obtained by unilateral amendment, giving rise to regulatory competition; but if the choice between incorporating under a national or a European form is unfettered, in order to incorporate under the law of a different Member State regulatory arbitrage must be legal. Back in 1999 the Centros jurisprudence allowed letterbox companies to be set up and to operate throughout Europe, thus making regulatory competition at least theoretically practicable.

As far as public companies are concerned, there is not much room for regulatory arbitrage. National regimes show a significant degree of overlap, thanks mainly to EU harmonisation over past decades. Although important

areas of company law are still not covered, they are unlikely to justify mass migrations [19].

The case of limited companies, those that might be interested in expanding abroad using a SUP, is rather different. If what they are interested in is reduced setup costs through a low minimum capital requirement plus a single, flexible legal structure, the fact is that many Member States already offer it. Such simplified company forms have been instituted in a good many countries for some time now, and although they are not perfectly identical they all serve substantially the same purpose [18].

So there does appear to be an inter pairs competition to establish popular company forms, but the cause was clearly not the emergence of aggressive and competitive European company forms, but rather a string of decisions by the European Court of Justice in favour of freedom of establishment. In other words, vertical competition was superseded by horizontal competition.

Member States protect the domestic status quo both by influencing supranational measures and by shaping the national company forms they control to make them more competitive. This unilateral amendment process may give birth to national models that resemble one another more and more closely.

The root of the problem with European Company Forms, then, can be traced to the workings of a sort of dual regulatory competition: one implicit and negative, in the form of Member State rejection of potentially popular company forms at European level, and another explicit and positive, in the form of spontaneous cross-country emulation, at least as far as small companies are concerned. The two types of competition have substantially different effects: one prevents legal unification, the second is likely to bring national laws towards convergence [20, p.15 and next].

Non-cooperative convergence can be an effective alternative to cooperative unification, at least for now, bringing comparable advantages while circumventing supranational political roadblocks.

8. The possible definition of the current "European Company Law" situation: the facts

Nowadays, it is possible to explain the current "European Company Law" situation, through the descriptions of facts which have been happening into the European Legal framework. They are mainly the (private) project for an European Model Company Act ("EMCA") and the Americanisation of the European Company law.

Starting from the first of these two phenomena, the EMCA is intended as a model statute regulating corporations, somehow akin to the American

Model Business Corporation Act. The document has been prepared by an independent group of academics and practitioners not formally affiliated with political institutions or interest groups [21].

The EMCA is divided in 12 chapters dedicated, respectively, to general principles, formation of companies, registration, transformation and re-registration, shares, financial structure, capital, governance and management, directors' duties and liabilities, shareholders' meeting and protection of minorities, financial statements and auditing, restructuring, dissolution and liquidation, groups of companies, and branches of foreign companies [21].

The intention of the drafters is to offer a coherent and comprehensive model act that might be the basis for further European harmonisation or used by current and future Member States as a blueprint for their legislation, bypassing the political compromises and bureaucratic hurdles of European legislation. The drafters should be commended for a significant effort, and the project is a welcomed occasion to discuss the future of European corporate law. The EMCA will definitely contribute to a deeper understanding of corporate law, and might concretely contribute to the development of the corporate laws of the European Union and single States, especially new Members with a less advanced corporate law system [21].

Under present conditions, it is possible to draw some critical considerations. Firstly, The EMCA, as explicitly stated in the Introduction, is intended to avoid over-detailed provisions and offer primarily general principles. This approach is justified by the need to leave enough fine-tuning room to single legislatures to adapt the model to local needs. This approach raises some questions in terms of the actual utility that the document will have, especially for jurisdictions characterized by a modern and sophisticated corporate law system.

Secondly, the theoretical underpinnings of the EMCA are not entirely clear. For example, the Introduction indicates that the aim is to favour harmonisation, but that the EMCA can also promote regulatory competition.

Also, the EMCA claims to be not restricted by European legislation, and therefore to contain also solutions at odds with existing European law when the latter is not optimal. This claim is fair but it must also be observed that, in reality, often the EMCA was drafted with a careful eye aimed at making it compatible with EU law. In addition and not surprisingly, often the solutions offered follow the experience of one or a few Member States, rather than advancing new approaches.

Lastly, stylistically and technically this first draft still requires an attentive fine-tuning for consistency and precision in its language and wording. This is particularly important since one of the purposes of the document is to be a reference for jurisdictions less conversant in corporate law [21].

About the second mentioned phenomenon – the Americanisation of the European Company Law – we can briefly assert that it consists of the tendency to give priority to issues with cross-border reflexes. It may well configurable in an interstate commerce clause for Europe [22, p.3 and next].

Although in the EU we do not have the explicit legal basis for an interstate commerce clause – unlike the USA – we have the principle of subsidiarity and the flexibility clause (art. 352 TFEU). Then, since the finance has no borders, both cross-border transactions and cross-border interest-related finance have moved European legislation (the most significant examples are offered by the numerous directives mentioned earlier) [22, p.7].

