Student number:

Shareholders' Rights Protection After Brexit: Hic Sunt Leones?

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Submitted in fulfilment of the requirements of the Degree of
Master of Laws (LLM) By Research
University of Glasgow
School of Law
December 2021

Author's declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

28 December 2021, _____

Abstract

In the European Union, the rights of shareholders of listed companies have been strengthened in the last decades, in several instances at the national level, but also by means of EU law. Today, the United Kingdom – the shareholder-centric Member State *par excellence* – is no longer part of the Union. Some authors have claimed that this may lead to a new dominance of the German stakeholder-oriented model in further corporate law harmonisation. Conversely, this dissertation, investigating whether Britain's departure endangers the pathway towards the empowerment of shareholders, concludes that it is likely that the strands of convergence towards higher levels of shareholders' rights will continue to unfold in the long run, unaltered by Brexit. In particular, this dissertation studies the influence of the 'UK benchmark' – a comparative example for lawmakers – on two past patterns of convergence towards higher levels of shareholders' rights in the European Union: on a 'horizontal' level, their autonomous enhancement by Member States, and on a 'vertical' level, their harmonisation promoted by the European Commission. The projection of these trajectories into the aftermath of Brexit allows to assess the likeliness of various scenarios and explore the rationale behind different policy choices related to shareholders' rights.

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Chapter 1: Introduction

1.1 Background

In the wake of the 2016 Brexit referendum, the literature investigated the effects that the withdrawal of the United Kingdom from the European Union could have had on companies. For firms incorporated in Britain – today outside the European Economic Area – the explored implications covered the conversion of *Societates Europaeae* (SEs)[1] and the loss of access to the regulatory passporting[2] and corporate mobility system.[3] The future use of the UK as a restructuring jurisdiction for continental companies attracted the attention of some scholars as well.[4]

Conversely, this dissertation is not based on the study of applicable rules, conflicts of laws or incorporation and real seat theories.[5] Brexit is here studied from the point of view of lawmakers:[6] it is considered as a disruption that will reshape the mutual influence between London and Brussels, and as a fault line between a past of convergence and a future of eventual legislative divergence. Chronologically, this research is carried out at the beginning of this crossroad. From this perspective, the literature explored possible developments for the prospectus regulation,[7] the *Societas Europaea*,[8] and stakeholderism.[9]

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[1] Matthias Lehmann and Dirk Zetzsche, 'Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK' (2016) 27(7) EBLR 999, 1014.

[2] John Armour, 'Brexit and financial services' (2017) 33(S1) OxREP S54. Niamh Moloney, 'Financial services, the EU, and Brexit: an uncertain future for the city?' (2016) 17(S1) GLJ 75, 77. Lehmann and Zetzsche (n 1) 1016-1017.

[3] John Armour and others, 'Brexit and Corporate Citizenship' (2017) 18(2) EBOR 225. Jürgen Basedow, 'BREXIT and business law' (2017) 5(3) China-EU Law 101, 108-109. Peter Böckli and others, 'The consequences of Brexit for companies and company law' (2017) University of Cambridge Faculty of Law Research Paper No. 22/2017, 6. Michael A Schillig, 'Corporate Law after Brexit' (2016) 27(3) KCLJ 431, 436-438.

[4] Schillig (n 3) 438-440. Chris Umfreville and others, 'Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario' (2018) 27(3) IIR 422. Lehmann and Zetzsche (n 1) 1015-1016.

[5] Böckli and others (n 3) 9-17.

[6] See Pavlos Masouros and Thomas Papadopoulos, 'The Impact of Brexit on UK Company Law' (2016) 13(6) ECL 208. Vanessa Knapp, 'UK and EU Company Law after Brexit' (2020) 17(2) ECFR 184, 193-199.

[7] Elizabeth Howell, 'An Analysis of the Prospectus Regime: The EU Reforms and the 'Brexit' Factor' (2018) 15(1) ECFR 69.

[8] Marios Koutsias, 'Exit Britain Enter the Stakeholders: Could Brexit End the Cultural Wars within the European Union Company Law and Give Birth to a Truly "European Company"?' (2019) 30(6) EBLR 881.

[9] Andrew Johnston, 'Company law and corporate governance after Brexit: from short-term disruption to long-term sustainability?' (2020) ETUI Research Paper No. 8/2020.

This dissertation fills the gap on the scenarios related to shareholders' rights, an area of corporate law that, in this respect, has not been examined so far.

1.2 Research question

Hic sunt leones ('here be lions') is a caveat written on ancient maps to indicate unexplored lands suspected to be full of dangers. The aim of this dissertation is to identify the implications of Brexit on the future enhancement, protection, or diminishment of shareholders' rights on both sides of the Channel. In particular, this dissertation investigates whether Britain's departure from the Union could jeopardise the pathway towards the empowerment of shareholders and the preservation of existing rights.

1.3 Thesis overview

This dissertation preliminarily insulates the historical, normative, and economic peculiarities of the British shareholders' rights framework, reviewing a unique combination of original allocation of corporate power, regulatory environment, and market.

Once asserted the characteristics of the 'UK benchmark' with specific regard to the role that shareholders play in the governance of corporations, this dissertation studies its influence on two past patterns of convergence towards higher levels of shareholders' rights in the European Union; the first runs on an 'horizontal' level, representing their autonomous enhancement by Member States; the other runs on a 'vertical' level, representing their harmonisation promoted by the European Commission. A rationalisation of the role of the UK, the continental Member States, the European Commission, the European Parliament, and the Council of the European Union in the convergence that already took place allows to realistically explore various post-Brexit scenarios.

1.4 Scope of the research

In the European Union, the last two decades of company law harmonisation have been

characterised by a particular attention to the specific theme of corporate governance.[10] Since the late 1990s and 2000s, two phenomena have occurred simultaneously. On a 'horizontal' level, national reforms focused not only on boards but also on shareholders empowerment,[11] often anticipating EU law. On a 'vertical' level, the United Kingdom did not show a notable centrifugal force to EU corporate law: it has been argued that the reference model for the top-down work of the European Commission shifted, in the abovementioned years, from the German to the British one, the latter fully embracing shareholder centrism.[12] Thus, the power of shareholders in European companies has undergone changes that ranged from minor adjustments up to considerable jolts to traditional governance structures.

This dissertation focuses on listed companies and retraces the introduction of the rights contained in the Takeover Directive (2004),[13] the Shareholder Rights Directive I (2007)[14] and the Shareholder Rights Directive II (2017).[15] These three instruments are labelled by the European Commission as the subset of EU company law addressing corporate governance issues, and thus the ways in which corporations are managed and controlled.[16] They also represent the product of the last two decades of harmonisation in the field of company law, excluding specific corporate governance rules for banks or investment firms, hence providing an overview of the reforms already concluded that today account for the current state of affairs of convergence.

[10] See Klaus J Hopt, 'Comparative Company Law', 1138, 1153 in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019) on the Commission's 2003 Action Plan (21 May 2003, COM (2003) 284 final). See Klaus J Hopt, 'Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance' (2015) 12(1) NYU JLB 139, on the Commission's 2012 Action Plan (12 December 2012, COM (2012) 740 final).

[11] Luca Enriques and Paolo Volpin, 'Corporate Governance Reforms in Continental Europe' (2007) 21(1) JEP 117, 131-134. Michael Martinek, 'Law and Economics of Corporate Finance in Europe – From Diversity to Convergence and Harmonization' (2008) 2008 JSAfrL 16, 25.

[12] Martin Gelter, 'EU Company Law Harmonization Between Convergence and Varieties of Capitalism', 323 in Harwell Wells (ed), *Research Handbook on the History of Corporate and Company Law* (Edward Elgar Publishing 2018).

[13] Directive 2004/25/EC of 21 April 2004 [2004] OJ L142/12.

[14] Directive 2007/36/EC of 11 July 2007 [2007] OJ L184/17.

[15] Directive (EU) 2017/828 of 17 May 2017 [2017] OJ L132/1. See also the Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 [2018] OJ L223/1.

[16] European Commission, 'Company Law and Corporate Governance', <https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en>, visited on 20 November 2021.

1.5 Methodology

To assess the influence of the 'UK benchmark' at national and EU level, this dissertation validates two hypotheses. According to the first hypothesis, the 'UK benchmark' has been used as a point of reference for shareholder law by continental lawmakers in adaptive and circumscribed legal transplants.

The origin of the rights investigated in this dissertation, such as the right to vote on defence measures during takeovers, on remuneration policies and reports, and on related party transactions, is reconducted to the UK. The introduction of these rights in their actual formulation is easily identifiable, and thus, once asserted that the UK was the first jurisdiction to recognise them, their spread will be considered a contamination among lawmakers. The objective is not to claim as a sterile observation an ill-defined 'UK primacy' over these rights but to reconstruct the rationale behind the convergence towards them, to further project it towards the future. These rights resonate with a particular corporate governance model that accommodates institutional investors, that characterise the UK market in absolute prevalence[17] and influence its corporate environment.[18] Reasonably, continental lawmakers adopt the comparative method to overview other national examples before reforming and modernising their corporate laws to attract investors. Whether normative developments anticipate the spread of minority shareownership (the 'law matters' thesis)[19] or follow it, the abatement of the walls of the concentrated ownership citadel in continental markets calls for the protection of shareholders, and thus explains the spread of these rights.

If validated, this hypothesis proves that the fostering of the shareholders' rights later harmonised by the EU is a phenomenon partly independent from EU law, because a slow convergence towards their introduction was already in place. Therefore, this trajectory can easily continue in the aftermath of Brexit. The validation of this hypothesis fits into the literature on the UK regulation as a comparative example for other lawmakers; it focuses

[17] See Adriana De La Cruz and others, 'Owners of the World's Listed Companies' (2019) OECD Capital Market Series 12.

[18] John Armour and others, 'The Basic Governance Structure: The Interests of Shareholders as a Class', 49, 73 in Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (OUP 2017).

[19] In Rafael La Porta and others, 'Law and Finance' (1998) 106(6) JPE 1113 the concentration of shareownership was defined as an adaptive response to (and a substitute of) poor legal minority protection. Thus, a strong protection was identified as the precondition for stock market development and for the separation of ownership and control.

on influences on Europe rather than on the Commonwealth,[20] and it does so from the perspective of shareholders' rights rather than that of board mechanisms.[21] This hypothesis fits also into the broader literature on the convergence towards the shareholder-centric model.[22]

The second hypothesis focuses on the fostering of shareholders' rights at the EU level; it theorises that in the last twenty years the European Commission – that in the institutional architecture of the EU retains the power to initiate legislation – invariably proposed the enhancement of shareholders' rights configurating them congruently with the 'UK benchmark', an intuitive and homogeneously applicable solution to respond to the instances of shareholders protection. The Commission, representing the interests of the Union, proposed the introduction of rights functional to the integration of the common market and the development of modern capital markets, resonating with a particular corporate governance model. In the subsequent legislative process, the Council and the Parliament – captured by the hindering interests of continental Member States – mostly succeeded in curbing those rights into merely optional rights.

This hypothesis will be validated if the analysis of the Commission's proposals will show a complete or almost complete overlap or congruence with the UK regulation at the time. This would display how the influence of the UK was not internal to the subsequent legislative process, exerted in the Council or Parliament, but prominently involuntary (present at its inception, by imitation, in the Commission's proposals); it follows that this would considerably scale back the assessment of Britain's influence within the following interinstitutional work, meaning the internal influence in the formation of those provisions, which is the channel now cut by Brexit.

If validated, this hypothesis will suggest that the promoter of shareholders' rights within the EU has been the European Commission, that can continue to exercise this role in the

[20] See Brian R Cheffins, 'Corporate Governance Reform: Britain as an Exporter' (2000) 8(1) Hume Papers on Public Policy 10, 11; the 1948 UK Companies Act has been called 'the great mother of Commonwealth companies law' in Cally Jordan, 'An International Survey of Companies Law in the Commonwealth, North America, Asia and Europe' (1998) Department of Trade and Industry. See also John Armour and others, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2009) 6(2) JELS 343, 373 on the UK as the 'parent' system of the common-law.

[21] See Cheffins (n 20) 12-17. The Corporate Governance Codes movement that originated from the Cadbury, Greenbury and Hampel Reports revitalised the world-influence of the UK framework after a 50-year decline.

[22] The cornerstone of this literature is Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89(2) GeoLJ 439.

aftermath of Brexit. This hypothesis combines the observation of the national and economic interests that clash within the EU legislative process with considerations on the use of the comparative method by the European Commission in the formulation of its proposals.

1.6 State of the art

With Brexit, a notable pillar of the varieties of national capitalisms has left the EU.[23] Some authors have then claimed that, in the absence of an influential and fervid promoter of shareholderism such as the UK, a new dominance of the German stakeholder-oriented model in further corporate law harmonisation might be finally forthcoming.[24] Conversely, this dissertation, in assessing whether Britain's departure from the Union jeopardises the pathway towards the empowerment of shareholders, concludes that Brexit in itself will not impact the deep strands of convergence towards higher levels of shareholders' rights.

The next chapter confirms the role of the UK as an involuntary benchmark for corporate governance provisions. In doing so, it integrates the studies on the UK as a first-mover norm-producer, but with specific respect to certain shareholders' rights. It then investigates continental national reforms through a recollection of the legal transplants of shareholders' rights.

Subsequently, the next chapter also confirms the role of the UK as an unintentional influencer of EU law. With regard to this 'vertical' analysis, the pivotal study that adopted this perspective concluded that the UK membership to the Union was irrelevant for the harmonisation in areas related to capital markets,[25] because the UK's influence on EU law – specifically on takeover regulation and accounting standards – was merely indirect: the former, due to its capital markets orientation, represented a comparative example for the

[23] See Irene Lynch-Fannon, *Working Within Two Kinds of Capitalism. Corporate Governance and Employee Stakeholding – US and EC Perspectives* (Hart Publishing 2003).

[24] Johnston (n 9) 3-4 claimed that 'the EU has the opportunity to strike out in a radically different direction'; the author, while acknowledging that '[p]owerful institutional investors will continue to demand shareholder-friendly norms, and much of the shareholder-value thinking in the last two decades has come from the Commission', considered that 'there will no longer be a large Member State strongly insisting on shareholder primacy'. Koutsias (n 8) 882 argued that '[t]he exit of one of the two main pillars of the conflict may pave the way for the dominance of the stakeholder model of corporate governance in the EU'.

[25] Martin Gelter and Alexandra M Reif, 'What is Dead May Never Die: The UK's Influence on EU Company Law' (2017) 40(5) FordhamIntlLJ 1413, 1440.

latter, but abstained from actively promoting the export of its model to the continent.[26] While derailing the projects in which German law was historically influential, the UK became the model for the post-1990s harmonisation period – to which continental jurisdictions were on the brake[27] – because it was seen as a 'paragon of good corporate governance', and not because it was a EU Member that influenced EU law to conform it to its own standard.[28]

Another commentator poignantly highlighted the norm-providing leadership of the UK in the 'bottom-up and learning framework' that characterises the European corporate governance landscape:[29] given its engagement in domestic norm production rather than legal transplantation and borrowing,[30] the author concluded that the influence of its distinctive corporate governance system was not intentioned but benefitted from a first mover advantage.[31]

To support this view, this dissertation first validates it through an in-depth analysis of the legislative process of the Takeover Directive, and then extends it to the rights contained in the Shareholder Rights Directive I and the Shareholder Rights Directive II, thus integrating the literature by encompassing all the provisions on which the hypothesis must be comprehensively tested.

While for the Takeover Directive the anecdotical chronicle of the legislative process plays a role in the reconstruction of the forces that interacted within it, the vast assortment of the interinstitutional and preparatory material related to the more recent Shareholder Rights Directive II allows to granularly chart the forces behind the promotion or the erosion of the right to vote on remuneration policies and reports, and on related party transactions. These provisions are fundamental because they reflect how, of all the corporate governance mechanisms that could have been deployed to protect shareholders, the Commission endorsed an allocation of power to them, coherently with the UK approach on the matter.

Moreover, this dissertation insulates a 'UK benchmark' not referred to a general capital

[26] ibid 1431, 1429, 1438.

[27] ibid 1416.

[28] ibid 1438.

[29] Iris H-Y Chiu, 'Learning from the UK in the Proposed Shareholders' Rights Directive 2014? European Corporate Governance Regulation from a UK Perspective' (2015) 114(2) ZVglRWiss 121, 126.

[30] ibid 127.

[31] ibid 134.

markets orientation, but with specific regard to the role that shareholders play in the governance of corporations, to identify the institutional players that actively exported or imported it.[32] In addition, the contribution of this analysis is to triangulate the position of the three European institutions, differentiating between the role of the Council and the Parliament in the dilution of the rights proposed by the Commission, thus disassembling the idea of a mono-interested and monolithic EU lawmaker. Indeed, this dissertation poses emphasis on the role of the Commission, placing these considerations into a broader recollection of the literature on the use of the comparative method in corporate law directives. In this sense, a part of the following chapter critiques this supra-national institution to the extent that it acted untied from any path dependency.

More broadly, this dissertation adopts the 'vertical' analysis as a complement to the 'horizontal' analysis on the voluntary convergence of continental Member States. Once asserted the role of continental lawmakers and the European Commission in the promotion of shareholders' rights, the aim of this dissertation is to realistically imagine future scenarios by projecting past trajectories into the post-Brexit era; since it is carried out in the aftermath of Brexit, this dissertation can also test whether new developments and recent normative proposals confirm the analysis here conducted.

[32] As distinguished in Mathias M Siems, *Convergence in Shareholder Law* (CUP 2007) 293, '[e]xport is based on the influence of foreign advisers and is often practised by Western countries', while '[w]ith import, the initiative starts from the copying country'.

Chapter 2: The enhancement of shareholders' rights before Brexit

2.1 'Horizontal' influences

The balance of power between shareholders and directors – and supervisory boards in two-tier systems – is rooted in national path dependency and is determined by a multi-layered stratification of factors. These factors include law, regulation, case law, litigation, legal enforcement and effectiveness of the judiciary, corporate governance codes, listing rules, articles of association, ownership concentration, and general business environment. While developing from relatively common origins, corporate laws diverged through time,[33] so that the abovementioned balance of power is today set differently depending on the jurisdiction. At the same time, lawmakers are in continuous comparative influence among each other, and therefore the literature is investigating whether a re-convergence – driven or not by the pressures of the marketplace – is in fact occurring.

The literature has developed indexes to assess and compare the levels of protection that jurisdictions secure to shareholders,[34] and to measure their increase through the years, concluding that an enhancement of shareholders protection in the UK and on the continent has indeed occurred.[35] Considerations against the effort to develop a single governance metric for dispersed and concentrated markets were made as well.[36] The analysis contained in this dissertation is not based on the assumption that the 'UK benchmark' grants the highest level of shareholders protection. The 'UK benchmark' is defined in the next sections as a governance system in which shareholders protection is addressed through shareholders' rights of direct engagement, in strict divergence with the US and continental systems.

It must be noted that jurisdictions can aim at shareholders protection in different ways, not

[33] Siems (n 32) 23 pointed out 'a certain congruency from the outset, followed by a … wave-like development'.

[34] See La Porta and others (n 19). Contra, see the literature cited in Mathias M Siems, 'The leximetric research on shareholder protection', 168, 169-170 in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar Publishing 2015). Priya P Lele and Mathias M Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7(1) JCLS 17, 36.

[35] Lele and Siems (n 34) 31. Mathias M Siems, 'Shareholder Protection Around the World (Leximetric II)' (2008) 33(1) DJCL 111, 122-124. Armour and others (n 20) 371.

