

Corporate Governance, Financial Market Regulation and the Next 'Great Transformation' of Markets and States in the Transnational Space:

Of Investors, Employees, Global Assemblages and Polanyi's Double Movement °

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Abstract: It is a well-known and much explored fact that capital market regulation has had a larger share of activity and visible success within the process of European integration than the long-standing efforts towards the establishment of harmonized rules in the area of corporate governance. While a unified, harmonized or effective market-wide corporate governance regime was identified early on as one of the building blocks of the European project, the historically grown, path-dependent varieties in national corporate law systems proved – for the longest time – resistant to ambitious Europeanization efforts. This paper argues that precisely at the time when companies' financing structures were being adapted to globally available and moveable capital, corporate governance rules came under immense pressure to address the interests of world-wide operating investors, and that this development resulted in a dis-embedding of the corporation. The corporation at the end of the 20th century was no longer primarily seen as an organizational entity, but had become a financial vehicle, operating in a regulatory framework largely out of control of domestic company law legislation. This emerging regulatory environment consists of supra-national legislation directed at increased efficiency of regional and global financial markets on the one hand and increasingly incentive-oriented, indirect regulation of corporate governance rules, placed to a large degree within the discretion of market actors. The financialization of corporate governance and the emergence of a transnational legal pluralist regime of applicable rules and standards provides a particular challenge to Karl Polanyi's identified 'double movement' in the regulation of increasingly disembedded markets.

And, yet, this is only the first of two analytical steps that must be made to understand the present regulatory challenge. As the study of capital market law and corporate governance in the European Union illustrates, the emerging regimes cannot adequately be represented as either national or international. As they are both and yet neither exclusively, they represent examples of what Saskia Sassen calls 'global assemblages' and what I shall here study as transnational legal pluralism. While Sassen's concept provides for a powerful illustration of the autonomy of self-constituting spaces that comprise human, institutional and technological, digital elements, this framework needs to be complemented by a specifically legal perspective on the evolving forms of regulatory approaches and instruments that are present here.

Key words: European Corporate Law, Financial Market Regulation, Corporate Governance, Varieties of Capitalism, Embeddedness, Global Assemblages, Legal Pluralism, Transnational Law.

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I. Introduction

In midst a rapidly unfolding and spreading financial crisis, which many hold to be the worst since the Great Depression of 1929¹, scholarly assessments of market regulatory instruments are prone to be highly volatile, experimental in nature at best. Not particularly well equipped to quip about 'I told you so's'² or 'I should have known's'³, lawyers, working in the primarily affected areas of banking and securities regulation, corporate governance and accounting, find themselves struggling with contradicting evidence from 'experts' right and left. Much of the retrospective wisdom presented by economists, accountants and market analysts, turns on the in/predictability of the current situation and there seems to be a collective, if increasingly coy⁴ remembering of the exaltation and 'irrational exuberance' of times and actions not so long ago. Those that have not (yet) lost house or job but instead, enjoy the privilege of observing and interpreting these 'interesting times'⁵, find themselves pondering, it seems, about responsibilities for the emphatically embraced views that, for example, house prices could only rise, or that markets could provide not only sufficient incentives to managers to keep stock performance on an upward surge but also provide for the necessary oversight and control. It is within these confinements that current thinking yearningly looks to the past, gloomily observes the present and – in a strangely heartened and resolved manner – sets out to dream up the future. And it is in the centre of the current attempts to address, explain and overcome the crisis, that conceptual and institutional suggestions are running high. Plus ça change, plus c'est la même chose?