Furthermore, the use of soft law instruments has increased so much that it has become a source of law. In fact, in its Action Plan (COM(2003) 284 Final), the European Commission calls for "alternative tools for regulation", in other words alternatives to EU Directives implemented in national company laws. One alternative is "soft law", such as corporate governance codes and other self-regulatory measures.

Consequently, the Commission recommendations are used mostly in corporate governance matter and the EMCA can be considered an instrument of soft law.

9. The attitude to the spontaneous convergence of the regulations: an Italian example

A well-known example of a company that engaged at the same time in a cross-border merger and in regulatory arbitrage is Fiat's combination with U.S. company Chrysler to create Fiat Chrysler Automobiles ('FCA') in 2014: the choice was made to incorporate the resulting company in the Netherlands, one of reasons for that choice being that Fiat's controlling shareholders could take advantage of the absence of a ban on 'loyalty shares' in Dutch company law (unlike in Fiat's incorporation state, Italy, until then) and hence reinforce their grip on the company [23, p.521].

After Centros decision, nevertheless, the preconditions for the development of an active market to attract the formation of companies have never been realised, and indeed, experience has shown that those who could take on the role of European Delaware - England - are well watched from doing so.

In the middle of the year 2000 a lot of continental entrepreneurs, especially German, formed new companies in England to escape the cost of constitution and the minimum capital requirement. Many European states "reacted" by providing special forms of companies with lower constitutional costs and reduced capital. Then, the bubble of pseudo-foreign societies soon deflated,

probably more as a result of the observed cost of maintaining an English company than due to defensive competition [23, p.550].

Instead, there was a form of “defensive” competition between the rules, with regard first of all to the rules on capital and, more recently, on shares with increased voting rights and multiple voting rights.

The discipline, introduced in 2014 in Italy, which allows the issuance of shares with increased voting rights and multiple voting rights, is probably also born as reaction to the transfer to the Netherlands of Fiat’s registered office [23, p.533].

10. The post-Brexit Hamlet-like scenarios

One may wonder whether things may change after Brexit. That could well be the case, if any evidence existed either of interest group resistance to harmonising measures coming predominantly from the UK or of UK interest groups having opposing interests to those prevailing in continental Europe, so that, with the former out of the way, the latter could successfully coalesce to push for a given uniform legislative outcome. Yet, resistance to harmonising measures is definitely not a British-only tradition, as the generalised opposition at the Council level against many of the proposals put forth by the European Commission in the field of shareholder rights exemplifies [24, p.17 and next].

And while one may expect pro-institutional investors, and therefore pro-shareholder pressures, to come more from the UK than from elsewhere, given its comparatively large asset management and insurance industry, continental European dominant shareholders and insiders appear historically to have had little appetite for advocating for an increase in harmonised rules [24, p.28].

Rather, they have opposed EU legislation. It would be surprising if that will no longer be the case in the future.

11. Conclusion

EU company laws are not uniform, despite half a century of harmonisation measures, and will most likely never be. Yet, they do fit together well, if that means that private parties may set up companies that will be recognised as such across the EU to do business anywhere within the EU, reincorporate midstream in a different Member State at reasonable cost (possibly with the exception of the few countries of destination that adopt the real seat doctrine), reorganise their business across EU Member States’ borders without the need for reincorporating (again, with the exception of companies set up in real state doctrine Member States) and do business with companies from other Member States without facing unreasonable company-law related transaction costs [25].

In a less ambitious meaning, thus, the long quest for a harmonised European company law has been successful. More, of course, can be done to make diverse national company laws fit even better together, such as by simplifying the tools for mid-stream re-incorporations, namely the rules on cross-border mergers [26, p.16 and next].

It goes without saying that attempts to make European company laws more uniform and more 'beautiful' will never stop. But it is comforting to think that, if they fail, much has already been achieved in the field of company law that is instrumental to the Treaty's goal of market integration.

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Attilio Altieri. Europeanisation versus Regulatory Competition: The Case of Business Entities

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The article presents the possible definition of the current «European Company Law» situation, overcoming both the model of Europeanisation and, possibly, the model of the Regulatory Competition: coherently, it can be affirmed that the direction taken is towards an «Americanisation» of the company law of Community background. Among the warnings may be the cold reception of the (private) project for a European Model Company Act; the tendency to give priority to issues with

cross-border reflexes (configurable in an interstate commerce clause for Europe); the use of soft law instruments; the attitude to the spontaneous convergence of the regulations (as happened with the Fiat-Chrysler case and the fall of the prohibition of multiple voting shares in Italy); the post-Brexit Hamlet-like scenarios.

Keywords: Europeanisation, Regulatory Competition, Business Entities, company, Brexit.