[36] Lucian A Bebchuk and Assaf Hamdani, 'The Elusive Quest for Global Governance Standards' (2009) 157(5) UPaLRev 1263.

necessarily envisioning their active role within their companies. Board mechanisms, for instance, aim at preventing damages to shareholders ex ante, and litigation at correcting them ex post. Accounting standards address asymmetric information to enable shareholders to consciously but passively invest or disinvest, and fiduciary duties set the course for value maximisation. Still, shareholders protection can also be reached through the development of their participative role in the governance of their companies. While rules that fall into various formal classifications can nonetheless perform the same function,[37] it is also true that this toolbox of protective mechanisms[38] reflects different economic realities, addressing the conflict of shareholders *vis-à-vis* directors or tackling intra-shareholders agency costs depending on the shareownership concentration present in the market.[39]

Before Brexit, two historically opposed corporate governance models coexisted in the Union.[40] On the one side, in the United Kingdom – where diffused ownership in public companies is common – the corporate power is mainly allocated by the contractual bargaining of shareholders,[41] that frequently partake in crucial decisions within the general meeting, and from which the power of the board derives by delegation.[42] The maximisation of shareholders' value is paramount,[43] and notwithstanding notable attempts,[44] the wall that separates capital and labour never cracked, with unionised workers playing a role outside

[37] Siems (n 34) 171.

[38] See Luca Enriques and others, 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies', 79 in Kraakman and others (n 18).

[39] Wolf-Georg Ringe, 'Changing law and ownership patterns in Germany: corporate governance and the erosion of Deutschland AG', 404, 410 in Hill and Thomas (n 34).

[40] Amit M Sachdeva, 'Regulatory competition in European company law' (2010) 30(2) EJLE 137, 151 nt. 124. Sigurt Vitols, 'Varieties of Corporate Governance: Comparing Germany and the UK', 337 in Peter A Hall and David W Soskice (eds), *Varieties of capitalism: the institutional foundations of comparative advantage* (OUP 2001).

[41] Richard C Nolan, 'Shareholder Rights in Britain' (2006) 7(2) EBOR 549, 551.

[42] Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (CUP 2013) 36. Brian R Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP 2008) 30. Paul L Davies and others, *Gower's Principles of Modern Company Law* (Sweet & Maxwell 2021) para. 3-010.

[43] S. 172(1) Companies Act 2006 ('CA 2006'). While pursuing shareholders' value, directors must have regard to a plethora of other subordinated factors, albeit in the lack of a direct enforcement mechanism. See Elaine Lynch, 'Section 172: a ground-breaking reform of directors' duties, or the 'Emperor's New Clothes'?' (2012) 33(7) Company Lawyer 196. Deryn Fisher, 'The enlightened shareholder: leaving stakeholders in the dark – will section 172 of the Companies Act 2006 make directors consider the impact of their decisions on third parties?' (2009) 20(1) ICCLR 10.

[44] See Johnston (n 9) 3 and Brian R Cheffins, 'The Rise of Corporate Governance in the U.K.: When and Why' (2015) 68(1) CLP 387, 403-404.

the corporate governance structure of corporations.[45] On the other side, in the German two-tier system, board power is institutionalised,[46] employees are internalised within the governance – participating in the supervision of the management – and concentrated ownership is common. Shareholders protection against the blockholder is traditionally achieved with different mechanisms then their direct engagement. If the first system relies on capital markets to finance companies and is characterised by a vibrant market for corporate control that disciplines directors through takeovers, the second is traditionally more bank-centred and entrenched.[47] Moreover, it has been noted that lengthier terms in office, stricter removal rules, and labour directors, all contribute to a greater insulation of German boards from the pressures of shareholders, even compared to other European jurisdictions.[48]

After Brexit, one of this two poles of comparative influences has left the Union.[49] Intuitively, this should impact further corporate law harmonisation at the EU level – that could be shaped in a new and different fashion – more incisively than the 'horizontal' contamination among States in their national reforms. The membership to the Union does not affect the use of the comparative method by lawmakers, that draw from the broader catalogue of corporate laws on the global stage: from this perspective, the EU does not work as a closed system.

The following section insulates the peculiarities of British shareholders' power, role, and protection within the governance structure of their companies, to attribute to the UK and not to a broader 'Anglo-American model' the benchmark for the autonomous 'horizontal' diffusion of the shareholders' rights later harmonised by the EU.

[45] See Paul L Davies and Claire Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33(2) ILJ 121.

[46] Carsten Gerner-Beuerle and Michael A Schillig, *Comparative Company Law* (OUP 2019) 351. See Siems (n 32) 151 on the German 'statutory division of powers'.

[47] Ringe (n 39) 408-410.

[48] Armour and others (n 18) 74. Siems (n 32) 157 compared the reappointment term of one year contained in the Draft Model Articles of Association for Public Companies (Art. 21) and in the UK Combined Code (today, provision 18 of the Corporate Governance Code) with the 5-year term of the German management board (§84(1) AktG), revoked by the supervisory board only for grave cause (§84(3) AktG).

[49] The French and the Nordic systems stand between the two ends. See Manzur Rahman, 'Corporate Governance in the European Union: Firm Nationality and the 'German' Model' (2009) 17(4) Multinatl Bus Rev 77, 80.

2.1.1 The UK as a shareholder-centric jurisdiction

Sir Robert Lowe, introducing the Joint Stock Company Act of 1856, amongst the presentation of the mandatory provisions on the register of shareholders and on the publicity of the balance sheet, stated:

> The clauses as to the management of the company I pass over, because the management we leave to the companies themselves. Having given them a pattern the State leaves them to manage their own affairs and has no desire to force on these little republics any particular constitution.[50]

Referring to self-organisation and sovereignty, the quote conveys the contractual foundation of British corporate law, while acknowledging that this principle could approximate a corporation to a direct democracy as much as to a representative, delegated and hierarchical system depending on the bargaining of its members. Thus, while the laissez-faire legal system of Victorian Britain did not protect outside investors,[51] the poor statutory protection[52] was supported by default provisions for the companies' constitutions.[53] In the context of a primitive separation between ownership and control,[54] corporations were then able to provide in their articles of association levels of shareholders protection comparable to those of modern corporate law.[55]

The market approached the progressive creation of the modern Berle-Means corporation[56] in the last century – later than in the US[57] – in a self-regulatory shareholder-friendly

[50] Robert Lowe, *Hansard*, House of Commons, 1 February 1856.

[51] Gareth Campbell and John D Turner, 'Substitutes for legal protection: corporate governance and dividends in Victorian Britain' (2011) 64(2) Econ Hist Rev 571.

[52] Christopher Coyle and others, 'Law and finance in Britain c.1900' (2019) 26(3) Financ Hist Rev 267.

[53] See Campbell and Turner (n 51) 574.

[54] Graeme G Acheson and others, 'Corporate Ownership and control in Victorian Britain' (2015) 68(3) Econ Hist Rev 911. The wealthy capitalists – as large shareholders – did not own large portions of voting rights in the invested businesses and did not appoint themselves nor their family members as directors. Graeme G Acheson and others, 'Active Controllers or Wealthy Rentiers? Large Shareholders in Victorian Public Companies' (2015) 89(4) Bus Hist Rev 661.

[55] Graeme G Acheson and others, 'Common law and the origin of shareholder protection' (2016) QUCEH Working Paper Series No. 16-04. Graeme G Acheson and others, 'Private contracting, law, and finance' (2019) 32(11) Rev Financ Stud 4156.

[56] Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932).

[57] Brian R Cheffins, 'History and the Global Corporate Governance Revolution: The UK Perspective' (2001) 43(4) Bus Hist 87, 89.

business environment.[58] Legal protection followed, and case law was progressively absorbed by statutory law, up to what is now the longest statute ever approved by the British Parliament, the Companies Act 2006, which also implemented EU law. However, the articles of association still play a crucial role in the allocation of corporate power,[59] and the substantial body of legislation now provided, whether made of mandatory or default rules, acts as a facilitator for shareholders' rights rather than leading to their compression. Conversely, other jurisdictions developed their corporate laws by limiting the creative power of shareholders in the balance of corporate power. By institutionalising original board competences, these jurisdictions sketched the structure of corporations by distributing inalienable roles to different bodies.

Britain's short retail-investors era eventually faded into the re-concentration in institutional investors' hands, leaving in legacy a more complete set of shareholders' rights born out of the agency problem. These rights can now be more easily exercised through coordination.[60] Dispersed shareownership is of course functionally, and inevitably, based on the delegation of competences to a decisional and operational centre of information and expertise: the board. However, the above-outlined historical trajectory helps to explain why the UK jurisdiction easily reallocates some crucial decisions to the general meeting.

From this perspective, a common Anglo-American governance model does not exist.[61] Although the UK and Delaware share dispersed shareownership[62] and a reliance on capital markets to finance companies, the question 'for whom is the corporation managed'[63] must be differentiated from the one on the role that shareholders play within corporate governance.[64] On the latter, the two systems diverge considerably.[65] In Delaware,

[58] Brian R Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30(2) JLS 459, 475. Brian R Cheffins, 'Law, Economics and the UK's System of Corporate Governance: Lessons from History' (2001) 1(1) JCLS 71, 86.

[59] Nolan (n 41).

[60] See Paul L Davies, 'Shareholders in the United Kingdom', 355 in Hill and Thomas (n 34).

[61] Andrew Mullineux, 'Is there an Anglo-American corporate governance model?' (2010) 7(4) JIEEP 437.

[62] See De La Cruz and others (n 17) 18-19.

[63] Edward B Rock, 'For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose' (2021) 76(2) Bus Lawyer 363.

[64] See David Millon, 'Radical Shareholder Primacy' (2013) 10(4) U St Thomas LJ 1013, 1016, referring to Lyman Johnson and David Millon, 'Misreading the Williams Act' (1989) 87(7) MichLRev 1862, 1882-1886, and distinguishing between shareholder primacy considered 'as an injunction to management, defining its duty in relation to the corporation's various stakeholders' – thus instructing 'management to prioritize shareholder interests over competing non-shareholder interests' – and shareholder primacy as 'the view that shareholders should themselves be able to decide important questions regarding their economic interests'. Similarly, see Stephen M Bainbridge, 'Director v. Shareholder Primacy in the Convergence Debate' (2002) 16(1) Transnat'l Law 45, 45-46.

shareholders' value maximisation is mainly pursued through fiduciary duties and litigation before the Court of Chancery while shareholders' power is limited.[66] An original and undelegated board power[67] continues to reduce the role that shareholders play in the governance of US companies,[68] with competences absorbed by directors,[69] possibly as a result of the regulatory competition among States[70] in which Delaware came out victorious.[71]

To insulate the qualitative peculiarity of the UK framework, shareholders' rights can be divided into four categories: 'structural' rights, through which the members organise the corporate structure and participate in vital decisions concerning the corporation; 'operational' rights, through which the members, either indirectly (through the election of directors) or directly (by means of their own decision), imprint a directionality to the business; 'control' rights, whereby members, overseeing self-dealings and conflicts of interest of directors and other shareholders, avoid or limit value extraction; and 'functional' rights, through which shareholders can exercise the other three categories of rights.

As for the 'structural' rights, since the Companies Act does not allocate board

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[65] Bruner (n 42) 28-65. Jennifer G Hill, 'The Rising Tension between Shareholder and Director Power in the Common Law World' (2010) 18(4) Corp Gov 344. Edward B Rock, 'Shareholder Eugenics in the Public Corporation' (2012) 97(4) Corn L Rev 849, 893-895.

[66] Umakanth Varottil, 'Minority Shareholders' Rights, Powers and Duties: The Market for Corporate Influence' (2020) NUS Law Working Paper 2020/006, 8.

[67] Stephen M Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2002) 97(2) NULR 547, 560. Bruner (n 42) 38.

[68] See Daniel Attenborough, 'The Vacuous Concept of Shareholder Voting Rights' (2013) 14(2) EBOR 147, 162-166.

[69] Klaus J Hopt, 'Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules?' (2016) 61(1) Rivista delle Società 13, 20. The difference with the UK approach was outlined in Lucian A Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118(3) HarvLRev 833, 847-850. Contra the comparison: Stephen M Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119(6) HarvLRev 1735, 1744 nt. 51.

[70] This idea was first articulated in William L Cary, 'Federalism and Corporate Law: Reflections Upon Delaware' (1974) 83(4) YaleLJ 663. See Bebchuk (n 69) 874. The political influence of institutional investors or managers can explain the historical divergence between the UK and the US model. See Christopher M Bruner, 'Corporate Governance Reform in a Time of Crisis' (2011) 36(2) JCL 309, 325-329. According to Davies (n 60) 363-364, institutional investors contributed to the development of several shareholder-friendly self-regulations in the UK.

[71] David Charny, 'The politics of corporate convergence', 293, 300 in Jeffrey N Gordon and Mark J Roe (eds), *Convergence and Persistence in Corporate Governance* (CUP 2004) rightly pointed out how the data on abnormal returns after reincorporations in Delaware have 'been interpreted to suggest that these reincorporations represent moves towards shareholder value-enhancing rules', but '[u]nfortunately, the data do not remove the prospect that the jurisdiction of incorporation may provide managerialist rules'.

competences,[72] British shareholders can set – and later alter – the distribution of power. In Delaware, only the board is entitled to propose an amendment to the certificate of incorporation,[73] and the power to change the by-laws is generally extended to the board as well,[74] so that these fundamental rights must be initiated – and thus intermediated – by directors,[75] even though proposal rights would be a more effective instrument in the hands of shareholders than simple approval rights.[76]

In both jurisdictions members vote on mergers,[77] but British shareholders authorise the allotment of new shares[78] and vote to waive their pre-emption rights.[79] In the UK, a resolution can alter the authorised share capital,[80] and authorise market and off-market share repurchases.[81]

Not only British shareholders can elect and remove directors more frequently and easily,[82] but on the Premium Segment of the London Stock Exchange's Main Market they directly approve major transactions,[83] while in Delaware – where managerial competences are all encapsulated in the board[84] – shareholders can veto operations above a much higher quantitative threshold.[85] As provided by the Model Articles, British shareholders adopt the

[72] David Kershaw, *Company Law in Context: texts and materials* (OUP 2012) 210.

[73] S. 242(b) General Delaware Corporation Law ('DGCL'). See Bruner (n 42) 39.

[74] S. 109 DGCL. See Bruner (n 42) 48 and Kershaw (n 72) 215. Conversely, a special resolution by British shareholders, according to the CA 2006, can alter the articles (S. 21), change the name (S. 77), and re-registrate in a different form (90, 97).

[75] D Gordon Smith and others, 'Private Ordering with Shareholder Bylaws' (2011) 80(1) FordhamLRev 125, 132-133.

[76] John G Matsusaka and Oguzhan Ozbas, 'A Theory of Shareholder Approval and Proposal Rights' (2017) 33(2) JLEO 377.

[77] S. 251(c) DGCL and S. 907 CA 2006.

[78] S. 551 CA 2006.

[79] S. 561, 570-571 CA 2006.

[80] S. 617-618, 620, 622, 641 CA 2006.

[81] S. 693-694, 701 CA 2006.

[82] John Armour, 'Shareholder rights' (2020) 36(2) OxREP 314, 318. Lucian A Bebchuk, 'The Myth of the Shareholder Franchise' (2007) 93(3) VaLRev 675, 725. Bruner (n 42) 39. Bruner (n 70) 324. Against the insulation of boards through staggered elections, see Lucian A Bebchuk, 'The Myth that Insulating Boards Serves Long-Term Value' (2013) 113(6) ColumLRev 1637, 1681. The election of directors was described as the 'fundamental shareholder right', alongside the right to sell shares, in Julian Velasco, 'The Fundamental Rights of the Shareholder' (2006) 40(2) UC Davis L Rev 407.

[83] Listing Rule 10.5.1 ('Class 1 transactions', above a 25% threshold).

[84] S. 141(a) DGCL. Kershaw (n 72) 214.

[85] S. 271 DGCL. Kershaw (n 72) 214. Siems (n 32) 166. Klaus J Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' (2011) 59(1) AJCL 1, 47: '[c]odecision rights exist in all corporate laws, but the importance of shareholder voting is widely different depending on whether the general approach is board-centered, as in the United States, or shareholder-centered, as in Great Britain'.

dividend, while boards in Delaware generally retain this power.[86] More importantly, British shareholders, by special resolution, can directly instruct the board to take or abstain from action, if these rights are not waived in the articles.[87]

The UK jurisdiction controls conflicts of interest with ex ante internal procedures rather than ex post review in court. Although the control on conflicted transactions has been progressively absorbed by the board as default solution,[88] shareholders' approval is required for corporate political spending,[89] remuneration policies and reports,[90] related party transactions for companies on Premium Listing,[91] defence measures during a takeover[92] – which can be opportunistically used to entrench directors – and several others specific transactions.[93] Conversely, defence measures such as poison pills are accepted and used in Delaware,[94] consistently with the prerogatives of a centralised management.[95]

A detectable enhancement of shareholders' power has recently taken place in the US, but the increased participation of shareholders[96] has been mainly driven by market forces.[97] Two examples of normative developments are the federal introduction of an advisory vote

[86] Art. 70 Draft Model Articles for Public Companies. In Delaware the board generally decides (S. 170 DGCL). Siems (n 32) 72.

[87] Kershaw (n 72) 193.

[88] See Paul L Davies, 'Related Party Transactions: UK Model', 361 in Luca Enriques and Tobias H Tröger (eds), *The Law and Finance of Related Party Transactions* (CUP 2019).

[89] S. 366 CA 2006. In the US, an ultimate shareholders' decisional power over corporate political spending alongside the procedures of shareholders' democracy was supported by the Supreme Court (see Jay B Kesten, 'Shareholder Political Primacy' (2016) 10(2) Va L & Bus Rev 161), but it remains a principle not yet implemented. The UK provides a comparative benchmark for the US, see Ciara Torres-Spelliscy and Kathy Fogel, 'Shareholder-Authorized Corporate Political Spending in the United Kingdom' (2011) 46(2) USF L Rev 525.

[90] S. 7 Directors' Remuneration Report Regulations 2002, adding S. 241A to CA 1985. The vote on remuneration policies (originally included in the reports) was separately made binding in 2013. S. 79 Enterprise and Regulatory Reform Act 2013, adding S. 439A to CA 2006.

[91] Listing Rule 11.1.7. Before 1993, related party transactions were considered class 4 transactions, see Davies (n 88) 384 nt. 75.

[92] Rule 21 of the City Code on Takeovers and Mergers. The Panel on Takeovers and Mergers operates since 1968. See Bruner (n 70) 324.

[93] S. 188-225 CA 2006. Davies (n 88) 374.

[94] See Lucian A Bebchuk, 'The Case against Board Veto in Corporate Takeovers' (2002) 69(3) UChiLRev 973. Lucian A Bebchuk and Allen Ferrell, 'Federalism and Corporate Law: The Race to Protect Managers from Takeovers' (1999) 99(5) ColumLRev 1168. John Armour and David A Skeel Jr, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation' (2007) 95(6) GeoLJ 1727.

[95] Paul Davies and others, 'Control Transactions', 205, 238-239 in Kraakman and others (n 18).

[96] Robert B Thompson, 'The power of shareholders in the United States', 441, 451 in Hill and Thomas (n 34) noted that 'shareholders vote on more issues than ever before'.