Conceptually, of the contenders competing for attention in this future-building exercise, 'systemic risk management' appears to come out ahead. While 'risk' is not an alien concept to law⁶, its legal treatment poses a particular challenge to legal theory: en lieu of a general legal theory of risk that would necessarily always reflect a particular interpretation of law in general⁷, different legal areas have – over time – been dealing with risk in highly specialized, concrete forms.⁸ The notion of risk is of crucial importance in the present inquiry into the nature of the crisis and the adequacy of possible responses. It serves as a reminder that instead of being asked to devise a regulatory scheme modeled on a simple cause-effect analysis of the current crisis, any regulatory response will have to embrace the particular nature of risk that underlies and informs the present situation. The risks that lie at the heart of the current inquiry into

the crisis present a particular set of challenges. In fact, the evidence is too strong that the current situation grows out of a larger complex of contributing elements, which are not adequately squeezed beneath the sub-prime & mortgage collapse alone. Financial innovation, as it skyrocketed over the last decades, a development that had begun hundreds of years ago with the brazen invention of insurance schemes⁹, set free a truly mind-boggling sphere of risk-taking opportunities. Taking stock today, mortgage lending, while tremendously concentrated and over-heated and thus prone to implosion¹⁰, only formed part of a seemingly insatiable expansion of borrowing and lending activities concerning commercial real estate, commodities and international equities.¹¹ As the first 'lessons' are being drawn and the first sets of calls for speedy but comprehensive, swift but thorough reform made, it is fast becoming clear that the risk of the financial surge of the last 15 years has and will be borne by investors who in an absolutely disillusioning manner had everything 'on the line'. Yet, a closer look at the investors who are said to have lost their homes and their income soon reveals that in fact many of these investors had already been in a miserable position well before the bubble burst. The close linkage between so-called defined contribution (401-K) plans in the U.S. and the particular corporate finance/governance regime that exclusively focused on a company's short-term performance on the stock market, made of most employees *de facto* investors. As retirement savings were put into corporate stock, which became reinvested and commodified, these 'savings' became crucially exposed to the volatility of the market. The insecurity of employees' old age investments was only exacerbated through the increasingly aggressive role played by institutional investors, above all, by pension funds that are often plagued by short-term orientation and their fund managers' brief tenure.¹² The current 'crisis', in fact, continues but does not constitute a long-term decline of retirement security.¹³ This has important repercussions for any identification and assessment of the risk(s) connected with the current financial situation.

Close up, the picture of the current crisis is in fact one of many layers and shades. This provides a formidably humbling context for any search for responses, remedies, solutions. Complementing the current inquiry into systemic risk and its management, just touched upon, *institutionally*, then, the talk today is concerned with the need for a 'strong' hand, and the inevitability of 'intervention', of 'more' and of 'better' control and oversight. It is this widely shared sense of emergency out of which grow the suggestions for general toughness and diligence. This paper takes issue with this enthusiasm for institutional responses, the creation of tougher rules, new monitoring agencies and more severe accountability. It does so for the simple reason that things are not that simple.¹⁴ Striking evidence for the complexity of the situation and, correspondingly, of the regulatory concepts and instruments that we are in need of developing is provided by the history of the regulatory state itself. This paper will briefly touch on the development of regulatory law during and after the height of the regulatory state in Western Europe, if only to illustrate the deeply complex landscape of direct and indirect regulation, by government agencies, courts, private parties and numerous organizations that fit nicely neither in the public nor the private arena. While this is well known

generally¹⁵, it is certainly true in the area of financial regulation, capital market law and corporate governance¹⁶, with which this paper is primarily concerned.

The following observations focus on the intricate correlation between the *conceptual* notion of risk management and on the *institutional* dimension of 'market regulation' or 'state intervention' in the area of capital market law and corporate governance. In a strict sense, geographically, the paper will use examples from the European Union, but the concerned regulatory regimes can more adequately be understood as 'global assemblages'¹⁷, or, as I will argue, as examples of *transnational legal pluralism*.¹⁸ As such, they are – on the one hand – neither exclusively national (domestic) nor international, while – on the other – not eliminating or overcoming the nation state.¹⁹ Rather, these assemblages, in their description through the Chicago sociologist, Saskia Sassen, are constituted through persistent local activity and interpretation and are as such comprised of human, institutional as well as technological elements, the latter resulting predominantly from the breathtaking advances in information technology ('digitalizations').²⁰ In contrasting the concept of transnational legal pluralism with that of Sassen's global assemblages, I will suggest that despite the convincing account of the changed and yet crucial relation between the national and the global that Sassen presents, there is a continuing need for a specifically legal perspective on the reconfiguration of 'spaces and places' that is so powerfully shaping human activity and policies. It is here where it is important to draw on earlier writing in legal sociology and legal pluralism.