[97] See Armour and others (n 18) 75. The authors concluded that 'the U.S. is nowadays much less of a poster child for managerialist corporate law than in the past'.

on executive compensation[98] and, in Delaware, a 'majority of the minority approval' ('MoM') for related party transactions that, if combined with a board approval by independent directors, shifts the judicial review criterion from the burdensome entire fairness doctrine to the business judgment rule.[99] The voluntary MoM approval is a clear example of how the general corporate governance system is built around a fundamental centrality of ex post remedies rather than on ex ante participative mechanisms, given that a board could voluntarily decide to conclude the conflicted transaction without the approval of shareholders, and if eventually challenged in court, defend it under the more intrusive standard of review. In this sense, these new allocations of corporate power to shareholders clash with the general board-centric spirit of US corporate governance, whilst they are coherent with the UK system.[100]

Lastly, in Britain, a set of rights 'functionally' facilitates the exercise of other shareholders' rights, to secure to the dispersed shareownership base the participation to the meetings. These range from the right to call a meeting at company's expense and without any court involvement,[101] to propose a resolution for the agenda of the annual general meeting and require the company to circulate details of the resolution to all members,[102] or only a statement,[103] and to vote by mail or proxy. Not only in Delaware these rights are frequently limited,[104] but it has been argued that federal proxy rules have contributed to their compression.[105]

The division of shareholders' rights into these four categories does not encompass the ways in which lawmakers can protect shareholders but reconnects to the 'UK benchmark' a corporate governance system in which shareholders are granted rights of direct engagement and that relies on the allocation of corporate power to the general meeting.[106] The next section applies this taxonomy to continental European reforms, to map the

[98] §14A Securities Exchange Act of 1934 added by §951 Dodd-Frank Act of 2010.

[99] Armour (n 82) 319, 328.

[100] See Bruner (n 70).

[101] S. 303, 305 CA 2006. Siems (n 32) 93. The 10% threshold, already contained in S. 368 CA 1985, was lowered to 5% in the implementation of the Shareholder Rights Directive I.

[102] S. 338-340 CA 2006. Previously, S. 376 CA 1985.

[103] S. 314 CA 2006.

[104] Bonnie G Buchanan and others, 'Shareholder Proposal Rules and Practice: Evidence from a Comparison of the United States and United Kingdom' (2012) 49(4) ABLJ 739, 754-758.

[105] Jay R Brown Jr, 'The Proxy Rules and Restrictions on Shareholder Voting Rights' (2016) 47(1) SetonHallLRev 45.

[106] Davies (n 60) 367-369.

autonomous spread of the rights later harmonised by the EU.

2.1.2 Legal transplants of shareholders' rights in continental Europe

Continental jurisdictions legislatively distribute functions to different corporate bodies,[107] but still recognise a certain 'structural' centrality of the general meeting in pivotal decisions,[108] where a super-majority conveys the idea of the assembly as a unitary body composed by members pursuing a common purpose. Moreover, structural decisions that affect the insiders, such as the issue of new shares, generally undergo shareholders' scrutiny. However, in concentrated ownership markets, the board is disciplined by being monitored by one or more insiders that can replace it without coordination costs.[109] Thus, notwithstanding fiduciary duties are due to the shareholders as a whole, there is a binomial relation between the majority and the board; this ensures that the legislative reforms aimed at shifting direct operational power from the latter to the former do not encounter the resistances that would be encountered in directors-friendly Delaware, but result pointless in the absence of a separation between ownership and control. Moreover, in two-tier systems the institutionalised competences of supervisory boards filter a possible reallocation of power.

'Control' rights reforms, aimed at avoiding directors' opportunistic extraction of value, further strengthen the bond between the insiders and the board. Therefore, if not perceived as a disruption of path dependent traditional corporate roles, the introduction of these rights is accepted by the insiders, as showed by the spread of the shareholders' right to vote on remuneration reports and policies.

Control over pay can be exerted with disclosure, internal board mechanisms such as remuneration committees, or a shareholders' vote ('Say on Pay'). Pay is an instrument to limit the agency problem by aligning the interests of agents and principals, but it is also an agency problem in itself to the extent that the pay is set by the agents, therefore

[107] Sofie Cools, 'The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers' (2005) 30(3) DJCL 697, 745. Some space for an allocation of power by default residues on the continent (ibid 739), while the enabling character of Delaware law results in board empowerment (ibid 738-739).

[108] ibid 740-741.

[109] It should be however noted that in two-tier systems supervisory boards intermediate between the general meeting and the management board by electing and monitoring the latter.

representing a self-dealing opportunity to extract shareholders' value.[110] In widely-held companies, both aspects are intensified. In a progressive reallocation of direct control to shareholders, the UK was the first jurisdiction to introduce a vote on remuneration reports and policies in 2002.[111]

The UK example was followed by the Netherlands in 2004,[112] Sweden in 2006,[113] Denmark, Norway and Finland in 2007,[114] Italy[115] and Belgium in 2010,[116] and Spain in 2011.[117] In Germany, since 2009, companies could voluntarily submit the remuneration policies of the management to an advisory vote.[118] In France, after a nonbinding vote on policies was introduced in soft law in 2013,[119] a reform in 2016 drawn a strict system of mandatory (and yearly) approval of reports and policies.[120]

Nevertheless, since concentrated ownership determines an agency problem between majority and minority shareholders, 'control' rights, if framed as rights of the minority to constrain the opportunistic behaviours of the majority, transform the general meeting in an arena for horizontal conflicts. In parallel, shareholders protection is crucial in the development of capital markets capable of attracting equity, and the continent has gone

[110] Christoph Van der Elst and Anne Lafarre, 'Article 9A and 9B: Say on Pay', 250, 254-255 in Hanne S Birkmose and Konstantinos Sergakis (eds), *The Shareholder Rights Directive II – A Commentary* (Edward Elgar Publishing 2021), citing Lucian A Bebchuk and Jesse M Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (HUP 2004). See also Rüdiger Fahlenbrach, 'Shareholder Rights, Boards, and CEO Compensation' (2009) 13(1) RF 81.

[111] Directors' Remuneration Report Regulations 2002 (n 90).

[112] Art. 2:135(1) Dutch Civil Code introduced a vote on remuneration policies. Randall S Thomas and Christoph Van der Elst, 'Say on Pay around the World' (2015) 92(3) Wash U L Rev 653, 701-703.

[113] Chapter 7(61) Companies Act 2005. See Thomas and Van der Elst (n 112) 695-696.

[114] Fabrizio Ferri and Robert F Göx, 'Executive Compensation, Corporate Governance, and Say on Pay' (2018) 12(1) Found Trends Account 1, 61.

[115] Leg. Decree No. 259/2010 introduced a vote on remuneration policies by adding Art. 123-ter to the Consolidated Financial Services Act.

[116] Art. 3 Law of 6 April 2010 added §2-3 to Art. 96 BCC. Thomas and Van der Elst (n 112) 676-677.

[117] Law 2/2011 of 4 March. The regime was later strengthened transforming the nonbinding vote on policies into a binding one with Art. 58 Law 31/2014 of 3 December, that added Art. 529novodecies to the Corporate Enterprises Act.

[118] Art. 1 VorstAG, adding para. 4 to §120 AktG. Thomas and Van der Elst (n 112) 689-690.

[119] §24.3 Corporate Governance Code (2013). Thomas and Van der Elst (n 112) 683.

[120] Art. 161 Law No. 2016-1691 ('Sapin II Law'), amending the Commercial Code. Alain Pietrancosta, 'Say on Pay: The New French Legal Regime in Light of the Shareholders' Rights Directive II' (2017) 3 RTDF 105.

through decades of expansion of shareownership.[121] For this reason, investors can find it harder to push for shareholders' rights reforms if these rights are not exercised by the general meeting controlled by the insiders but directly by the minority. In these cases, continental jurisdictions can address the instances of shareholders protection in an easier way by developing mechanisms that do not necessarily involve the direct engagement of shareholders.

In this sense, while the UK Listing Rules mandate a MoM approval of related party transactions, continental jurisdictions, when freely delineating their ex ante approval regime, did not introduce the shareholders' approval as primary solution, preferring board mechanisms. In France, the rejection from disinterested shareholders in the ratification of the transactions does not impact on their validity, being relevant only for the purposes of a subsequent dispute.[122] In the 2010 Italian regulation, shareholders' approval is merely optional: companies' procedures can request it to overcome the negative opinion of a commission of independent directors.[123] Similarly, the Belgian regime relies on committees of independent directors.[124]

The vote on defence measures during takeovers sits at the crossroad between a right against the opportunistic behaviour of the directors, and a right to retain structural decisions. An open approach in the UK is complementary to dispersed ownership, where pressures in the market for corporate control balance the costs for coordination; on the continent, defence measures can be used by insiders to barricade the company.

The literature has outlined the convergence towards the UK system.[125] The distinctive Rule

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[121] Germany, for instance, underwent a significant spread of shareownership in the 1990s. See Marc Goergen and others, 'Is the German system of corporate governance converging towards the Anglo-American model?' (2008) 12(1) JMG 37, 41. See also Ulrich Jürgens and Joachim Rupp, 'The German system of corporate governance: Characteristics and changes' (2002) WZB Discussion Paper No. FS II 02-203. On the dilution of traditional German shareownership and the rise of institutional investors, see Jeffrey N Gordon, 'Pathways to Corporate Convergence – Two Steps on the Road to Shareholder Capitalism in Germany' (1999) 5(2) CJEL 219. See also Ringe (n 39).

[122] Artt. L225-40 and L225-41 Commercial Code. Previously, Artt. 103-104 Law No. 66-537. Geneviève Helleringer, 'Related Party Transactions in France: A Critical Assessment', 400, 408 in Enriques and Tröger (n 88).

[123] Artt. 8(2) and 11(3) CONSOB Regulation No. 17221 of 12 March 2010.

[124] Art. 524 BCC, today 7:97 CSA. Christoph Van der Elst, 'The Belgian Struggle for Corporate Governance Improvements' (2008) ECGI Law Working Paper No. 114/2008, 9. Christoph Van der Elst, 'Empowering the Audit Committee and the Auditor in Related Party Transactions' (2016) ECGI Law Working Paper No. 318/2016, 6.

[125] Marc Goergen and others, 'Corporate Governance Convergence: Evidence from Takeover Regulation Reforms in Europe' (2005) 21(2) OxREP 243.

21 of the City Code on Takeovers and Mergers – a self-regulatory by-product of the Takeover Panel – requires shareholders' approval to waive the directors' duties of non-frustration. The vote on defence measures was imported in Italy in 1998,[126] in Portugal in 1999,[127] and in France in 2002.[128] In Spain, a passivity rule without the shareholders' vote was introduced in 1991,[129] and in 2001 a general passivity rule was introduced in Germany.[130] Moreover, an autonomous convergence towards the mandatory bid rule can also be detected.[131] The rule protects shareholders by limiting the premium of the insiders, but at the same time it does not involve their direct engagement, only their disinvestment. The British Rule 9 model was adapted and adopted by Belgium in 1989,[132] Spain in 1991,[133] France in 1992,[134] Italy in 1998,[135] Portugal in 1999,[136] and Germany in 2001.[137] Moreover, the Austrian Takeover Act of 1998 was modelled on the City Code,[138] and so was the Swedish Takeover Recommendation of 1971,[139] albeit without a mandatory bid rule, later contained in the Recommendation of 1999.[140]

It can be concluded that the instances of shareholders protection were thus addressed

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[126] Art. 104 Consolidated Financial Services Act. Previously, Law No. 149/1992 mandated a strict passivity rule.

[127] Art. 182(3)(b) Securities Code. Martim Krupenski, 'Portugal', 330, 343 in Dirk Van Gerven (ed), *Common Legal Framework for Takeover Bids in Europe* (CUP 2008 vol 1).

[128] Rule 4 COB Regulation No. 2002-04. See also Art. L233-32 Commercial Code as introduced by Law No. 2006-387.

[129] Art. 14 Royal Decree 1197/1991.

[130] Securities Acquisition and Takeover Act ('WpÜG'). An 18-month authorisation of defence measures by shareholders was alternative to the approval by the supervisory board.

[131] According to Armour and others (n 20) 372, the proliferation of mandatory bid rules in the period 1995-2005 reflected the influence of the UK approach to shareholders protection. This alignment with British practice can be explained by the fact that the mandatory bid rule can entrench companies (ibid 375, citing Marco Ventoruzzo, 'Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe' (2008) 11(1) U Pa J Bus L 135).

[132] Artt. 3 and 41 Royal Decree of 8 November 1989. Mischael Modrikamen, 'New Rules Governing Takeover Bids in Belgium' (1990) 18(2) Int'l Bus Law 59, 60-61.

[133] Art. 1 Royal Decree 1197/1991. Partial takeover bids were mandated in accordance with the exceeding of different thresholds. Carlos Paredes Galego and Dámaso Riaño López, 'Spain', 378, 386 in Van Gerven (n 127).

[134] Law No. 89-531. The mandatory bid originally covered only 2/3 of the voting capital but was extended to all shares on 18 March 1992.

[135] Art. 106 Consolidated Financial Services Act.

[136] Art. 187(1) Securities Code. Krupenski (n 127) 335-336.

[137] WpÜG (n 130).

[138] Florian Kohl and Thomas Berghammer, 'Austria', 73, 74 in Van Gerven (n 127).

[139] Rolf Skog and Erik Sjöman, 'No Rule, Just Exemptions? Mandatory Bids in Sweden and the EU' (2014) 11(3) ECFR 393, 395.

[140] ibid.

through circumscribed legal transplants, disputed between the insiders interested in retaining control,[141] and the necessity to open up companies to equity. Similarly, continental reforms promoted 'functional' shareholders' rights by lowering thresholds and breaking down obstacles for an active and disintermediated participation in general meetings.[142]

The autonomous spread of the shareholders' rights investigated in this section anticipated EU law, and proves that several national reforms enhanced shareholders' power, resonating with a 'UK benchmark' that is characterised by the pursuit of shareholders protection through the allocation of decisions to the general meeting. In particular, the UK Say on Pay spread inasmuch a right of the general meeting that tightens the control over directors, an already strong bond in concentrated ownership markets. The Rules 9 and 21 of the City Code were also imported by continental lawmakers with circumscribed legal transplants, in contraposition to the interest of the insiders to entrench companies and decide when to sell without a takeover on the minority.

At the same time, as previously noted, shareholders protection can be achieved in different ways. Indeed, if board mechanisms in dispersed markets are complementary to costly shareholders' coordination and thus partly substitute their monitoring, in concentrated markets, where blockholders can more easily discipline directors, board mechanisms can substitute the direct engagement of the minority. The UK MoM approval of related party transactions for companies on the Premium Segment – that relies on the vote of unrelated shareholders to control conflicts of interest – did not spread 'horizontally'; alternative procedures were developed to protect the minority without subtracting decision-making power from the insiders and giving it to the minority itself.

Four considerations can be made to conclude the study of this 'horizontal' convergence. First, it should be noted that some lawmakers, while legal transplanting the 'UK benchmark', eventually surpassed it by further strengthening shareholders' role. The Dutch Say on Pay introduced in 2004[143] is a notable example, anticipating its binding character in a jurisdiction that seldom requires the direct engagement of shareholders, being traditionally inclined to board mechanisms. Second, autonomous legal transplants of

[141] Charny (n 71) 298-299 considered that controlling shareholders may prefer sub-optimal rules about capital structure to extract benefits for themselves.

[142] Enriques and Volpin (n 11) 132.

[143] Art. 2:135(1) Dutch Civil Code (n 112).

shareholders' rights allow lawmakers to adapt their perimeter, role in more complex approval procedures, and frequency, congruently with shareownership concentration and path dependency. Third, politics can play a role in this process of convergence. For instance, although pay is a corporate law issue insofar it represents an agency problem, public outrage had a role in the strict French reform.[144] Fourth, pending EU harmonisation can accelerate the convergence.[145] Germany approved the takeover reform just before the approval of the Takeover Directive, and the French Say on Pay reform came just before the approval of the Shareholder Rights Directive II.[146] Partly or totally overlapping with this process of convergence, the European Commission's proposals, which as showed in the next sections were also templated on the 'UK benchmark', were thus casting a shadow on continental lawmakers.[147] Conversely, pending Commission's proposals could also, in some cases, slow down the convergence: lawmakers might find it rational to wait for the approval of EU law instead of engaging in national reforms.[148] In any case, the 'horizontal' convergence shall not be seen as separate process from EU harmonisation, but in constant mutual influence with the latter.

2.2 'Vertical' influences: shareholders' rights at the EU level

Alongside the 'horizontal' dimension of the analysis conducted above, a 'vertical' dimension must be here introduced. Indeed, like on a Cartesian plane, the development of shareholders' rights has also progressed on a second axis; as noted by a scholar, Europe is a 'remarkable laboratory for the study of multilevel and multipolar [corporate] law-making in a politically and culturally contested arena',[149] insofar the European Union, as a supra-national organisation, consistently absorbed legislative competence from Member States in

[144] See Pietrancosta (n 120) 106. Thomas and Van der Elst (n 112) 720-726 expressed this argument by noting that alongside the increased ownership by institutional investors, social intolerance of income inequality and politics can explain the adoption of the Say on Pay. Similarly, for the US, see Fabrizio Ferri, 'Say on pay', 319, 321 in Hill and Thomas (n 34).

[145] Soft law, albeit nonbinding for Member States, can also contribute to the convergence, as in the case of the European Commission's Recommendations on Say on Pay. Recommendation 2004/913/EC of 14 December 2004 [2004] OJ L385/55. Recommendation 2009/385/EC of 30 April 2009 [2009] OJ L120/28. For example, the Italian Leg. Decree No. 259/2010 explicitly implemented the Recommendations.

[146] See Pietrancosta (n 120) 106.

[147] In this sense, on the introduction of the mandatory bid rule in Sweden, see Skog and Sjöman (n 139) 395-396.

[148] For instance, on Finland's takeover law, see Thomas Williams, 'Financial Downturn Tests Nordic Takeover Law' (2003) 22(3) IFLR 30, 34.

[149] Peer Zumbansen, 'Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law' (2007) 8(4) EBOR 467, 473.

the area of corporate law.

The audacious enhancement of common standards at the EU level prevented a possible development of infra-State regulatory competition[150] that could have determined a decline towards managerial-oriented national corporate laws. After *Centros* (1999)[151] overcame the real seat doctrine, the dam of foreign incorporations broke, flooding the European landscape with a renewed freedom of establishment. Although scholars noted that no European Delaware was in sight,[152] the coincidental developments of further corporate law harmonisation, in sharp divergence with what has been accomplished at the federal level in the United States, created a common playing field that now makes a degradation of corporate laws towards managerialism unplausible.

In this multi-level system,[153] the enhancement of shareholders' rights played a twofold function. First, by breaking legal and material barriers to the vote and participation to the general meetings, the enhancement of shareholders' rights facilitated the ownership of foreign shares, and therefore the cross-border mobility of capitals. The restatement of the link between ownership and rights does have the positive effect of advancing the position of the shareholders within the power structure of the company. In the United States, for instance, the recognition of rights 'functional' to voting and participation through federal proxy rules is one of the few areas in which the federal government and its apparatus (the Securities and Exchange Commission) stretched their shadows over State laws. Second, the enhancement of shareholders' rights has been a substantial feature of the optimal corporate governance model promoted by the European Commission, that resonated with universal paradigms and trends of convergence, as showed by the next sections.

The European Commission, in all the corporate governance directives the European Union eventually adopted, originally proposed to mandate shareholders' rights rather than other corporate governance mechanisms. Towering over a variety of national models and acting as a norm-importer, the Commission picked the shareholder-centric legal solutions. The legislative process subsequent to the Commission's proposals was templated by the pressures from continental Member States and interest groups, and watered-down the

[150] See Gelter and Reif (n 25) 1414-1415.

[151] Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459.

[152] Tobias H Tröger, 'Choice of Jurisdiction in European Corporate Law – Perspectives of European Corporate Governance' (2005) 6(1) EBOR 3.

[153] See Krešimir Piršl, 'Trends, Developments, and Mutual Influences between United States Corporate Law(s) and European Community Company Law(s)' (2008) 14(2) CJEL 277.

proposed rights. The assessment of how the Commission, the UK and the continental Member States interacted within the EU legislative process to foster or curb the rights of shareholders allows to reflect on the implications of Brexit from the perspective of the European legislative technique.

2.2.1 The Takeover Directive

The legislative procedure of the Takeover Directive, conceived in the 1985 White Paper as an instrument to complete the integration of the common market,[154] followed two failed harmonisation projects in the field of corporate governance. Indeed, in 1972 the European Commission proposed a Fifth Directive on company law to extend the German dual board system – characterised by co-determination – to all Member States.[155] The proposal was opposed by the United Kingdom,[156] traditionally a one-tier board system, that became Member of the European Economic Community on January 1st, 1973. After being diluted in 1983,[157] 1990,[158] and 1991,[159] it was withdrawn in 2001 and is now a 'prominent monument in a virtual museum of defunct company law harmonisation initiatives'.[160] The 1984 draft proposal for a Ninth Council Directive on corporate groups[161] was also inspired by German law and eventually dropped,[162] after a consultation revealed how 'the business sector viewed it as too cumbersome and too inflexible'.[163] Similarly, the harmonisation in the broader area of company law was also undertaken using the same benchmarking approach: the 1970 proposal for a Council Regulation embodying a Statute for European Companies,[164] explicitly aimed at encouraging employees' participation in corporate

[154] White Paper from the Commission to the European Council (28-29 June 1985, COM (1985) 310 final) 29.

[155] Proposal for a Fifth Directive [1972] OJ C131/49.

[156] See Gelter (n 12) 336.

[157] Amended proposal for a Fifth Directive [1983] OJ C240/2. See Daniel T Murphy, 'The Amended Proposal for a Fifth Company Law Directive – Nihil Novum' (1985) 7(2) HousJIntlL 215.

[158] Second amendment to the proposal for a Fifth Council Directive [1991] OJ C7/4.

[159] Third amendment to the proposal for a Fifth Council Directive [1991] OJ C321/9.

[160] Koutsias (n 8) 902.

[161] See Klaus Böhlhoff and Julius Budde, 'Company Groups – The ECC Proposal for a Ninth Directive in the light of the Legal situation in the Federal Republic of Germany' (1984) 6(2) J Comp Bus & Cap Market L 163.

[162] Gelter (n 12) 336.

[163] 2003 Action Plan (n 10) 18 nt. 21.

[164] Proposal for a Council Regulation embodying a Statute for the European Company [1970] OJ C124/1.

governance, was templated on the German model.[165] A flexible corporate form for the *Societas Europaea*, without co-determination, was eventually introduced only 31 years later.[166]

Contrariwise, the 1989 Commission's proposal for a directive on takeover bids[167] was templated on the British City Code on Takeovers and Mergers, as outlined in this section. Notwithstanding the fierce resistance of continental Member States, a diluted version of the Directive was approved in 2004. Thus, besides being the first corporate governance directive approved by the EU, the Takeover Directive has a double relevance for the purposes of this analysis. First, its roots date back to a document – the 1989 proposal – that represented a preliminary shift in the model adopted by the European Commission, marking a line between the pre-1990s period of German-oriented corporate governance proposals and the post-1990s British-oriented period. Second, its tortuous legislative procedure culminated in an approval that overlapped with the harmonisation cycle that originated from the 2003 Action Plan, thus reinforcing the post-2000s period as compactly and homogeneously shareholder centric.

The influence of the 'UK benchmark' on the Takeover Directive can be traced back to its inception. Commercial Law Professor Robert Pennington, in drafting a proposal for a directive on takeover bids in his 1974 Report to the European Commission, used the City Code as blueprint.[168] Building on this base, the European Commission endeavoured to utilise the bearing beams of the UK framework, namely the shareholders' approval of defence measures and the mandatory bid rule, as a picklock to open up a market for corporate control in the entrenched continental Europe.

A shift in the normative technique occurred between the 1989 and the 1996 proposal:[169] after the failed attempt to introduce an elaborate and comprehensive set of rules, the

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[165] Michael Gold and Sandra Schwimbersky, 'The European Company Statute: Implications for Industrial Relations in the European Union' (2008) 14(1) EJIR 46, 49. Joseph A McCahery and Erik P M Vermeulen, 'Does the European Company Prevent the 'Delaware Effect'?' (2005) 11(6) ELJ 785, 797.

[166] Gelter (n 12) 336. Council Regulation (EC) No. 2157/2001 of 8 October 2001 [2001] OJ L294/1.

[167] Proposal for a Thirteenth Council Directive [1989] OJ C64/8.

[168] Blanaid Clarke, 'The role of employees in the Takeover Bids Directive', 33, 34 in Jan Cremers and Sigurt Vitols (eds), *Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive* (ETUI 2016). Jonathan Mukwiri, 'The End of History for the Board Neutrality Rule in the EU' (2020) 21(2) EBOR 253, 261. Peter O Mülbert and Max Birke, 'In Defense of Passivity – on the Proper Role of a Target's Management in Response to a Hostile Tender Offer' (2000) 1(3) EBOR 445, 446.

[169] Proposal for a 13th European Parliament and Council Directive [1996] OJ C162/5.

Commission proposed a 'framework directive', shorter and less detailed.[170] This explains the lack of 'general principles' in the 1989 document, but also allows to note how the Commission, in drafting a principles-based proposal several years later, drew once again from the City Code. This suggests that the influence of the 'UK benchmark' on the Commission was not merely intermediated by the Pennington Report: on the contrary, the comparative analysis between the City Code and the Commission's proposals reiterated in 1996 and 2002[171] shows an almost literal overlap in the general principles concerning the treatment of shareholders, their right to information, the directors' duty to act in their interest, and the prevention of false markets.[172]

The adoption of the 'UK benchmark' by the Commission led to what has been described as a 'clash of capitalisms'[173] that resulted in a long record of political compromises, to the point that the Directive 'became an end in itself'.[174] The consequences of the arm wrestling with Member States can be assessed by comparing the final diluted normative outcome to the initial Commission's stance.[175] The positions made explicit in the interinstitutional work and reflected in the final flexible text of the Directive illustrate how the forced – and therefore disruptive – convergence towards the UK system promoted by the Commission caused notable friction.

The national interests that curbed the provision on the shareholders' approval of defence measures are well documented: on the wake of Vodafone's takeover of Mannesmann (1999), Volkswagen and BASF engaged in intensive lobbying to persuade Germany to boycott the Directive.[176] With reference to the mandatory bid rule, the Recommendation for

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[170] Rolf Skog, 'The Takeover Directive – an endless Saga?' (2002) 13(4) EBLR 301, 303.

[171] Proposal for a Directive on takeover bids [2003] OJ C45E/1.

[172] Confront Art. 5.1(a) of the 1996 proposal and Art. 3.1(a) of the 2002 proposal with General Principle ('GP') 1 of the 1985 City Code; Art. 5.1(b) (1996) and 3.1(b) (2002) with GP 4; Art. 5.1(c) (1996) and Art. 3.1(c) (2002) with GP 9; Art. 5.1(d) (1996) and Art. 3.1(d) (2002) with GP 6.

[173] Helen Callaghan and Martin Höpner, 'European Integration and the Clash of Capitalisms: Political Cleavages over Takeover Liberalization' (2005) 3(3) CEP 307. Ben Clift, 'The Second Time as Farce? The EU Takeover Directive, the Clash of Capitalisms and the Hamstrung Harmonization of European (and French) Corporate Governance' (2009) 47(1) JCMS 55.

[174] Beate Sjåfjell, 'Political Path Dependency in Practice: The Takeover Directive' (2008) 27(1) Yearb Eur 387, 401.

[175] The shareholders' approval of defence measures contained in the 1989 proposal and 1990 amended proposal [1990] OJ C240/77 was confirmed in the 1996 proposal and 1997 amended proposal [1997] OJ C378/10, and in the 2002 proposal, but it was made optional in the final text. Conversely, the mandatory bid rule – contained in the 1989 proposal and 1990 amendment, in the 2002 proposal, and in the final text – was proposed as optional in 1996 and 1997.

[176] Skog (n 170) 308. Initially, the Council's 'common position' was obstructed by Spain for political reasons linked to Gibraltar sovereignty, causing a stalemate (ibid 304).

the Parliament's second reading recognised that, with most of the takeovers taking place in the United Kingdom, it was reasonable 'to take these tried and tested rules as a model'.[177] The non-frustration rule, however, was accused of diminishing 'the position of European companies compared with American companies'.[178] Therefore, the Parliament's opinion on second reading twisted the Council's 'common position', reached after exhausting negotiations, to Commissioner Bolkestein's disappointment.[179] During the subsequent conciliation process between Parliament and Council, Germany dropped out of the Council's 'common position', opposing the proposed shareholders' right to approve defence measures.[180] Failing to stop the Directive in the Council, Germany sank it during the parliamentary ratification of the conciliation result, with a 273-273 vote.[181] MEP Theo Bouwman commented: '[t]he vote against the directive on mergers and takeovers is a clear sign that we are developing a European social policy and not an Anglo-Saxon one. The European Parliament today defeated a hostile take-over bid for this genuine social model'.[182]

The 2002 Report of the Winter Group revitalised the project for a directive on takeovers building on two solid principles: 'shareholder decision-making' and 'proportionality between risk-bearing capital and control'.[183] As outlined above, the first principle, namely the allocation to the shareholders of a vote on defence measures, was the dividing issue behind the previous failed attempt. The second, albeit not contained in the City Code, well resonated with the 'one-share, one-vote' philosophy followed in the UK. Thus, both the Report and the 2002 Commission's proposal, besides the never abandoned shareholders' vote on defence measures, promoted a new 'break-through rule', targeting multiple voting shares typical of Nordic countries.[184] In Germany, although the principle of equivalency between shareownership and control could also be violated with non-voting shares,[185]

[177] Committee on Legal Affairs and the Internal Market, Recommendation for second reading, 29 November 2000, FINAL A5-0368/2000, 20.

[178] ibid 21.

[179] Andrew Osborn, 'MEPs act to restrict takeovers: 'Poison pill' move attacked' *The Guardian* (14 December 2000) 29.

[180] Skog (n 170) 309.

[181] ibid 310.

[182] Euractiv, 'MEPs reject compromise on takeover directive' (5 July 2001).

[183] Jaap Winter and others, 'Report of the High Level Group of Company Law Experts on Issue Related to Takeover Bids' (10 January 2002) 2-3.

[184] See Rolf Skog, 'The European Union's Proposed Takeover Directive, the "Breakthrough" Rule and the Swedish System of Dual Class Common Stock' (2004) 45 Sc.St.L. 293.

[185] Marc Goergen and Luc Renneboog, 'Why Are the Levels of Control (So) Different in German and U.K. Companies? Evidence from Initial Public Offerings' (2003) 19(1) JLEO 141, 149, 152.

multiple voting shares were banned since 1998.[186] This means that the Commission, in its campaign for shareholders' rights, reproposed not only the same rule that caused the failure of the previous proposal, but also a rule 'indigestible' for other countries, especially for Sweden – although explicitly abstaining from targeting other continental control structures such as pyramid structures.[187] After the lobbying of the Wallenberg family, the Council and the Parliament (whose rapporteur was German MEP Klaus-Heiner Lehne as for the previous failed directive) agreed to a compromise that made both the 'passivity rule' and the 'break-through rule' merely optional for Member States.[188]

The analysis just conducted showed that the European Commission used the UK regulation as a benchmark to propose the implementation of shareholders' rights functional to the integration of the common market. The Commission's efforts were directed at actively importing the 'UK benchmark' to impose a shareholder-centric takeover regime on the continent. Against the Commission's position, continental Member States halted the implementation of those rights, curbing them into optional provisions, or directly rejecting the proposals in the impossibility of reaching consensus.

In this process, the United Kingdom could have played three different roles: an active engagement in the Council to defend the Commission's position and expand the rights to continental Europe; an apathetic disengagement to the process; or a braking force against the Commission's proposal, like the other States. As a matter of fact, despite the 1989 proposal was heavily inspired by the City Code and did not have any parallels on the continent, the first resistances to the document came exactly from the UK, that 'feared it would have to abandon its self-regulation in favour of legislation',[189] as well as a possible increase in litigation.[190] Notably, in its 1996-1997 Report, the City Takeover Panel stated:

> … the Panel gave evidence to a House of Lords Select Committee concerning the revised draft Takeover Directive … The Commission accepted that the system in the United Kingdom served as its model and asserted that it had never been the Commission's intention to change this system and indeed that a

[186] Enriques and Volpin (n 11) 132. §12(2) AktG.

[187] Winter and others (n 183) 6. Sjåfjell (n 174) 390.

[188] André Nilsen, 'The EU Takeover Directive and the Competitiveness of European Industry' (2004) OCGG Economy Analysis No. 1, 4-5.

[189] Skog (n 170) 303.

[190] Blanaid Clarke, 'Takeover Regulation: Through the Regulatory Looking Glass' (2007) 8(4) GLJ 381, 411. Caroline O'Driscoll, 'Now Brussels Wants a Job in the City' *The Spectator* (28 September 1996) 9. Tim Jenkinson and Colin Mayer, 'The Assessment: Corporate Governance and Corporate Control' (1992) 8(3) OxREP 1, 2.

> subsidiary purpose had been to leave it, if possible, completely intact. … The Committee ended by saying "we do not believe that there should be a Directive. We reiterate the view expressed by the Committee in 1989 that the Government should strive to protect the position of the Code and the Panel." … The Committee was not satisfied that the Directive would guarantee adequate protection of minority shareholders. There might, however, be a risk of increased litigation and, furthermore, being subject to the Directive and interpretative rulings of the European Court of Justice, the Panel might not be able to apply the Code with sufficient certainty and flexibility.

Moreover, the continental pressures manifested in the Council and in the European Parliament, while amending the Commission's proposals, progressively contributed to the enhancement of employees' protection in the drafted rules,[191] providing another motive for the UK's resistance to the Directive.[192]

As for the export of the 'UK benchmark' to the continent by means of EU law, City lobbyist did not engage in the promotion of the Commission's position, being complacent about the Directive's success or failure, since they did not see how the legislation would have changed the UK regulation already in place.[193] The overseas expansion of its approach had so little significance for the UK that it has been claimed that the British government actually helped Germany to strip the proposed directive in return to Germany's help in fighting the Commission's proposals on temporary workers' rights.[194]

To conclude, the comparative analysis between the City Code and the proposals has showed that the influence of the 'UK benchmark' on the Commission was prominently unintentional and endured throughout the history of the Directive's legislative process. Stemming from a fundamental shareholder-centric approach envisioned by the Commission and harshly contrasted by continental Member States, the 'UK benchmark' represented the inspiration for the top-down approach of the former. Retracing the role of the UK has casted light on how the adoption of its model by the Commission did not

[191] The 1989 proposal adopted the same light touch on employees' protection (Artt. 10.1(l) and 19) of the City Code (Rules 24.1 and 25.2 of the 1985 version). The 1990 amended proposal increased their protection (Artt. 10.1(l), 10.5 and 19). Similarly, the 1996 proposal adopted a light touch (Art. 6.3), and the 1997 amended proposal considerably shifted towards employees' protection (Artt. 6.1, 6.2, 6.3, 7.2), even mentioning the employment in the general principles, in Art. 5.1(c). The Parliamentary Committee (n 177) further strengthened workers' position in Artt. 3.1(b), 3.1(c), 6.3(h), 6.4, 9.1(b). The 2002 proposal showed the signs of these pressures (Artt. 3.1(b), 6.1, 6.2, 6.3(h), 8.2, 9.5, 13).

[192] Clarke (n 190) 391-394.

[193] Dan Dombey, 'Watered-down EU takeover directive is a missed opportunity for open markets' *Financial Times* (20 December 2003) 20.

[194] ibid, also reported in Fiona Hayes-Renshaw, 'Least Accessible but not Inaccessible: Lobbying the Council and the European Council', 70, 82 in David Coen and Jeremy Richardson (eds), *Lobbying the European Union: Institutions, Actors, and Issues* (OUP 2009).

prevent its resistance: the interest in the preservation of its framework against rigid supra-national regulation was evidently stronger than the interest in extending it to the continent.

2.2.2 The Shareholder Rights Directive I

From the work of the Winter Group nominated by Commissioner Bolkestein stemmed not only a revitalised proposal for the Takeover Directive, but also the 2003 Action Plan – the Commission's response to the Group's Final Report.[195] The Commission affirmed the necessity to strengthen 'functional' shareholders' rights through the dismantling of participation and information barriers;[196] more broadly, it considered that there was 'a strong medium to long term case for aiming to establish a real shareholder democracy in the EU'.[197] Behind the actions aimed at vitalising the general meeting as a core forum for corporate governance lied the awakening of institutional investors, which in turn conveyed the promise of the mitigation of the classic shareholders' collective action problem, the development of modern communication technologies, and the internationalisation of shareholdings.[198]

The motion for the European Parliament's Resolution, although supportive of the Commission's intention to strengthen shareholders' rights,[199] claimed that governance could not be seen 'as a problem confined solely to relations between shareholders and management', and pointed 'to the essential role to be played by stakeholders within or close to the company'.[200] Rapporteur Fiorella Ghilardotti (PES) specified her position

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[195] Jaap Winter and others, 'Report on a modern regulatory framework for company law in Europe' (4 November 2002). 2003 Action Plan (n 10) 4.

[196] 2003 Action Plan (n 10) 11, 13-14. See Vanessa Knapp, 'The requirements of the Shareholder Rights Directive' (2008) 9(3) ERA Forum 377.

[197] 2003 Action Plan (n 10) 14. The shareholders empowerment agenda was an important component of the reforms advocated in the Action Plan. Maria L Passador and Federico Riganti, 'Shareholders' Rights in Agency's Conflicts: Selected Issues in the Transatlantic Debate' (2018) 42(3) DJCL 569, 572 noted that 'the EU "Lawmakers" have worked on … a redefinition of the position of shareholders within the company'.

[198] Theodor Baums, 'General Meetings in Listed Companies – New Challenges and Opportunities' in OECD, 'Company Law Reform in OECD Countries: A Comparative Outlook of Current Trends' (Stockholm, 7-8 December 2000) 2. In Deirdre Ahern, 'The Mythical Value of Voice and Stewardship in the EU Directive on Long-term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make' (2018) 20 CYELS 88, 90, the Shareholder Rights Directive was described as 'rights-defining, focused on providing and buttressing substantive shareholder voting and participation rights in service of shareholder democracy, both for its own sake, but also to assist fulfilment of the shareholder body's role as a backstop against potential abuse of delegated power by the board'.

[199] Committee on Legal Affairs and the Internal Market, Report on the communication from the Commission, 7 April 2004, FINAL A5-0253/2004, 8 paras. 19 and 21, 10 paras. 36 and 37.