The paper will proceed in three steps. First, I will contrast the pursued regulatory strategies in the two areas of capital market law and corporate governance in the EU. The central assumption of this complementary presentation of these two areas, that have seen a surge in regulatory activity – in Europe and beyond – is that in particular the transformation of corporate finance during the last two decades has led to a far-reaching approximation of both areas. This is a remarkable development, as it raises intriguing questions regarding, for one, the methodology that informs the conceptual construction and demarcation of legal doctrinal fields. In other words, how and why do we (continue to) distinguish between capital market law and corporate governance (law)? Secondly, the apparent overlapping and intertwining of these two distinct regulatory areas presents formidable challenges for our understanding of the law and the specific regulatory instruments relied upon governing each or both of the concerned areas.

In the second section I will reflect on the driving forces behind the continuing regulatory reform process in both areas and discuss recurring concepts such as harmonization ('maximum', 'minimum', 'reflexive') and regulatory competition against the analysis of market embeddedness provided by Karl Polanyi in the 1940s and the 'Varieties of Capitalism' studies by scholars such as Hollingsworth²¹ and Hall/Soskice²² in recent years. The third and last section seeks to provide an explanation for the particular forms of legal regulatory regimes that are emerging in the named areas. Contrasting or

complementing Sassen's account of 'global assemblages', I will argue for a legal pluralist reading of the emerging regulatory regimes.

II. Capital Market Regulation and Corporate Governance: Who are Kain and Abel in the Quest for an Efficient European Securities Market?

A. In Search of a Harmonized European Securities Market

In the context of this paper, we can confine ourselves to a brief overview and assessment of the developments made with respect to the regulation of capital market law. During the last years, extensive and comprehensive studies have become available that pay adequate due to the important growth of this area of regulatory activity and scholarly inquiry. Common to these assessments is the assumption that long-term, economic growth in Europe is being closely linked to an effectively and supportively regulated securities market.²³ Namely, the European Commission and the European Court of Justice [ECJ] have been playing decisive roles in the context of shaping a continuously evolving, regulatory framework in this area. Central to the Commission's regulatory efforts was the 1999 release of the Financial Services Action Plan ["FASP"], which in its wake spurred a tremendously dynamic series of legislative initiatives. The FASP came into being at a time, when there was very little movement and even less advance in the area of corporate law harmonization – some even spoke of an 'almost empty' agenda²⁴ Programmatic and regulatory initiatives in the context of the FASP have included the inauguration of the *Lamfalussy* Commission, which in 2001, after a the release of a preliminary report and the initiation of a consultation process, produced its comprehensive final report where it addressed and discussed the challenges and needs to work towards an efficient and dynamic securities market in Europe.²⁵ Echoing the views shared by a wide spectrum of scholars and practitioners in the area, the Report, from the outset, identified the immediate necessity to bring swift reform to the existing regulatory framework in European financial regulation. This reform had become necessary mainly in light of the breathtaking advances made in financial activity around the world over the past 15-20 years, the consequences of which for securities regulation on the one hand and corporate (organization and finance) law on the other were becoming more and more obvious.²⁶

Despite the fact that the FASP regulatory initiatives partake of a very recent history, the wide-ranging assessments of their structure, aspirations, their successes and shortcomings are fast beginning to fill symposia, edited collections and bibliographies, not to mention the slew of working papers appearing, in short succession, in the Social Science Research Network (www.ssrn.com). Central to the debates surrounding the state of the European Financial Market after the introduction of a number of Directives is the concern over the inconsistency of the Directives' implementation by the individual Member States. The verdict, for the time being at least, is that due to the many political

differences on the one hand and existing variations of securities regulation institutions across Europe a harmonized securities market is still far away.²⁷ Looked at closely, the Prospectus²⁸, Market Abuse²⁹, Takeover Bids³⁰ and Transparency³¹ Directives allow for a range of varying implementation regimes that are altogether committed to the idea of 'optionality'³² but, as a consequence, fall short of bringing about an effectively levelled playing field for actors in the European Market. At the same time, the Lamfalussy Commission consolidated and formalized the operation of a monitoring mechanism with a stick, embodied by the European Securities Committee – ESC on the one hand and the Committee of European Securities Regulators – CESR on the other. These play an important role in the evolving multi-polar process of European securities regulation. After the political orientation is identified through the Council and the Parliament, the Commission and the Parliament – in collaboration with ESC and CESR – design the more concrete implementation and execution procedures. It is after this process that in a third step the CESR through the different regulatory agencies it brings together produce recommendations, benchmarks standards. Despite these being without legally binding power, they are meant to nevertheless provide a compellingly coherent reference mark for the implementation of the introduced measures.³³ On a fourth and last step it is the Commission that is in charge to assess the successful implementation of the regulations.

As we will discuss in more detail later in this paper (III., IV.), the particular dynamics of this regulatory area raise significant questions concerning the way in which legislative goals are being identified, which interests are being considered and how these feed into the constitution and re-constitution of distinct doctrinal and conceptual fields. As in other areas, markedly European Contract law and, more specifically, European consumer protection law³⁴, the pursuit of a European regulatory framework in capital markets law and corporate governance occurs against highly charged assessments of the underlying assumptions and goals that inform the regulatory process. Market efficiency represents, in this context, a highly persuasive formula that, when studied more closely, does not by itself contain much clarification as to the interests and goals that are actually being pursued. This dilemma, that certainly seems to plague any reform agenda in complex regulatory areas, is further exacerbated by the fact that the European securities market (or, the European Company Law Scene³⁵) constitutes an even more complex arena and context than a historically evolved regulatory area in a particular state.³⁶ As will be argued more fully below (III), substantive law reforms in Europe regularly occur with the open-ended European integration project in their background.

Before we briefly highlight the particular dimensions of European Corporate Governance Regulation [ECGR], we shall pause for a moment to reflect on the connections between capital market law and corporate governance. The different speeds at which each area has been developing in Europe could suggest that it would indeed be possible to neatly distinguish between them as clearly distinct, conceptually and doctrinally contained regulatory areas. There are several elements at play that point

into the opposite direction, which we briefly want to allude to under the heading of the 'financialization of the corporation'.

B. The Financialization of the Corporation

Since 1980, the financialization of the corporation has led to a widely held acceptance of subjecting every element of a business firm to varied processes of securitization³⁷, involving a fast proliferating landscape of investment actors.³⁸ This strategy, pursued by companies across the world, is pursued to attract a highly diversified investment of global investment pools. Far-reaching deregulation with regard to capital control during the 1980s has facilitated an unprecedented flow of capital across national boundaries, allowing for securitizations, often repeatedly, of a large number of assets, including pension claims, real estate and commercial claims. With companies designing corporate strategy primarily with stock performance in mind, shareholder value became the dominating principle in assessing corporate performance, fuelled by a seemingly unstoppable growth in index values.