[200] ibid 6 para. 4. This point was later confirmed in the Committee on Legal Affairs's Report on recent developments and prospects in relation to company law, 26 June 2006, FINAL A6-0229/2006, 5 para. 14.

underlying the necessity to take into due consideration the position of stakeholders. 'From this point of view', she argued, 'the approach with which the Commission tackles the problem of governance appears reductive and partial. The issue relating to corporate governance is presented as a problem limited only to the relationship between shareholders and management as if a company were an entity referable solely to the interests of shareholders'.[201]

The explanatory memorandum of the proposal for the Directive, which aims at allowing 'shareholders to play their full role in the decision-making process of the company',[202] started off with the meaningful statement that '[s]hareholder participation is an essential precondition for effective corporate governance'.[203] Although the draft overlapped with the UK pattern of regulation,[204] the Directive was conceived as eminently cross-border, and the mild interest of concentrated continental jurisdictions for the strengthening of 'functional' rights was reflected in the unobstructed legislative process.[205] The UK, with the Companies Act 1985 (Electronic Communications) Order 2000, had already addressed a rejuvenation of 'functional' rights,[206] anticipating other lawmakers. At the time of the Directive, the UK already had a well-developed framework of 'functional' shareholders' rights – furthermore enhanced by the Companies Act 2006 – so that besides few adjustments to the provisions of the Directive, the UK already provided for a significant proportion of the areas covered by it.[207]

The Companies (Shareholders' Rights) Regulations 2009, implementing the Directive in the UK, added to the right to ask questions at the general meeting the right to receive an answer,[208] and to the right to request the circulation of a resolution the right to add – at the

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[201] ibid 13, freely translated from the original in Italian.

[202] Commission Staff Working Document, Annex to the Proposal, Impact Assessment, 17 February 2006, SEC(2006) 181, 3, 20.

[203] Proposal for a Directive on the exercise of voting rights by shareholders [2006] OJ C49/37.

[204] Nolan (n 41) 578 observed that '[t]he Draft Shareholder Rights Directive adopts the pattern of regulation which the UK government has adopted hitherto in relation to British companies'.

[205] For instance, Hopt, 'Corporate Governance in Europe' (n 10) 176 reported that the Shareholder Rights Directive I 'hardly had any effect in Germany, given Germany's already comparatively high level of shareholder protection'.

[206] Baums (n 198) 7.

[207] Department of Business Enterprise and Regulatory Reform, 'Implementation of the Directive on the Exercise of Certain Rights of Shareholders in listed Companies' (October 2008) 6: '[t]he UK has a large and prestigious equity market with a dispersed shareholder structure. Consequently the regime of shareholder rights is well-developed. … the UK framework for shareholder rights already meets the majority of the requirements in the Directive'.

[208] S. 319A CA 2006. Notably, the right was already present in Germany (§131 AktG). Siems (n 32) 121.

expenses of the company[209] – other matters in the business to be dealt with at the annual general meeting.[210] These exceptions aside, the Annex 3 of the Impact Assessment accompanying the proposal shows how the UK jurisdiction was the most aligned with the rights promoted by the Commission.[211]

However, Art. 5 of the proposal contained a term of notice for convening a general meeting of no less than 30 days, therefore more burdensome than the one provided by the UK framework. The UK engaged in intensive lobbying flanking the Confederation of European Business to reduce the term and to align it to its national framework.[212] Similarly, the United Kingdom Shareholders' Association ('UKSA') responded to the consultation commenting that while it did not wish to see the terms required by UK law shortened, it did not see the need to extend them neither.[213] Moreover, as clearly stated by the Department of Business Enterprise and Regulatory Reform, the shorter notice to call extraordinary general meetings was preserved during the negotiations following lobbying by the UK.[214] As in the case of the Takeover Directive, this allows to preliminary conclude that the UK represented a comparative benchmark for the Commission but that it also contrasted EU law to the extent that it was not completely adherent to its regulation.

2.2.3 The Shareholder Rights Directive II

Once again, the Shareholder Rights Directive II – approved after the Brexit referendum – drew heavily on UK law.[215] Indeed, the Commission's proposal (2014) was a remarkable example of promotion of shareholders' rights at least in three respects. First, it aimed at completing the set of 'functional' rights contained in the previous directive, thus further facilitating the exercise of extant rights by abating the legal and material barriers that

[209] S. 340B CA 2006, if requests are received before the end of the financial year preceding the meeting.

[210] S. 338A CA 2006.

[211] Commission Staff Working Document (n 202) 55-118. As observed by Caspar Rose, 'The new European shareholder rights directive: removing barriers and creating opportunities for more shareholder activism and democracy' (2012) 16(2) JMG 268, 275, given that most of the proposals were already in place in the UK, the country 'was much less resilient towards the directive than normal'.

[212] Rose (n 211) 275-276. For instance, the Committee on Legal Affairs, Report tabled for the plenary's first reading, 2 February 2007, FINAL A6-0024/2007, 14-15 reduced the 30-day term to 21 days for annual general meetings and 14 days for extraordinary general meetings, as in UK company law.

[213] UKSA's response to the European Commission's Second Consultation (14 July 2005).

[214] Department of Business Enterprise and Regulatory Reform (n 207) 7.

[215] Andrew Johnston and Paige Morrow, 'The Revised Shareholder Rights Directive 2017: Policy Implications for Workers' (2018) ETUI Research Paper – Policy Brief No. 2/2018, 1.

separate shareholders from their companies.[216] Second, it promoted the engagement of institutional investors with an approach inspired by the UK Stewardship Code.[217] Third, it proposed the introduction of two substantial 'control' rights: the right to vote on remuneration policies and reports, and on related party transactions, both characteristics of the 'UK benchmark'. Given the above, the Directive as envisioned by the Commission would have significantly advanced the power of shareholders within European corporations.[218]

The Commission had already recommended an advisory shareholders' vote on remuneration policies in 2004.[219] The position was later reaffirmed in the European Corporate Governance Forum in 2009[220] and in the 2011 Green Paper, where the Commission acknowledged the growing tendency among Member States to legislate on the shareholders' vote and requested feedbacks on the shareholders' approval.[221] Eventually, the Commission's proposal for the Directive contained a shareholders' right to approve remuneration policies (Art. 9a) and remuneration reports (Art. 9b), as envisioned in the 2012 Action Plan.[222]

Both the remuneration reporting practice[223] and the vote of shareholders were hallmarks of the leadership of Britain in the European corporate governance landscape.[224] The rights proposed by the Commission were modified in the subsequent legislative process, that diluted the proposed triennial binding vote on remuneration policies (therefore equivalent

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[216] In particular, it addressed the identification of shareholders – a deficiency of the Shareholder Rights Directive I, as outlined in Dirk Zetzsche, 'Shareholder Passivity, Cross-Border Voting and the Shareholder Rights Directive' (2008) 8(2) JCLS 289, 297, 331.

[217] For the similarities and differences, see Iris H-Y Chiu, 'European Shareholder Rights Directive proposals: a critical analysis in mapping with the UK Stewardship Code?' (2016) 17(1) ERA Forum 31.

[218] According to Passador and Riganti (n 197) 593, the Directive 'aims to solve the opposition between shareholders' primacy and directors' primacy in the sense of giving the former a specific right of voice in the field of remuneration', thus 'confirming their role as Principal, and emphasizing the importance of their commitment to every aspect of society'.

[219] Art. 4.1 Recommendation 2004/913/EC (n 145). Art. 4.2 also recommended the submission of a remuneration statement to the shareholders' vote, either mandatory or advisory.

[220] European Corporate Governance Forum of 23 March 2009, para. 6.

[221] Green Paper: The EU corporate governance framework (5 April 2011, COM (2011) 164 final) 9. The previous year the Commission issued a Report on the application of the 2009 Recommendation on directors' remuneration (2 May 2010, COM/2010/0285 final) 3, observing that '[a] minority of Member States has taken action to promote shareholder voting with regard to remuneration issues. … There is also a trend among Member States to regulate these issues in a binding way'.

[222] 2012 Action Plan (n 10) 9.

[223] Guido Ferrarini and Maria C Ungureanu, 'Response to Consob's Consultation document on Amendments to the Issuers Regulations on the Subject of Transparency of Remuneration' (11 November 2011) 2.

[224] See Chiu (n 29) 135, 142.

to that of the UK) into a merely quadrennial advisory vote.

Three months after the Commission's proposal, the German Parliament submitted a contribution, harshly rejecting the idea of a binding shareholders' vote.[225] The response argued that the decision on remuneration could not be transferred to shareholders alone, because the shareholders' goal is often not the long-term growth of the company but a significant interest in short-term corporate success. Therefore, the response defended the role of supervisory boards in the dualistic system to develop remuneration in the interests of the shareholders, arguing that this model guarantees their sufficient representation, without any further need for shareholders' approval. Moreover, the response underlined the role of employees in the setting of pay: in supervisory boards with co-determination, compensation is determined also by workers, not only by shareholders as in the general meeting.[226] This point was also mentioned in the discussion during the Parliament's first reading by Austrian MEP Heinz K. Becker.[227]

The German Parliament's response also proposed to strengthen the provision on the directors-to-workers pay ratio, whose disclosure was contained in the proposal. The original provision was inspired by the US Dodd-Frank Act and was supported by the European Parliament,[228] but it was modified during the legislative process to adapt it to the UK approach on the matter.[229] Specifically, the final Art. 9a para. 6 states that '[t]he remuneration policy shall explain how the pay and employment conditions of employees of the company were taken into account', mirroring S. 38 of the Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013, which contains almost the same wording.[230]

The report of the Parliamentary Committee for the first reading greatly increased the substance of Artt. 9a and 9b, backing the binding vote on remuneration policies,[231] but the

[225] Bundesrat, printed paper 165/14 (resolution of 11 July 2014).

[226] In Germany, see §87(1) AktG. Siems (n 32) 159.

[227] Debate in Parliament (7 July 2015).

[228] Van der Elst and Lafarre (n 110) 271-272.

[229] ibid 272.

[230] ibid.

[231] Committee on Legal Affairs, Report tabled for the plenary's first reading, 12 May 2015, A8-0158/2015. The document also advanced the stakeholders' position by strengthening the directors-to-workers pay ratio in the remuneration report, adding Art. 9b.1(aa), and with a provision on the expression of the employees' view, via their representatives, before the submission of the reports and policies to the shareholders (Art. 9b.3). Eventually, the Parliament in first reading did not approve these two stakeholder-oriented modifications.

Parliament in first reading amended the draft allowing Member States to opt for a merely advisory vote on the policies.[232] The Council's Working Party on Company Law and the national delegations also contributed to dilute the proposed shareholders' rights, to respond to the request of Member States and the business community for a high level of flexibility and respect for different legal systems.[233] The text was initially amended to enable Member States to allow companies to pay remuneration in accordance to rejected policies as long as they were later submitted for approval at the following general meetings, and to submit the policies for approval only at every change.[234] Later, the draft allowed a merely advisory vote, every five years instead of three.[235] The loosening in the frequency was considered a compromise between Member States that pushed to submit the policies to general meetings more often and Member States that asked not to request periodic reviews of policies at all.[236]

An alternative to the vote on the remuneration report, namely a simple discussion in the annual general meeting as a separate item of the agenda, was also proposed.[237] Defining the Council's position in preparation to an informal trilogue, a compromise between States was reached to limit the vote on the remuneration report only to the largest companies, roughly 10% of all listed companies across the EU.[238]

To summarise, the tenacity of Council and Parliament in the mitigation of the proposed shareholders' rights rendered the EU legislative process a descent from what envisioned by the Commission down to a flexible and therefore tenuous regime.

As regards the lack of direct influence from the UK in the export of its framework – conversely sponsored by the Commission – the UK Government itself advocated cautiousness; to the 2011 Green Paper's question: '[s]hould it be mandatory to put the remuneration policy and the remuneration report to a vote by shareholders?', it responded:

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[232] Amendments adopted by the European Parliament in first reading, 8 July 2015, P8_TA(2015)0257. The amendment was initially proposed in the internal works of the Committee on the basis that the non-binding votes already introduced by some Member States had proved to be sufficiently effective, but the provision was later removed in the Report submitted to the Parliament.

[233] Council of the European Union, Document 5362/15 (17 February 2015) 6.

[234] Document 13758/14 (10 November 2014).

[235] Document 15647/14 (5 December 2014); Document 5215/15 (14 January 2015); Document 5362/15 (17 February 2015); Document 6514/15 (6 March 2015); Document 6514/1/15 REV 1 (13 March 2015); Document 7088/15 (17 March 2015); Document 7315/15 (20 March 2015).

[236] Document 6514/15 (6 March 2015) 6; Document 6514/1/15 REV 1 (13 March 2015) 6.

[237] Document 5215/15 (14 January 2015) 18.

[238] Document 7088/15 (17 March 2015); Document 7315/15 (20 March 2015) 3.

> There are varying ways in which shareholders can exercise influence over directors' remuneration. In some EU Member States, particularly those with dispersed ownership, a vote prescribed in law will likely be the most appropriate method. This raises the complex question of whether the vote should be advisory or mandatory in nature … The implications of mandating in these areas need to be carefully considered. In Member States with less dispersed ownership, or where dual-board structures are more prevalent, a legal requirement for a shareholder vote might not be a necessity.[239]

Similarly, the shareholders' right to vote on related party transactions contained in Art. 9c was also modified. The European Commission, inspired by the UK Listing Rules[240] and supported only by institutional investors and asset managers,[241] proposed a voting right to specifically address the lack of shareholders' oversight over these transactions,[242] but Member States in the subsequent legislative process fought back.

As in the case of the Say on Pay, the comparison between the UK regulation (in this case, the UK Listing Rule 11) and the Commission's proposal shows an almost complete overlap in the envisioned right, with transactions over a 5% threshold to be submitted to the general meeting or concluded under the condition of shareholders' approval, the involved shareholders excluded from the vote, and an aggregation period of 12 months. Conversely, in final text of the Directive approved, Member States define the thresholds, and the transactions 'are approved by the general meeting or by the administrative or supervisory body of the company according to procedures which prevent the related party from taking advantage of its position';[243] the involved shareholders can participate to the vote at certain conditions, and the aggregation period is 12 months or the financial year.

The Council, the Parliamentary Committee that worked on the report, and the Parliament in first reading were responsible for the shift from shareholders' rights to flexible corporate governance mechanisms, backing the introduction of an approval by the administrative or supervisory board. Significantly, the title of the article was changed from 'Right to vote on related party transactions' to 'Transparency and approval of related party transactions'.[244]

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[239] UK Government Response to European Commission's Green Paper (July 2011) 10.

[240] Paul L Davies and others, 'Implementation of the SRD II Provisions on Related Party Transactions' (2020) ECGI Law Working Paper No. 543/2020, 2.

[241] Alperen A Gözlügöl, 'The Political Economy of the Related Party Transactions Regulation in the Shareholders' Rights Directive II' (2020) 39(1) YEL 497, 515-517.

[242] Commission Staff Working Document, Impact Assessment accompanying the proposal, 9 April 2014, SWD(2014) 127 final, 4. On the proposed article, see Kristinn Reynisson, 'Related Party Transactions: Analysis of Proposed Article 9c of Shareholders' Rights Directive' (2016) 13(5) ECL 175.

[243] Art. 9c para. 4 of the Directive.

[244] Document 6514/1/15 REV 1 (13 March 2015).

Rapporteur Sergio Gaetano Cofferati (PES) in introducing the report to the Assembly explicitly referred to national differences and to the differentiation of the controls according to the system of each Member State.[245]

The exclusion of the involved shareholders from the vote was also diluted, preventing them only from having a determining role in the approval process,[246] but the rule was quickly dropped.[247] An amendment allowed Member States to let related-party shareholders to take part in the vote, provided that national law ensured appropriate safeguards to protect the unrelated minority shareholders, namely 'by preventing the related-party from approving the transaction despite the opposing opinion of the majority of shareholders who are not related parties',[248] 'or despite the opposing opinion of the majority of the independent directors'.[249]

Therefore, the shareholders' right to approve related party transactions proposed by the Commission was watered-down under the influence of the Council and the Parliament,[250] as in the case of the vote on defence measures during takeovers and the Say on Pay. As noted by a commentator, albeit the Directive 'works hard to shift the locus of corporate power',[251] 'opt-out rights considerably weaken the arsenal of the shareholder body as a corporate governance backstop'.[252]

More specifically, the profound remodulation of Art. 9c allows to draw a parallelism with the lack of 'horizontal' convergence towards the 'UK benchmark' in the national approval regimes of related party transactions: the continental resistances towards minority rights configured against other shareholders were more incisive than towards majority rights, such as the Say on Pay contained in Artt. 9a and 9b. Companies dominated by blockholders cannot easily resolve conflicts of interest like widely-held companies – the UK corporations listed on the Premium Segment, or the US corporations incorporated in

[245] Debate in Parliament (7 July 2015).

[246] Document 13758/14 (10 November 2014) and Document 15647/14 (5 December 2014).

[247] Document 5215/15 (14 January 2015) and Document 5362/15 (17 February 2015).

[248] Document 6514/15 (6 March 2015).

[249] Document 7088/15 (17 March 2015), confirmed in Document 7315/15 (20 March 2015). The almost identical provision was adopted by the Committee report tabled for the plenary's first reading (n 231) and in the decision by Parliament in first reading, 8 July 2015, T8-0257/2015.

[250] Ahern (n 198) 102.

[251] ibid 113.

[252] ibid 109.

Delaware – namely by introducing shareholders' 'control' rights. This is further confirmed by the implementation of the flexible Art. 9c in continental jurisdictions, which delineated approval regimes centred around the approval by the supervisory board or independent directors, and not by the general meeting.[253]

In addition, the fact that the vote on related party transactions in the 'UK benchmark' is confined to the biggest companies and rarely activated[254] allows to further assert the unintentional nature of the UK's influence on the Commission, in that the latter proposed a generalised MoM approval for all listed companies. Indeed, in the implementation of Art. 9c, the UK Financial Conduct Authority introduced a regime for the other listed companies based on the independent directors' approval.[255] It follows that the Commission in drafting the original Art. 9c, albeit resonating with institutional investors' preferences, was certainly not captured by the UK lawmaker, given that the latter subsequentially rejected the proposed regime in the transposition of the Directive.

2.3 Validation of the hypotheses

With regard to the 'horizontal' hypothesis, the spread of the rights investigated in this dissertation confirms an increasing reallocation of power to the general meeting in continental Member States. This adaptive and circumscribed convergence is therefore to a certain extent autonomous and fits into a defined motus aimed at the modernisation of national frameworks. The continental import of some corporate governance mechanisms of the 'UK benchmark' is an identifiable strand of this trajectory of reforms and responds to the instances of shareholders protection. The UK role in this process has been that of a first-mover, domestic norm producer, and comparative example.

As for the 'vertical' hypothesis, its validation is patent in the light of the comparative analysis carried out in the previous sections, which displayed an evident overlap between the Commission's corporate governance proposals and the UK framework.

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[253] See Rikke S Petersen and Tom Fagernäs, 'Shareholder Rights Directive II (EU 2017/828) – analysis of a new corporate governance regime' (2019), available on <www.ibanet.org>, visited on 29 November 2021. The survey considered the transpositions as of 10 September 2019. At 18, the authors report that only four countries out of 23 had introduced a shareholders' vote as the only mechanisms for the approval of related party transactions. 16 countries had opted for the approval by the board of directors or the supervisory board, and three countries for both approvals.

[254] Davies and others (n 240) 22 and Marcello Bianchi and Mateja Milič, 'Article 9c: Transparency and Approval of Related Party Transactions', 286, 290 in Birkmose and Sergakis (n 110).