The focus on short-time volatility of corporate shares to evaluate a company's merits and prospects would quickly become the only perspective from which we would try to understand a firm.³⁹ But this narrowing of gaze came at the price of also blinding out that the firm's environment had dramatically been transformed over the course of a few decades. To the degree that the advancement of communication and information technology revolutionized the transfer of derivatives, sometimes as a company's virtual assets, across vast strategic spaces, the attention given to stock performance eventually removed the firm from its geographical environment by elevating it into a purely ethereal realm. In consequence of its financialization, the share or other security of the corporation (its 'reference asset' for the creation of another synthetic security) became radically virtualised. What architects of synthetic credit instruments call the reference asset, which can be the original subject of a loan or security, became radically virtualised in relation to the business corporation. The corporation, in turn, was reduced to an anchoring point for independently originated financial programs, thereby positioning the corporation no longer in a real economy, but in an artificial space of financial engineering.

In the end the firm as we have come to understand it over the past 20 years, had even outgrown even the ideal model of a nexus of contracts.⁴⁰ In order to remain operational, the model had to be adapted to the processes of financial engineering, which – at least partially – moved the corporation out of the centre of the labyrinth of contracts in which it, or its securities, are entangled. The financialization of the corporation and its securities entailed a radical separation of the corporation itself from the instruments that represent claims in, of, or against the corporation. The corporation had become a nodal point for an ephemeral crossing, interlinking and overlapping of financial vectors, channelled through the glass structure of the legal person, with almost to no relation to

the original 'business' of the corporation. A dream fulfilled, with money flowing in and out of the firm, the corporation had become a virtual realm for strategic investment.

The financialization of corporate governance is powerfully reflected in the fast rise in importance of financial experts in the board of directors, the importance of financial expertise in the making of business decisions and, finally, in the transformation of the educational environment for the supporting professions – including lawyers, consultancies and accountants. The flip-side of this is the dramatic erosion of labour interests representation in the contemporary business corporation. Where corporate activity had for a long time been marked by a lively public political discussion of different constituencies' interests in the firm, its financial and physical virtualization⁴¹ increasingly erased the reference points for a general assessment of what corporations were doing.

As suggested above, the financialization of the corporation led to significant changes in the corporate regulatory framework. The 'financialization' of the business corporation, which arguably had always been part of the corporate identity⁴², does, however, exhaust itself neither in the adaptation of corporate finance to globally available, highly diversified investment tools and opportunities nor in the wide-ranging turn of regulatory policy towards shareholder value that gave rise to the 'corporate governance movement' of the last decade in corporate law theory and practice.⁴³ Moreover, the financialization paradigm eventually led to a dramatic reconfiguration of the 'embedded corporation',⁴⁴ by upsetting and shifting the institutional framework of the corporation's regulatory environment⁴⁵ with tremendous consequences on both the domestic and the transnational level. As national governments found themselves drawn into highly charged political debates over the goals of corporate law reform, that themselves were increasingly likened to existential questions of national survival⁴⁶, the European lawmaker, too, came under growing pressure to follow up on long-standing promises and aspirations to work towards a more effective level playing field for European companies.⁴⁷

C. The Ups and Downs, Rights and Lefts of European Corporate Governance

The varied history of European corporate law regulation is marked by the diversity of interests and concerns invested in this area of regulation. While the legislative record was, until recently, not altogether comprehensive⁴⁸, ECGR has in the last years become one of the most vibrant sectors of norm-creation and regulatory interaction. As such, ECGR has become a regulatory universe of its own, with a large portfolio within the Commission's Internal Market division and a seemingly tireless expert community feeding into the policy and norm making process at every turn. With ECGR long having left the confines of the European Court of Justice, the Council and Parliament, it has expanded into an extremely versatile, comparative and transnational legal field. ECGR constitutes a *semi-autonomous* field, comprised both of hard law and social norms, which are in a constant relation of complementarity, fusion and irritation.⁴⁹ As such