[255] Disclosure and Transparency Rule 7.3.

Given the nature of the EU legislative process, structured as a series of amendments of the Council and the Parliament to the proposals, the prevarication of a model in the underlying text binds the project to the general approach endorsed by the Commission.[256] The other two institutions contrasted the top-down acceleration of a trajectory of shareholders empowerment already slowly and adaptively undertaken through spontaneous convergence. For this reason, the rights keenly proposed by the Commission and drawn from the 'UK benchmark' were inexorably eroded by continental pressures exerted in the Council and by a stakeholder-oriented European Parliament.

Three considerations can be made in relation to the Commission's choice of adopting the 'UK benchmark'. First, the solution of granting rights of direct engagement is a simple, uniformly applicable, and intuitive way to respond to the instances of shareholders protection. After the 2008 financial crisis, moreover, the literature argued that an allocation of power to shareholders was needed to supply to directors' misbehaviours.[257] Thus, as noted by a commentator, in the context of 'an international upsurge in enhancing shareholder rights', the Shareholder Rights Directive II 'paves the way towards adopting a corporate governance model where shareholders act as an accountability body in corporate governance to prevent managerial inefficiencies through the exercise of their respective rights'.[258] Second, once decided to allocate power to shareholders, the UK regulation stands out as an excellent comparative example: it is the jurisdiction that more easily invokes the voice of shareholders in crucial decisions, and it is well studied by a literature that frames corporate governance as a relation between a dispersed shareowners base and the board. Indeed, it was noted that the Shareholder Rights Directive II 'harks back to classic agency theory control deficits which present in companies with dispersed ownership models'.[259] Moreover, every jurisdiction specialises in certain areas of corporate law: as the

[256] Christophe Crombez, 'Information, Lobbying and the Legislative Process in the European Union' (2002) 3(1) EUP 7, 9 noted that '[u]nidimensional policy spaces are more realistic in the EU than they are in United States politics, because the EU uses strict germaneness rules. That is, amendments to a legislative proposal are to be related to the topic considered in the proposal'.

[257] See Bruner (n 70). William W Bratton and Michael L Watcher, 'The Case against Shareholder Empowerment' (2010) 158(3) UPennLRev 653.

[258] Rafael Savva, 'Shareholder Power as an Accountability Mechanism: The 2017 Shareholder Rights Directive and the Challenges towards Enhancing Shareholder Rights' (2018) 5(2) InterEULawEast 277, 278. See also Ahern (n 198) 89.

[259] Ahern (n 198) 88.

Commission was inspired by the German model for a directive on groups,[260] and by French law – arguably the most advanced in mergers and divisions – for the Third and Sixth Directives,[261] it reasonably surveyed the UK for directives aimed at empowering shareholders. Third, the 'UK benchmark' is functional to the integration of the common market, as in the case of takeover law, and coherent with the outgrowth of modern capital markets characterised by an increasing presence of institutional investors, as in the case of the MoM approval of related party transactions.

Conversely, the European Parliament proved to be the forum for the representation of different ideologies. It played the role of a stakeholder-oriented institution committed to the preservation of a diversity of models in the Union – especially with regard to the different systems of administration and control – in contrast with the generalisation of the shareholders-as-principals approach. Alongside being constantly engaged in stakeholder-oriented amendments, in its response to the 2011 Green Paper it explicitly regretted the 'focus on the unitary system and disregard for the dual system, which is equally widely represented in Europe'.[262] In the report for the first reading of the Shareholder Rights Directive II, it added the following phrase referred to the shareholders: '[a]lthough they do not own corporations, which are separate legal entities beyond their full control …'.[263] Thus, it countered the 'neoliberal' shareholder ownership doctrine,[264] which was in turn supported by the UK Government in its response to the same consultation, that reads: '[t]he role of shareholders as owners of companies is crucial. … The role of the law and the regulator is of course important but should never detract from, or impede, the role of shareholders as owners of companies'.[265] The latter approach was adopted by the Commission, according to which '[s]hareholders own companies, not management – yet far too frequently their rights have been trampled on by shoddy, greedy and occasionally

[260] On the 'horizontal' influence of the German group law on other countries, see Hopt (n 85) 45. As in every area of corporate law, blueprinting one national legislation can rise concerns. Hopt, 'Corporate Governance in Europe' (n 10) 179 noted that there was consensus among the responses to the European Commission's 2012 Consultation on the future of European Company Law 'that there could not be a comprehensive European law of corporate groups patterned on the German corporate law groups'.

[261] Piršl (n 153) 332 nt. 383. Uwe Blaurock, 'Steps toward a Uniform Corporate Law in the European Union' (1998) 31(2) Cornell Int'l LJ 377, 387. Third Council Directive 78/855/EEC of 9 October 1978 [1978] OJ L295/36. Sixth Council Directive 82/891/EEC of 17 December 1982 [1982] OJ L378/47.

[262] Committee on Legal Affairs, Report on a corporate governance framework for European companies, 8 March 2012, A7-0051/2012, 3, confirmed in the resolution of 29 March 2012, P7_TA(2012)0118.

[263] Report tabled for the plenary's first reading (n 231) 7.

[264] See Robert J Foster, 'The Corporation in Anthropology', 111, 117-118 in Grietje Baars and Andre Spicer (eds), *The Corporation: A Critical, Multi-Disciplinary Handbook* (CUP 2017). Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) MLR 32.

[265] UK Government Response (n 239) 3.

fraudulent corporate behaviour'.[266]

The Commission's choice to pursue the policy of shareholders empowerment manifests a resonance with a global trend of convergence[267] already autonomously undertaken by Member States,[268] but it is precisely the forced acceleration of this convergence in a heterogeneous landscape such as the European one that caused resistances. Indeed, the *modus operandi* behind the concretisation of this project poses several implications: the adoption and promotion of a single national model by the only supra-national institution 'paid to think European',[269] in a Union characterised by a substrate of underlying national models and rules that coexist horizontally, can be cause for concern. The top-down prevarication of one of these models inevitably causes the resistance of all the others if the reform is considered disruptive, as corroborated by the symmetrical resistance of the UK to German-oriented proposals.[270]

Given that the distribution of corporate power is set differently according to the national jurisdiction, and that the instances of shareholders protection can be achieved in different ways other than their direct engagement, the promotion of an allocation of power to shareholders can clash with continental jurisdictions. Moreover, the project envisioned by the Commission can hardly be considered an equalising harmonisation of all jurisdictions, but rather an unconditional increase in the power of the general meeting. It seems, indeed, that the Commission, in writing the proposals, acted as emancipated from every path dependency, ignoring the fact that corporations in the single market are regulated by a massive body of national and traditional laws, on which EU law must be grafted. This

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[266] 2003 Action Plan (n 10) 7. Idoya Ferrero and Robert Ackrill, 'Europeanization and the Soft Law Process of EU Corporate Governance: How has the 2003 Action Plan Impacted on National Corporate Governance Codes?' (2016) 54(4) JCMS 878, 882.

[267] For instance, Robert M Hart and Stephen Wallenstein, 'Shareholder rights: an evolving story' (2012) 7(2) CMLJ 107, 108 argued that the 2002-2012 season of US reforms had the cumulative effect of reshaping the balance of corporate power, exposing boards and individual directors to shareholders' pressures. For Matsusaka and Ozbas (n 76) 378, the reform agenda that have transferred power from managers to shareholders is based on the belief that the latter need more tools to control managerial agency problems.

[268] As vividly formulated by Guido Ferrarini in his intervention at the Emittenti Titoli – Assonime Seminar, 'Boards and Shareholders in UK, Italian and European Listed Companies' (London, 8 May 2014), <https://www.youtube.com/watch?v=0pp-p1_slag&t=8420s>, visited on 21 November 2021, the fundamental question is whether the UK approach to shareholders' power at listed companies should become the rule for Europe. Ferrarini argued that the rules contained in the proposal for the Shareholder Rights Directive II, if adopted, would have represented a big shift of power from boards to shareholders, with the UK model becoming mandatory for the rest of Europe and imposed to all countries with a one-size-fits-all approach, in a context in which the situation was already steadily and spontaneously improving over the years coherently with domestic ownership structures.

[269] Euractiv, 'Interview with European Commission Secretary-General Catherine Day' (26 September 2006).

[270] Gelter (n 12) 346-347.

holds more poignancy wherever the Commission promoted standards of good corporate governance rather than provisions strictly functional to the integration of the common market, as in the case of Artt. 9a, 9b and 9c of the Shareholder Rights Directive II. For instance, the proposed Art. 9c for a vote on related party transactions that grossly mimicked the UK Listing Rule 11 shows how the path dependency of continental Member States in the regulation of related party transactions was absent in the work of the Commission, that proposed an article unreceivable by concentrated markets, and thus later profoundly reformed in the name of flexibility.

In addition, it should be noted that the imitation of the 'UK benchmark' does not come without risks: provisions exported out of their original context might assume a different function. For instance, a threshold for a mandatory bid rule set at 30% can become an insurmountable hurdle for takeovers in concentrated markets: being invariably activated, it can curb takeovers by making them too expensive rather than promoting a cross-border market for corporate control.[271]

The literature occasionally noted the Commission's use of the comparative method in directives that are beyond the scope of this dissertation. For instance, the rules on the disclosure of financial information contained in the First Directive[272] were resisted in Germany, while the UK Companies Act 1967 'exceeded and therefore complied with the standards'.[273] The British regulation indirectly influenced the Second Directive on capital requirements[274] and the Transparency Directive[275] – which was modelled on the UK disclosure rules.[276] Moreover, the Corporate Governance Codes movement originated in the UK, 'horizontally' spread,[277] and was later endorsed by the EU.[278] It follows that, as in the case of the three corporate governance directives investigated in this dissertation,

[271] Gelter and Reif (n 25) 1431 and Ventoruzzo (n 131).

[272] First Council Directive of 9 March 1968 [1968] OJ L65/8.

[273] Gelter and Reif (n 25) 1427.

[274] ibid 1424-1425. Second Council Directive 77/91/EEC of 13 December 1976 [1977] OJ L26/1.

[275] Directive 2004/109/EC of 15 December 2004 [2004] OJ L390/38.

[276] Gerner-Beuerle and Schillig (n 46) 402 nt. 428. On the influence of the UK's principle of the 'true and fair view' in the Fourth Council Directive 78/660/EEC of 25 July 1978 [1978] OJ L222/11, see Siems (n 32) 131.

[277] Hopt (n 85) 12.

[278] Art. 1.7 Directive 2006/46/EC of 14 June 2006 [2006] OJ L224/1 adding Art. 46a to the Fourth Directive.

continental resistances corresponded to the adoption of the UK framework as a model.[279]

Under the same lens it can be observed that the 'horizontal' influence of the UK Stewardship Code as a comparative example for other jurisdictions[280] preceded the adoption by the Commission of the UK approach for promoting long-termism: once again, the 'vertical' harmonisation trumped over a soft, 'horizontal' and experimental convergence. Coherently with the pattern outlined in this dissertation, stakeholder-oriented amendments were proposed by the European Parliament to include the dialogue and cooperation 'with other stakeholders of the investee companies' into the engagement policies.[281] Moreover, the Parliament's preparatory work, in amending the proposal of the Commission, drew from a more diverse spectrum of models, given that long-termism can be promoted with the solution of the UK framework (a Stewardship Code) but also with continental solutions such as voting rights connected to the long-term ownership of shares.[282] Indeed, as for the rights investigated in this dissertation, a shareholder-centric approach in a dispersed market dominated by institutional investors could play a different role in a concentrated market dominated by insiders.[283]

For the purposes of this analysis, once rationalised the triangulation between the Commission, the jurisdiction chosen as a model, and the other Member States, the focus must be placed on the lack of direct influence from the UK in the adoption of its model at the EU level. Indeed, as for the 'horizontal' imitations, on the 'vertical' level the influence of the 'UK benchmark' in the three corporate governance directives was passive as well.

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[279] For instance, with relation to the Commission Recommendation 2005/162/EC of 15 February 2005 [2005] OJ L52/51, see Klaus J Hopt, 'European Company Law and Corporate Governance: Where Does the Action Plan of the European Commission Lead?', 119, 133 in Klaus J Hopt and others (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (OUP 2005): the original draft of the Recommendation – which 'lays down a good corporate governance standard' and 'follows closely the Anglo-American regulatory pattern' – caused great concern in Germany. After a successful lobbying campaign in Brussels, a more careful approach was adopted.

[280] See Demetra Arsalidou, 'Shareholders and Corporate Scrutinty: The Role of the UK Stewardship Code' (2012) 9(3) ECFR 342. Dionysia Katelouzou and Konstantinos Sergakis, 'When Harmonization is Not Enough: Shareholder Stewardship in the European Union' (2021) 22(2) EBOR 203, 212-213. The more comprehensive study on the diffusion of Stewardship Codes is Dionysia Katelouzou and Mathias M Siems, 'The Global Diffusion of Stewardship Codes' (2020) ECGI Law Working Paper No. 526/2020.

[281] Report tabled for the plenary's first reading (n 231) 91. Amendment 45 proposed to add a new paragraph to Art. 3f.

[282] The Report (n 231) 33 proposed a new Art. 3ea to support long-term shareholding through additional voting rights, tax incentives, loyalty dividends and loyalty shares. As noted in George Dallas and David Pitt-Watson, 'Corporate Governance Policy in the European Union Through an Investor's Lens' (August 2016) CFA Institute Position Paper, 11, these new additions proposed by a number of parliamentarians 'stemmed from similar legal provisions in France (the Florange Act) and in Italy (the Growth Decree)'.

[283] Dan W Puchniak, 'The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit' (2021) ECGI Law Working Paper No. 589/2021.

To be sure, London-based institutional investors might have played a role in the promotion of shareholders' rights,[284] lobbying and responding to public consultations as every other interest group.[285] This, however, did not concretise in the activation of the UK on the chequerboard of the EU interinstitutional legislative procedure. On the contrary, the energies spent by the UK were devoted to resist – through marginal modifications – Commission's proposals already centred around the 'UK benchmark', to avoid any form of adaptation in the implementation of EU law, as in the case of the 30-day term for convening a meeting contained in the proposal for the Shareholder Rights Directive I.

This can be explained by the fact that the 'UK benchmark' is primarily an original by-product of national self-regulation: the main concern of the business interest groups and regulators is the preservation of the national regime against top-down intrusion rather than the export of the framework to the continent. For instance, in its response to the 2003 Action Plan, the UK argued that the EU interventions in the field should be non-legislative and limited to cross-border issues.[286] Another example of this is the general opposition of the United Kingdom Shareholders' Association to EU-level interventions.[287] Thus, the UK as a Member of the Union was committed to the preservation of its framework against supra-national dictates – such as a statutory stiffening of its takeover regime – whereas the Commission was the engine behind the import of the 'UK benchmark'.

However, the fact that the model that inspired the Commission in the corporate governance directives eventually approved was the British one determined the fact that the UK

[284] See Gözlügöl (n 241) 515-517. See also Beate Sjåfjell and others, 'Shareholder primacy: the main barrier to sustainable companies', 79, 124 in Beate Sjåfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP 2015), on how the Commission 'played an important role in driving the shareholder primacy agenda in the EU and disseminating the social norm of shareholder primacy' under the pressure of institutional investors.

[285] For example, for the Shareholder Rights I proposal, institutional investors and proxy advisors 'tried to influence the Commission not to give in or dilute shareholders rights' (Rose (n 211) 279). Conversely, the European Confederation of Directors' Associations reacted to the Shareholder Rights II proposal arguing that 'it is essential to keep boards of directors as the central actors and not to disturb the delicate equilibrium between the roles and duties of a shareholders' meeting versus a board of directors in a perhaps unsuccessful effort to cure the intrinsic problem of accountability of the board' by unrealistically turning 'inactive shareholders into micromanagers' (European Confederation of Directors' Associations, 'A Guide to Corporate Governance Practices in the European Union' (2014) 4).

[286] See the Department of Trade and Industry's Explanatory Memorandum 10041/03 (26 June 2003) and the Letter from MP Gerry Sutcliffe, Minister for Employment Relations and Consumer Affairs, Department of Trade and Industry to the Chairman (28 March 2006). See also the Letter from MP Ian McCartney, Minister of State for Trade, Investment and Foreign Affairs, Department of Trade and Industry/Foreign and Commonwealth Office to the Chairman (12 December 2006): '[t]he DTI, in partnership with UK business and investor representatives, worked hard … both to promote a review of the Action Plan, and to persuade the Commission and other Member States that EU measures should be pursued only where necessary to further competitiveness or better regulation principles'.

[287] See the UKSA's response to the EU Corporate Governance Framework (30 June 2011).

underwent only marginal adaptations in the implementation of EU law compared to other jurisdictions. For instance, in the UK some 'functional' rights were a by-product of the business practice, but the lawmaker had to introduce explicit provisions just to formally implement the Shareholder Rights Directive I into UK law.[288]

The approach adopted by research groups was also fundamental in intermediating the UK and the adoption of its model by the Commission,[289] and this further demonstrates that the influence of the former was merely unintentional. While the Winter Group adopted an open market approach for drafting its reports[290] – to the point that the 2003 Higgs Report stated that in many areas, the UK corporate governance regime already met the proposals of the High Level Group[291] – German scholars influenced the draft of the proposal for a Ninth Directive,[292] and the failed model statute for the European private company was jointly developed by the University of Heidelberg and the Chamber of Commerce of Paris.[293] Conversely, the country of origin of the respondents to the Commission's public consultations does not seem to determine the approach subsequently adopted, given that the observations from the continent outnumbered those from the UK.[294] In any case, the number of British respondents should intuitively decrease in the forthcoming years.[295]

By way of summary, this chapter has outlined the role of the UK, continental lawmakers, and three EU institutions in the promotion of shareholders' rights. So far, this dissertation has thus highlighted how the UK did not actively export rights. In conclusion, the response of the UK Government to the question contained in the 2011 Green Paper: '[d]o you think that minority shareholders need additional rights to represent their interests effectively in

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[288] The Department of Business Enterprise and Regulatory Reform (n 207) 7 commented that, despite share-blocking was not occurring in the UK, there was nothing in the letter of the law to explicitly prevent it. Likewise, albeit the ability to vote by electronic means was already widespread in listed companies and there were no barriers in legislation, an 'express provision excluding any legal obstacle to electronic voting' was desirable to remove any doubt.

[289] In this sense, on the Second Directive, see Gelter and Reif (n 25) 1425.

[290] Jaap Winter, a promoter of shareholders' rights at the time of the reports, has now become a supporter of stakeholder-oriented governance. See Johnston (n 9) 4.

[291] Derek Higgs, 'Review of the role and effectiveness of non-executive directors' (January 2003) 16.

[292] Mads Andenas and Frank Wooldridge, *European Comparative Company Law* (CUP 2009) 449.

[293] Hopt (n 279) 130.

[294] See, for instance, the European Commission's Feedback Statement, Summary of Responses to the Public Consultation on the Future of European Company Law (July 2012) 3.

[295] During the consultation for a Sustainable Corporate Governance Directive (October 2020 – February 2021), British respondents were still third in number, after French and German nationals. See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en>, visited on 21 November 2021.

companies with controlling or dominant shareholders?' is of the utmost significance:

> In the UK, minority shareholders are well protected by existing provisions in company law and the Listing Rules of the Financial Services Authority [today, the Financial Conduct Authority]. We would be happy to share the UK approach with other EU Member States, but would not necessarily want to promote this approach to all other Member States because of their differing financial traditions and rules.[296]

[296] UK Government Response (n 239) 15.

Chapter 3: Post-Brexit scenarios

3.1 Projection of past patterns

It is impossible to accurately predict future normative developments, but the projection of past patterns[297] into the post-Brexit era allows to assess the likeliness of various scenarios, and the rationale behind different policy choices.

To this end, it must be preliminary recalled that the passive role of shareholders in Delaware corporate law proves that the frequent shareholders' involvement through a vote is not a necessary feature of a shareholder-oriented governance model; similarly, while engaging in national reforms, continental lawmakers can dispose a wide range of mechanisms to address the protection of shareholders, as continental jurisdictions already show. In concentrated markets, the allocation of power to shareholders is an easy way to address this quest, but the presence of a stable majority that controls the general meeting gives a partially different meaning to the import of the key feature of the 'UK benchmark'. The rights of direct engagement in the UK serve as a tool either against the board to address the agency problem or against other shareholders. These rights operate in a dispersed shareownership context, where a fluid and crowded majority is constantly formed on the occasion. In a concentrated market, the empowerment of the general meeting – controlled by insiders – reinforces an already strong bond with the agents and can exacerbate the 'horizontal' conflicts between the minority and a stable majority.[298]

So far, the allocation of corporate power to the general meeting has represented an identifiable strand in the trajectory of continental national reforms, but there is no way of knowing to what extent continental lawmakers will combine different corporate governance mechanisms in the future to develop competitive and attractive national frameworks.[299] Path dependency will continue to play a role in this process, to which EU law has certainly not represented an obstacle. Moreover, in the future of continental

[297] In the words of Siems (n 32) 336, this forecasting exercise can avoid unreal historicism by only showing some trends, '[b]ut even from these it becomes clear whether, and with what substantive emphases, a further convergence of shareholder law may come about'.

[298] Enriques and others (n 38) 79 observed that a reduction of managerial agency costs through the empowerment of the majority is likely to exacerbate the conflict between the majority and the minority, but conversely, a mitigation of the conflict between the majority and the minority carried out by constraining the power of the majority can lead to an aggravation of the managerial agency problem.

[299] For instance, Italy has a slate voting system with minority shareholders' representation on the board. In Germany, a strong principle of equal treatment protects shareholders, see Enriques and others (n 38) 86-87 and Ringe (n 39) 411.

Europe, an increasing openness towards equity and the development of capital markets would lead to a dilution of the shareownership concentration; new steps towards a divorce between ownership and control[300] will reframe the function that shareholders' rights play in the taxonomy proposed in the previous chapter, distancing shareholders and directors and therefore turning rights of the 'insiders' into rights of the 'outsiders'. For instance, the direct 'operational' right of electing directors would be then shared by a larger plethora of shareholders – and would not be a formal *façade* that follows the informal influence of the majority over the board. 'Structural' rights, that shape the corporation within the limited space that continental jurisdictions reserve for private ordering, are already often shared by a super-majority, that is a way to 'fortify minority decision rights over fundamental corporate decisions'.[301] Similarly, the rights 'functional' to the participation of the minority to the general meeting would not be impacted by a diffusion of shareownership, besides an obvious increase in coordination costs. Conversely, 'control' rights *vis-à-vis* directors would be profoundly impacted by a dilution of concentration: the allocation of corporate power to the general meeting would serve to tackle the agency costs arising from the self-dealing of directors, and to discipline the board.

A superior model of corporate governance can be defined only in relation to a specific context. If the characteristics of the domestic markets will converge on the issue of shareownership diffusion, then the optimal model for continental lawmakers to strive for would converge as well.[302] Today, the dilution of concentration is intertwined with the rise of institutional investors.[303] The relevance of the 'UK benchmark' as a comparative example is therefore destined to increase. Strengthening shareholders' rights to promote a shift from a credit-based economy to an equity-based economy would be part of a process of convergence towards the 'UK benchmark' that matches a more dispersed shareownership structure, but it would also be an inherently political choice for continental social democracies to undertake substantial advances towards a fully market-based

[300] European Corporate Governance Network, 'The Separation of Ownership and Control: A Survey of 7 European Countries' (1997), cited in Baums (n 198) 4.

[301] Enriques and others (n 38) 84. Super-majorities can also be required for 'control' rights, not only for 'structural' rights. An example of this is the Dutch Say on Pay (n 112), where a super-majority of 75% is required, 'except if the articles of association provide a lower approval threshold' (Van der Elst and Lafarre (n 110) 261).

[302] See Charny (n 71) 294, distinguishing between the idea of convergence as based on an underlying approximation of the globalised economic environment, and the idea of convergence as based on the advantages of compliance with a uniform norm.

[303] See Siems (n 32) 289.

system.[304]

The same political,[305] societal and cultural forces[306] that counterbalanced the national shareholder-friendly reforms – aimed at attracting international and institutional equity – were also inevitably manifested at the supra-national level towards the forced convergence promoted by the Commission. Given the obstacles to the harmonisation of an area so domestically diverse as corporate law, it is plausible that further efforts to promote shareholders protection will be more easily achieved deploying securities and financial law directives and regulations. However, focusing on corporate law, the fact that the UK was a merely unintended benchmark for the European Commission allows to dismantle a precise post-Brexit scenario, that of an automatic resurgence of the German stakeholder-oriented model as the new comparative design type. The departure of the UK will not usher a new momentum for the German model in further corporate law harmonisation,[307] because Brexit does not remove the ultimate supporter of shareholderism from the Union. In this respect, the European Commission's use of the comparative method untied from any path dependency can easily continue in the aftermath of Brexit. To be sure, the UK will no longer represent an obstacle to German-oriented harmonisation, but such a shift would need to be initiated by the Commission, the institution that promoted – and keenly defended – the interventions to allocate decisional power to shareholders in the past.

More broadly, the departure of a jurisdiction that represents a benchmark among corporate governance systems could be beneficial to a process of 'harmonisation' intended as a compromise between antipodes, because it would intuitively lead to a smoother equalisation of the other 'remaining' jurisdictions. From the perspective of shareholders' rights, however, the desired outcome for the European Commission proved to be, quite evidently, not the convergence towards a central point among all the different systems, but the promotion of one of these models, through an acceleration of the convergence of all the

[304] Mark J Roe, 'Political Preconditions to Separating Ownership from Corporate Control' (2000) 53(3) StanLRev 539.

[305] For instance, Zumbansen (n 149) 480-481 described the 1980s and 1990s in Germany as 'a period of difficult bargaining between a pro-shareholder government and deeply entrenched stakeholders, unions and lobby groups'. The author argued that '[d]omestic corporate law reform discussions such as those in Germany or in other countries are taking place in the light of a European and global debate over competition for mobile capital … At the same time, the debate is taking place against the background of a complex European integration process in which the political and cultural outcome remains unsettled'.

[306] See Paul Rose, 'EU Company Law Convergence Possibilities after Centros' (2001) 11(1) TLCP 121. According to Siems (n 32) 291, 'shareholder law is dependent on cultural and economic-policy circumstances', and '[t]his is true particularly of the shareholder's position in the power structure of the company'.

[307] Koutsias (n 8) 882-883. Johnston (n 9) 3-4.

others towards it.[308] The defining feature of the 'UK benchmark', namely the frequent shareholders' involvement, was a major component of the Commission's proposals, adopted to increase the power of shareholders in the EU. Conversely, the UK exerted no pressure to export its system and empower the shareholders of continental companies, in a lukewarm 'fog in the Channel, continent cut off' mindset. The main focus of the UK was the preservation of its national regulation against supra-national intrusion, rather than its adoption abroad.

3.2 Scenarios

An additional allocation of rights to shareholders would further affect the balance of power within European corporations, tilting it towards the general meeting. However, new reforms would need to be approved by the Council and the Parliament, as the Commission can only continue to promote this trajectory of EU law. Moreover, as on the 'horizontal' level, further convergence towards a shareholder-centric governance could be achieved by supplementing the rights of shareholders but also with other corporate governance mechanisms.

In the opposite scenario, the European Commission could consider the post-2000s season of shareholder-friendly legislation concluded, after the approval of two directives on shareholders' rights and the failed attempt to introduce a mandatory binding vote on remuneration policies and related party transactions. The harmonisation project that began with the 2003 Action Plan represented a relay race between Commissioner Bolkestein and Commissioner McCreevy, both promoters of shareholders' democracy.[309] Conversely, President von der Leyen, in her inaugural speech, claimed that 'family-owned businesses all across our European Union … were not built solely on shareholder value',[310] thus

[308] Piršl (n 153) 335 noted a 'shift in the understanding of the harmonization process': 'the objective need not be to achieve an average solution of all national company laws, technically perfect and equally acceptable to each member state', because the 'harmonization's law-making function is independent of the need to compromise between national provisions'.

[309] Francesco Guerrera and Simon Targett, 'Brussels set to shake up corporate governance. The European Commission is looking to pave the way for a shareholder democracy' *Financial Times* (25 February 2002) 1: 'Bolkestein ... is keen to improve the rights of shareholders across Europe'. Francesco Guerrera and Simon Targett, 'Generating shareholder power (Interview with Frits Bolkestein)' *Financial Times* (25 February 2002) 4: 'I want to have a European market in shares, a shareholder democracy, one share one vote'. As for Commissioner McCreevy, see Financial Times, 'One Share, One Vote is the Way to a Fairer Market' (14 August 2006) 15. Tobias Buck and Patrick Jenkins, 'Brussels Plans to Boost Rights of Cross-border Shareholders' *Financial Times* (17 May 2005) 11. Financial Times, 'European Shareholders Sans Frontières' (10 January 2006) 18.

[310] President-elect von der Leyen, Speech in the European Parliament Plenary on the occasion of the presentation of her College of Commissioners and their programme (Strasbourg, 27 November 2019).

reaffirming the specificity of continental concentrated markets while resonating with the declarations of US President Biden, that called for 'an end to the era of shareholder capitalism'.[311] However, the previous chapter showed that this eventual shift would have nothing to do with the departure of the UK from the EU. The next sections explore the likeliness of two opposite scenarios – the enhancement of shareholders' power, or its diminishment – on both sides of the Channel.

3.3 Openness

In the aftermath of Brexit, the UK lawmaker has the power to dismantle the substrate of EU law implemented nationally. A degradation of shareholders' rights is highly unlikely, and it would not be correlated with Brexit, as such rights were first introduced as an internal by-product rather than an external imposition: the UK did not receive a significant increase in shareholders' rights from its membership to the Union. The foundations of the shareholder-centric 'UK benchmark' were not nicked but neither significantly reinforced by EU law. Conversely, the European Commission benchmarked the UK, tirelessly promoting the introduction of new rights on the continent.

As for the most plausible direction that the British lawmaker could take, in the UK there are still spaces for a further enhancement of shareholders' power, as shareholders' democracy is not fully realised yet.[312] For instance, the shareholders' vote on related party transactions is mandated only for the companies on Premium Listing. However, the predisposition of the UK to norm-produce shareholders' rights constitutes a fertile ground for the introduction of new shareholder-friendly provisions. It is not a case that the idea of a 'Say on Climate' originated in the UK,[313] the jurisdiction that more easily allocates competences to the general meeting. This trajectory, if further undertaken, would not be related to Brexit, since EU law was not preventing it.

An observable post-Brexit development is the one related to Special Purpose Acquisition Companies ('SPACs'), a phenomenon in relation to which the City was losing ground to other stock exchanges due to an unadapt regulation that did not appropriately protect shareholders. Specifically, the London Stock Exchange lagged behind in attracting the

[311] Andy Puzder, 'Biden's Assault on 'Shareholder Capitalism'' *WSJ Opinion* (17 August 2020).

[312] Anita I Anand, *Shareholder-driven Corporate Governance* (OUP 2019) 102: '[Shareholder-driven corporate governance] is a trend to be observed, but it is also an ideal to be achieved'.

[313] Attracta Mooney, 'UK urged to introduce mandatory climate votes at AGMs' *Financial Times* (12 January 2021).

listings of SPACs – shell companies that go public to later merge in their 2-year 'life span' with private companies, thus bypassing some expenses of the initial public offering process. SPACs shareholders did not have a say on the merger with the target, nor could opt-out from the operation cashing back their investment, nor could sell their shares in the proximity of the merger. Once individuated the gap in the rights of shareholders, the Financial Conduct Authority promptly responded, strengthening the rules.[314] The Authority explicitly avoided a 'race to the bottom' on standards,[315] and while understanding the view that the redemption option and a simple board approval might have been sufficient,[316] it eventually decided to mandate a shareholders' approval, moreover excluding founders, sponsors and directors from the vote,[317] thus providing the shareholders with a powerful tool to express their voice.

There is however one significant aspect in which Brexit could play a role from the perspective of shareholders' rights. The EU law, albeit inspired by the UK regulation, did indeed stiffen several areas of the latter. For instance, the Companies Act 2006 incorporated, to a certain extent, this 'statutorisation'. To be sure, the progressive subtraction of UK company law from the common law is a much broader process, partially independent from the EU harmonisation process. To claim the contrary would mean to boldly argue that this process was entirely a result of a progressive assimilation, by the UK, of an EU 'bureaucratic' approach – what Lord Frost called the 'EU ways of thinking' now internalised by the City's regulators.[318] A devolution to the common law as a possible policy choice was in effect impeded, in circumscribed areas, by EU law, but it has always been possible in other non-harmonised areas. There is also a chance that an eventual devolution of company law to the courts – in the wider context of a relocation of the 'green mile' under the umbrella of the common law[319] – could lead, in the future, to a compression

[314] UK Listing Review (3 March 2021) 28-31. Financial Conduct Authority, 'Investor protection measures for special purpose acquisition companies: Proposed changes to the Listing Rules', Consultation Paper 21/10 (April 2021).

[315] Financial Conduct Authority, 'Investor protection measures for special purpose acquisition companies: Changes to the Listing Rules', Policy Statement 21/10 (July 2021) 3.

[316] ibid 18.

[317] ibid.

[318] James Crisp, 'Stop thinking like the EU, Lord Frost tells 'indoctrinated' UK officials' *The Telegraph* (17 May 2021).

[319] See Bepi Pezzulli and Raffaella Tenconi, 'The Recovery of the City of London's Competitive Advantage in Global Capital Markets: Renouncing Inherited EU Law to Restore English Common Law' (2021) 62 VJIL Online 33.

of shareholders' rights rather than to their enhancement.[320] Indeed, an attribution of competences to the general meeting, albeit founded on an original allocation of power, is mainly a policy choice rather than an inevitable consequence of the latter. For instance, the pro-shareholder Delaware law, directors-centred from the perspective of corporate power, is consistently developed by the Court of Chancery.[321]

The implementation of the EU directives led to the introduction of statutory provisions that did not change the substance of the shareholders' rights of the 'UK benchmark'. Moreover, the British shareholders' rights investigated in this dissertation are now ejected from the jurisdiction of the European Court of Justice, but this subjection did not play a significant role in the past. The City Code and the Listing Rules – but also the UK Corporate Governance Code – are still a fundamental by-product of self-regulation. In this sense, rather than to the common law, the devolution of more norm-production to technocratic bodies, considered by the literature as inherently shareholder-oriented,[322] could be seen as an upgrade of an historical distinctive feature of the UK regime. This, however, was not significantly impeded by the membership to the Union.

As for an openness scenario in the EU, this would be based on the continuation, by the Commission, of its campaign for shareholders' rights. The easier enhancement would be in the area of 'functional' rights, the more prominently transnational, given their role in a pan-European cross-border market of shares that would exceed by definition the national dimension. In the long-run, the application of the Shareholder Rights Directive I and of the first part of the Shareholder Rights Directive II – and of the Regulation on the identification of shareholders – could be integrated with a more stringent common regime for shareholders' participation, if the extant will turn out to be insufficient for a more effective turnover at general meetings. Otherwise, the European Commission risks opening a new chapter without having closed the previous one.

Today, new 'control' rights would be inscribed in a precise context – that of concentrated markets – and could therefore be framed as a way to tackle 'horizontal' conflicts between the majority and the minority. If European companies become more dispersed, the

[320] As noted by Davies (n 60) 366, 'the common law was much less favorable to shareholder activism than the legislation'.

[321] Thompson (n 96) 441 highlighted the role of the US judiciary in defining the roles of directors and shareholders.

[322] See Daniel Attenborough, 'The political legitimacy of company law and regulation' (2019) 70(4) NILQ 383. See also Zumbansen (n 149) 488.

harmonisation of the rights that limit 'vertical' agency costs, well studied by the Anglo-American literature, will become more relevant. Member States could anticipate this by converging towards the introduction of rights aimed at intermediating a dispersed general meeting and the board. Of course, the 'UK benchmark' would represent an excellent model to be inspired from. As a caveat, it should be noted that for now, an allocation of competences to majority-dominated general meetings may exacerbate the power of blockholders and could hinder the diffusion of shareownership rather than facilitate it. In any case, in the context of a progressive increase in the number of widely-held continental companies,[323] such a balance would be more surgically carried out by national lawmakers rather than by EU institutions.

'Operational' and 'structural' rights are difficult to harmonise at the EU level insofar they are deeply rooted in divergent national traditions; they do not simply consist in an intuitive allocation of a vote on a specific item of the agenda. Moreover, it is not clear what relevance they may play for EU institutions in the future.

Lastly, it is worth mentioning that a restrictive interpretation of the subsidiarity principle, that should in theory bind the European Commission,[324] would entail a further harmonisation only in the area of cross-border 'functional' rights,[325] rather than the promotion of a common corporate governance model, let alone if interpreted as a simple allocation of voting rights to shareholders as a panacea for every systemic problem.

3.4 Protectionism and stakeholderism

The foundations of the 'UK benchmark', an original and national by-product, already proved to be solid. During a global wave of economic protectionism, the UK Government approved the National Security and Investment Bill 2020, dubbed by the press as the end of the takeover open-door policy,[326] to increase governmental scrutiny on transactions of particular interest, operating at the 'contours' of takeover law by strengthening a 2002

[323] As noted by Siems (n 32) 174, 'in most countries 'outsider' and 'insider' companies exist, so that 'twofold protection' [against the management or against the majority] is necessary'.

[324] The subsidiary principle limits the regulatory competency of the federal set-up. Siems (n 32) 243.

[325] The internationalisation of shareownership makes 'functional' rights increasingly more relevant. This point was mentioned in Ringe (n 39) 431.

[326] Nils Pratley, 'UK security bill signals open door era for foreign takeovers is over' *The Guardian* (11 November 2020).

regulation.[327] However, the pillar of the generalised shareholders' right to approve defence measures, well inscribed in the core of the City Code, remained untouched. Contrariwise, in 2008 in Italy,[328] and in 2014 in France,[329] the previously introduced right was downgraded into a mere opt-in by companies: lawmakers within the EU, to the extent that they perceive such rights as not central to their national regime, can curb them in the spaces of manoeuvre allowed by the flexible EU law. In this sense, the balance of power in the UK is steadily tilted towards the shareholders, while on the continent it can swing more easily; put differently, implanted provisions could be weaker than the one rooted into the British corporate governance system.[330]

Similarly, the implementation of Art. 9c of the Shareholder Rights Directive II shows that the jurisdictions that already had a well-developed regime for the approval of related party transactions – like Italy, France and Belgium – maintained it, while the lawmakers that had to introduce it for the first time – like Luxembourg[331] – copied and pasted the article of the Directive.[332] Today, crystallised by the implementation of the flexible EU law, complex and articulated regimes that evolved 'internally' stand out alongside regimes that grossly resemble the text of Art. 9c.

However, in the EU, the two Shareholder Rights Directives impede a future segregation of shareholders from the governance of their corporations. Given the cumbersome nature of the EU legislative process, EU law is not easy to change or repeal,[333] and thus it is extremely improbable that these rights, in a future reorganisation of the corporate governance directives, will be revised downwards. To be sure, the Commission acted without any path dependency towards the substantial and heterogeneous body of domestic laws, but these rights are now carved into EU law and constitute the terse precedent upon which, in the future, the Commission will have to develop the new initiatives.

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[327] Enterprise Act 2002.

[328] Art. 13 Law Decree No. 185/2008.

[329] Art. 10 Florange Act.

[330] According to Mukwiri (n 168) 253-254, 'the failed attempt to introduce a mandatory board neutrality rule into EU takeover law is an object lesson that it is difficult to enact rules that are contrary to the corporate law cultures of the majority of the Member States'.

[331] Art 7quater Law of 24 May 2011, added by Art. 6 Law of 1 August 2019.

[332] Similarly, on the literal and minimalistic transposition of stewardship-related provisions, see Katelouzou and Sergakis (n 280).

[333] Luca Enriques and Matteo Gatti, 'The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union' (2006) 27(4) UPaJIntEconL 939, 978.

In addition, strong shareholders' rights are functional to a supra-national market, while the German model, if used to equalise all European corporations, could tie them to local stakeholders rather than to the international capital. Not only the common market has become more integrated since the time of the proposals for a Fifth and a Ninth Directive, but the institutional architecture of the EU has also changed, since the Union expanded – especially in 2004 – and counts now 27 jurisdictions. This makes the promotion of a strongly characteristic model such as the German one almost impossible to reconcile with national divergences, whilst an allocation of rights to the general meeting continues to represent a relatively easier outcome to achieve. Moreover, a great number of Members would hamper German-oriented reforms, given that co-determination – but also the two-tier system – is only present in patches in the Union, and other countries already found it unimplementable in the past. Italy, for instance, shares with the UK a traditional externalisation of unionised industrial relations from the governance of corporations, and despite a reform introduced the choice to opt for the dualistic system, virtually no corporations depart today from the 'traditional' system of administration and control.[334]

In another respect Brexit could turn out to be decisive: if it will lead to a stronger Union and the European Parliament will become more central in the legislative process – for instance, by initiating legislation – then more stakeholder-oriented EU company law may be forthcoming. The European Parliament, in its amendments to the proposed Shareholder Rights Directive II, added a recital 2a stating that 'since shareholder rights are not the only long-term factor which needs to be taken into consideration in corporate governance, they should be accompanied by additional measures to ensure a greater involvement of all stakeholders, in particular employees, local authorities and civil society'.[335] The Committee on Legal Affairs proposed an amendment to acknowledge, in Recital 14, that 'greater involvement of all stakeholders, in particular employees, in corporate governance is an important factor in ensuring a more long-term approach by listed companies that needs to be encouraged and taken into consideration'.[336] This dissertation outlined how this institution, representing ideologies rather than national interests, was the promoter of such a vision. Similarly, structural changes to the EU legislative process, such as the shift from the unanimity to the majority rule for the decisions of the Council, likely played a role in determining how dissenting models can obstruct the legislative procedures, and how

[334] Consob, 'Report on corporate governance of Italian listed companies' (2020) 30.

[335] Amendments adopted in first reading (n 232).

[336] Document A8-0158/32 (9 March 2017).

clusters of Members that adopt the same model can prevail over less represented models.[337]

It must be noted, however, that the UK is not extraneous from the global debate on stakeholder capitalism, approached without mandating stakeholders' involvement. Section 172 of the Companies Act 2006, albeit conversely and explicitly codifying shareholders' primacy, shows the marks of such a debate, in which a more radical pluralist approach was eventually discarded.[338] In this sense, the future use of the UK framework as a benchmark for the European Commission could further confirm the inadequacy of the German model as an inspiration for company law reforms, especially as the attention is progressively turned to broader interests such as the environmental one.

The next step in the construction of a common corporate governance model has been recently undertaken. The Ernst & Young Report,[339] commissioned in preparation of a proposal for a Sustainable Corporate Governance Directive, already reflects how the UK regulation, surveyed now as a third country to identify good practices, continues to exercise its influence. The Report, for instance, in addressing long-termism and sustainability, evaluated the integration of directors' duties with a proper balance of different interests alongside the interest of shareholders – a solution that, if implemented mildly, would not be incongruent with the Enlightened Shareholder Value approach of Section 172 – and even a derivate action for stakeholders against directors, a proposal well inscribed in the literature on British company law.[340] From the perspective of comparative law, however, the extent to which the European Commission will act in the future as a norm-producer rather than a norm-taker cannot be anticipated. Certainly, the comparative method will remain a fundamental tool in the development of the proposals.

Given the central weight of the Commission's inputs to the EU legislative process, the

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[337] See Lucian Cernat, 'The emerging European corporate governance model: Anglo-Saxon, Continental, or still the century of diversity?' (2004) 11(1) JEPP 147, 158-159, 162. Indeed, according to Blaurock (n 261) 378, the European Council 'remains an assembly composed of government representatives of sovereign member states' that 'continue to apprehensively guard their own national interests'.

[338] See House of Commons Trade and Industry Committee, 'The White Paper on Modernising Company Law' Sixth Report of Session (2002-03) 7 on how the Review Group rejected the pluralist approach to defining directors' duties, that would have required a fundamental change in company law because it would have forced directors 'to consider the interests of stakeholders in their own right', so that shareholders would have become 'merely one of a number of parties whose interests the directors would weigh against each other when making decisions'.

[339] Ernst & Young, 'Study on directors' duties and sustainable corporate governance. Final Report' (July 2020).

[340] Martin Gelter and Neshat Safari, 'British Home Stores collapse: the case for an employee derivative claim' (2019) 19(1) JCLS 43. Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'' (2007) 29(4) SydneyLR 577.

pendulum between shareholders empowerment and shareholders disempowerment could eventually shift, in initiatives aimed at shaping a pan-European corporate governance system, not altered by Brexit but by a resonance with other international debates and strands of convergence. A factor that will play a crucial role in a possible departure from the 'UK benchmark' could be a further transition – already foreseeable in the Shareholder Rights Directive II – from the harmonisation of European corporate governance intended as a process functional to the integration of the common market, to a process aimed at creating a superior corporate governance model *per se*.

With the Shareholder Rights Directive II, the EU advanced the role of shareholders as principals, 'corporate governance gatekeepers and drivers of its long-term sustainability agenda',[341] by fostering their participation. Conversely, the 2018 Report of the High-Level Expert Group on Sustainable Finance, building on the OECD Corporate Governance principles, recommended to strengthen directors' duties related to sustainability,[342] alongside an extension of the Stewardship Principles to boost their environmental and social component through an amendment of the Shareholder Rights Directive II.[343] Subsequently, the Commission promoted a public consultation to explore 'the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest'.[344] Thus, today the ideal model of corporate governance seems integrated with goals that exceed the simple accountability of directors to shareholders, and that are identified in long-termism and environmental and social sustainability.

In this sense, the wind of change could blow in the future with calls for the insultation of boards from what could be considered the short-term profit-oriented pressures of shareholders,[345] in the opposite direction of the collocation of the latter at the core of the governance of corporations, keenly promoted by the European Commission in the past. This would substitute to the convergence towards shareholders' democracy not a German-style industrial democracy, but a newer concept of stakeholderism, approached with a focus on board-empowerment and discretion – namely, managerialism at its best. In the future, the expansion of directors' duties with a pluralist approach – with directors-oriented

[341] Ahern (n 198) 114.

[342] High-Level Expert Group on Sustainable Finance, 'Final Report' (2018) 40.

[343] ibid 38, 40.

[344] Action Plan: Financing Sustainable Growth (8 March 2018, COM (2018) 97 final) 11.

[345] In this sense, see the Ernst & Young Report (n 339) 28. The Report attracted harsh criticism from Academia, that exposed its flaws.

reforms aimed at strengthening the corporate power of boards rather than just their quality, and to diminish their accountability to shareholders rather than to increase it – would indeed cause a derailment from the pathway towards shareholders empowerment, and a divergence with the approach followed by the UK on the matter.

3.5 A note about Ireland

With Brexit, Ireland remains the only country of the Anglo-Sphere – a closed system of reciprocal legal influence[346] – to be part of the European Union. As already outlined, the proposed shareholders' vote on related party transactions was already contained in Chapter 11 of the UK Listing Rules since 1993, for companies on Premium Listing. Today, Chapter 8 of the Euronext Dublin Listing Rules contains a shareholders' approval regime. Notwithstanding the fact that the vote on related party transactions proposed by the Commission was eventually diluted into a flexible approval procedure, Ireland was one of the very few countries that implemented the provision by mandating the shareholders' approval,[347] while even in the UK the new Disclosure and Transparency Rule 7.3 – introduced to fill the gap with the scope of the Directive, that applies to all listed companies – demands only an approval by disinterested directors. At the same time, Ireland 'received' from the Shareholder Rights Directive II, among other shareholder-friendly provisions, the shareholders' right to vote on remuneration policies and reports,[348] already mandated by UK law.

Similarly, Ireland implemented the Shareholder Rights Directive I with the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 that led to an increase of the levels of shareholders' rights in the country. Moreover, between 1973 and 1995, Ireland and the UK shared the International Stock Exchange of Great Britain and Ireland, with Irish companies subjected to the London's Takeover Panel. A national takeover regime that blueprinted the City Code, and that therefore contained the shareholders' approval of defence measures,

[346] See Holger Spamann, 'Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law' (2009) 2009(6) BYU L Rev 1813, 1830-1837, that showed how the common law family acts as an insulated system of doctrinal influence and legal transplants, in which the UK has a notable central weight.

[347] S. 1110-O Companies Act 2014, added by the European Union (Shareholders' Rights) Regulations 2020. Petersen and Fagernäs (n 253) 18.

[348] S. 1110-M and 1110-N Companies Act 2014, added by the European Union (Shareholders' Rights) Regulations 2020.

was introduced in 1997.[349]

This proves that – in the area of shareholders' rights – Ireland was a norm-taker rather than a norm-maker.[350] Thus, it did not and will not represent a benchmark for the European Commission, that will continue to draw inspiration from the UK framework. Conversely, after Brexit, Ireland is now left in the Council without a powerful ally in contrasting the proposals templated on other models, and therefore it could find it difficult to oppose German-oriented proposals, if eventually proposed by the Commission.

3.6 Global race for charters and listings

After Brexit, the UK will continue to be exposed to two forms of regulatory competition that could impact the future development of shareholders' rights: the global competition to attract incorporations, and to attract listings. From the mere perspective of shareholders' rights, the business of attracting charters of public companies led to an international 'race to the bottom', being profitable only for small States that provide directors-friendly jurisdictions.[351] British Overseas Territories offer today degenerated corporate laws where shareholders are dispossessed of almost every right.[352] For the UK, engaging in such a race would mean to reform its model with a Copernican revolution, to only receive derisory revenues in return – in proportion to its public budget – from incorporation fees[353] or turnover for lawyers and consultants.[354] Moreover, the exit from the *Centros* mobility system definitively discourages the option of actively engaging in such a race.

Conversely, to maintain a competitiveness outside the European Union, the global race for listings puts an important pressure on the regulation applicable on the London Stock Exchange. In December 2021, the 'one-share, one-vote' principle – an institution of shareholders' democracy initially moulded through market pressures[355] that was still

[349] Irish Takeover Panel Act 1997, Principle 6.

[350] See more broadly, on Irish company law, Pat Nolan, *Dynamics of Regulation in Ireland: Advocacy, Power and Institutional Interests* (Institute of Public Administration 2008) 73.

[351] Corporations can migrate to Delaware corporate law to reduce shareholders' rights and enhance managerial powers. See Jennifer G Hill, 'Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware' (2010) 63(1) VandLRev 1.

[352] See William J Moon, 'Delaware's New Competition' (2020) 114(6) NwULawRev 1403.

[353] As noted by Siems (n 32) 321, under EU law 'no periodic franchise tax is levied, and, when a company is founded, only administrative costs may be charged'.

[354] ibid.

[355] Davies (n 60) 364.

standing on the Premium Segment – was relaxed[356] to attract initial public offerings with dual class structures,[357] under the competition of the US, Singapore, Hong Kong, and Europe.[358] Given the explicit aversion of institutional investors towards dual class shares, a departure from their preferences places London in an ambiguous position in this respect, because instead of further specialising in offering high standards to shareowners, it allows pro-founders and pro-directors listings that downgrade the role of some shareholders to that of mere capital providers.

However, notwithstanding this limited lowering in the pro-shareholders standards of the Premium Segment, the UK Listing Review clearly set the course for the post-Brexit era:

> What has been our general approach to thinking about regulation and the changes that Brexit might bring? As a global centre, we will want to continue to shape and follow global standards. It makes no sense to think in terms of 'ripping everything up' or that we should diverge for the sake of diverging. We clearly need to maintain the high standards of investor protection for which the UK is known.[359]

[356] Financial Conduct Authority, 'Primary Market Effectiveness Review: Feedback and final changes to the Listing Rules', Policy Statement 21/22 (December 2021) 9-15.

[357] Kalifa Review of UK Fintech (26 February 2021) 61-63.

[358] UK Listing Review (n 314) 59-62.

[359] ibid 4.

Chapter 4: Conclusion

4.1 Hic Sunt Leones?

To summarise the main findings of this dissertation, it can be firstly concluded that the European Commission initiated legislation to promote shareholders' rights, considering shareholders' power at the core of a model of good corporate governance. The rights were conceptually framed according to the 'UK benchmark' – namely through the allocation of competences to shareholders as the central constituency of the corporation, and through the enhancement of their participation in the general meeting to exert a pressure on the directors-as-agents. In the EU legislative process, the Council and the Parliament mostly succeeded in curbing those rights into merely optional rights. The UK did not act as an interinstitutional player to actively promote the adoption of the rights on the continent, but it was keenly engaged in the preservation of its regulation even against proposals templated on its model. This firmly confirms the role of the UK as an unintended and passive comparative example, rather than an active exporter of corporate governance provisions.

The Shareholder Rights Directive I and more importantly the Shareholder Rights Directive II validate the postulate on the irrelevance of the UK membership on the recent EU corporate law harmonisation cycle,[360] but even in a more specific way: it was not just Britain's open market approach that was adopted, but also the specific form of shareholders protection, namely the allocation of competences to the general meeting as an instrument to oversight the board. This is the corporate governance element that was opposed by continental Member States, where the balance of corporate power is tilted differently, other mechanisms can be developed to protect shareholders, and shareownership is not commonly widely held. However, a general trend towards the introduction of the same rights had already been undertaken spontaneously by continental lawmakers through adaptive legal transplants.

As for the possible perils that could jeopardise a future enhancement of shareholders' rights, a predominantly positive but to a certain extent mixed picture emerges from the analysis here conducted. On the one hand, the 'horizontal' and 'vertical' convergence towards higher levels of shareholders' rights will likely continue to unfold in the long run,

[360] Gelter and Reif (n 25).

unimpacted by Brexit. An increasing dilution of shareownership and rise of institutional investors will make the 'UK benchmark' and its rights framed *vis-à-vis* directors more relevant than ever, because corporate law would need to address 'managerial agency costs instead of intra-shareholder conflicts alone'.[361]

Lawmakers could actively facilitate the dilution of shareownership concentration to shift to a more developed capital markets-oriented economy, bolstering shareholders' rights to reinforce the market development that is already taking place. Institutional investors and interest groups of shareholders, whilst becoming progressively more influential, could start to lobby for new reforms, and this would lead to a virtuous spiral towards more shareholders' power.[362] Indeed, '[t]he dynamics of interest group politics depends on the existing pattern of corporate ownership',[363] and the growing presence of institutional investors is changing the current patterns. In the long run, the growth of the capital markets and their liberalisation – that is at the core of the EU integration – will increase the pressures of shareholders on lawmakers and shape the laws of corporations.[364]

On the other hand, the empowerment of shareholders shall not be taken for granted either. In continental Europe, path dependency and the clash of different interest groups could make this process a series of steps forward and steps back, rather than a smooth linear progression. Moreover, the Commission, given its use of the comparative method untied from the underlying heterogeneous body of national rules and its freedom to propose the imposition of a single model, might resonate with new international trends and debates, such as the idea that the insulation of boards could lead to sustainability.

In any case, the shareholders' rights already harmonised by EU law will likely be preserved on the continent. On the other side of the Channel, the rights of shareholders in

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[361] Ringe (n 39) 431; for the author, the trajectory of German corporate law confirmed this expectation, given that the reforms have all been framed to strengthen the shareholder body *vis-à-vis* the whole management, 'thus reflecting the growing importance of managerial agency costs in a *de facto* dispersed ownership environment'.

[362] In this sense, Ringe (n 39) 405 argued that 'the German example illustrates that … the interaction between market pressure and law reform can work in both ways', because 'changing ownership patterns have influenced the case for law reform: a legal system that is moving towards a dispersed ownership structure needs very different legal rules'.

[363] Lucian A Bebchuk and Mark J Roe, 'A theory of path dependence in corporate ownership and governance', 69, 97 in Gordon and Roe (n 71). Similarly, Enriques and others (n 38) 104.

[364] See Cernat (n 337) 148 and Siems (n 32) 334. Gelter and Reif (n 25) concluded that 'the general trajectory and needs of capital markets will remain the same, with or without UK membership' (see the brief of the paper in Martin Gelter, 'EU Law with the UK – EU Law without the UK' (2017) 40(5) FordhamIntlLJ 1327, 1330).

the UK – the quintessential shareholder-friendly and institutional investor-driven country – will not be altered by Brexit. In the long run, improbable but still possible loosening of the pro-shareholders standards, driven by the international competition, will not in any case counterbalance the general trajectory of the UK system, robustly centred around shareholders empowerment. On the contrary, new upgrades are to be expected.

4.2 Future areas of inquiries

In formulating company law directives, the European Commission drew from various jurisdictions. However, in the field of corporate governance, the UK was prominently a norm-producer in shaping the relation between shareholders and directors later endorsed by the European Commission. Future studies could deepen the use of the comparative method by the Commission in corporate law-making, but more importantly, they could focus on the adoption of a single national benchmark in its proposals, and on its clashes with Member States in the following interinstitutional work. At the 'horizontal' level, new transplants of shareholders' rights could be studied to investigate to what extent they represent an import of the 'UK benchmark' on the continent.

Moreover, future steps in the construction of a European corporate governance model could be analysed from the perspective of the balance of power between shareholders and directors. Thus, a special attention could be devoted to differentiating between the tension to relegate shareholders to the role of passive investors – externalised from the governance of corporations – and the legislative reforms aimed at repositioning them at the centre of corporate governance.

In this sense, the most comprehensive study on the convergence of shareholder law, published in 2007, concluded that although a reform in the distribution of powers among company bodies would have brought winners and losers, a further convergence – driven by the pressures of investors and by the internationalisation of the capital markets – was to be expected.[365] The author auspicated a convergence towards the empowerment of shareholders, arguing that '[t]he law should neither confine the shareholder's position to that of the investor, nor accept the shareholder's 'rational apathy' as unalterable', because 'it is possible and reasonable to grant the shareholder a strong position within the company

[365] Siems (n 32) 353-354.

(again)'.[366]

The analysis conducted in this dissertation confirms that such convergence has progressed in the European Union, and moreover in the hoped-for direction.

[366] ibid 391.

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