ECGR presents formidable challenges for legal, economic, sociological or political analysis. From the point of view of legal pluralism, the particularity and intricacy of ECGR lies in its mixed constitution of law and 'social norms'.⁵⁰ Seen through the legal pluralist lens, ECGR develops as a co-evolutionary process, where the imposition of law – which encompasses regulations, directives, recommendations and judgments – is both shaping and being shaped by the norms evolving outside of its imposition. Similar to the unpredictability of consequences and effects of rights/principles-transplants⁵¹, ECGR faces enormous challenges in terms of legal certainty and strategy, given its many sources of potential disturbance, irritation, and complementing points due to its complex regulatory agenda. With view to the challenges facing the EU from the substantive enlargement in 2004, Silvana Sciarra observed: 'As the tradition of comparative legal scholarship in Europe has taught us, the attempt to pursue a "transplant" of legal institutions uncritically is both a sign of disregard for traditions different from the one to be transplanted, and, very often, is an inefficient solution.'⁵²

Adding to the difficulties arising from the multilevel and multi-stakeholder dimension in company law regulation in Europe, ECGR has been amplifying the tensions that underlie the conceptual and architectural distinction between 'company' and 'capital market' law, which are deeply embedded in a country's market Regulation histories.⁵³ Struggling with competing policy goals regarding the enhancement of market freedoms as they relate to capital market rules on the one hand and to corporate governance law on the other, ECGR is driven to actualize 'the best of both worlds'. Yet, while corporate law itself appears to continue to withstand all attempts at deconstruction and demystification by other conceptual frameworks as to what corporations do⁵⁴, ECGR finds itself deeply involved in a large, ever-so amorphous market-building project. The 'function' of the firm, as necessarily implicated within ECGR, must now extend far beyond the financial-organisational dimensions that have recently again been depicted as the 'what', 'how' and 'why' of corporate law. Within the European project, in particular after the Lisbon Summit 2000⁵⁵ and its most recent reinvigoration in form of a 'social makeover'⁵⁶, corporate law has become a strategic token in a complex multilevel governance game that brings a much wider range of players to the policy-making table than any single Market regulation unit would reasonably want to assume responsibility for.

While the to-do-list for ECGR, only seems to keep growing in view of pressing competitive, social, environmental and monitoring demands⁵⁷, it has in fact always been evolving in a particularly accentuated and contested field of contrasting and competing Member State agendas in pursuit of national prosperity, of which corporate and capital market law had always been a central building block.⁵⁸ As such, ECGR has never sat comfortably within the wider market integration agenda. The real challenges of company law harmonization, however, became impressively obvious during the exhausting struggle over the adoption of a regulation concerning the creation of the European Company statute, originally initiated already in the 1970s, and eventually passed after many more compromises, in 2001.⁵⁹ Another illustration of how ECGR has

been inextricably caught up in the European 'Varieties of Capitalism'⁶⁰ was, without doubt, the long contest over a European Takeover Directive⁶¹, which resulted in 2004 in a Directive full of loop-holes and opt-out clauses.⁶² Eddy Wymeersch recently called the moment of adopting the Directive a 'provisional semi-final point in a process that has taken more than 17 years, and according to some even more than 30 years on the way to opening up the European markets for corporate control.'⁶³ At the time, André Nilsen observed that '[T]he Takeover Directive sees light after a long and acrimonious journey through the institutional labyrinth in Brussels.'⁶⁴

As the regulatory trajectory of ECGR continues to unfold, we must be even more sensitive to the degree to which this enterprise remains deeply embedded in the particular dynamics of multilevel governance of European integration on the one hand⁶⁵ and the globalization of markets and regulatory processes on the other.⁶⁶ Under such conditions, an assessment of the concrete forms of norm-creation presents great challenges due to ECGR's complex appearances ranging from 'hard' to 'soft' law to norms that are developed, promulgated and disseminated by a panoply of public and private actors.⁶⁷ Therefore, instead of trying to free ECGR from its embeddedness in this complex regulatory environment, the emphasis must be on the exact opposite. Precisely by embracing the embeddedness of ECGR as a *transnational legal field* can we begin to better see the concrete as well as the amorphous forms of change. Embeddedness is here understood in the following four dimensions:

- a) ECGR is informed by the policy and legislative dynamics between corporate law and capital-market law (securities regulation) as well as between corporate law and labour law, categorizations of functionally separable legal areas that can be found in all advanced industrialized societies and that are increasingly challenged through global forces of rule-making;
- b) ECGR is entangled in the European 'Varieties of Capitalism' with regard to corporate and labour regulation, as evidenced for example in the struggle over the Takeover Directive and the statute of the *Societas Europaea*;
- c) ECGR as part of the larger project towards the completion of the European internal market⁶⁸, in particular in the post-Lisbon environment of knowledge society politics within the EU⁶⁹
- d) ECGR as semi-autonomous field, marked by a vibrant and yet precarious, always threatened balance between official law making, transnational consultations, expert committee preparatory work, recommendations, communications and standardization, that we see unfolding on the domestic, EU-supranational and transnational level.

To better illustrate where the current debate on European corporate governance including comparative corporate governance stands from and to perhaps gain a better view on where it might be going, some comparative history is necessary. Within the US. Scholarly discourse – which powerfully feeds into and informs a global discussion about corporate governance standards, their convergence or divergence, among the defining

landmarks are: the Berle-Dodd debate of the 1930s about the responsibilities of management, the Berle-Means treatise on "Modern Corporation and Private Property" – this treatise, which famously observed that in liquified capital markets and with a professional management, shareholders face a monitoring problem due to the 'separation of ownership and control', has become again, some 75 years later, focus of renewed attention (*Bratton, Wachter, Tsuk Mitchell*) – this leads to a renewed inquiry into the conditions of US embedded capitalism then and now. It therefore enriches the political analysis provided for by scholars such as Mark Roe and potentially links it to ongoing work among economic sociologists such as Granovetter⁷⁰ and Beckert⁷¹ on the one hand and recent developments within new institutional economics on the other. Further, the rise of Law & Economics in Anglo-American and Anglo-Saxon corporate law, which has come to be the most persuasive and most influential unified approach to describe the nature of corporations.⁷² It is against this background, mixed with some comparative law, that the above named scholars have posited that there will be more convergence than divergence and that shareholder primacy will become the definitive theory of corporate governance regulation.⁷³ Closely related is the so-called Legal Origins Thesis, put forward by renowned economists *La Porta, Lopez-de-Silanes, Shleifer & Vishny* during the last one and a half decades: their claim is, abbreviated, that countries with common law tradition have higher levels of effective investor protection, liquid capital markets and growing prosperity whereas countries of the civil law tradition do not. Common law jurisdictions are found to be featuring a high level of outside control on corporations, whereas civil law countries are known as so-called insider-systems of corporate governance. This thesis has been attacked from various sides (Spamann, Siems, Deakin/Ahlering, Roe, Jackson, Licht). More recently, even, the recognition of the short-comings of the 'economic man' has been informing the fast rise to fame of the field of behavioural economics (Jolls, Sunstein, Thaler), which has been contributing to an ever more engaged debate about corporate actors' behaviour and the need for regulators to take a more differentiated, less heavy-handed and yet slightly paternalistic approach towards regulation. The overall gist has been one we might wish to call enlightened deregulation: it clearly builds on a distinct evolutionary pattern of post Welfare-state regulatory hubris and as such forms natural alliances with the administrative law shift towards participatory governance and indirect regulation through less 'interventionist' means such as 'transparency' and 'disclosure' – well, nudging.⁷⁴

In Europe, this comparative history is very present. The turn to 'law and finance' is occurring very persuasively⁷⁵ and with consequences for the continuously evolving regulatory landscape. This landscape is so intricately constituted through a combination of technological advance, institutional change and discursive practice that Saskia Sassen is rightly speaking of 'cultures of interpretation'.⁷⁶ As the European Commission continues to pursue a very effective dual agenda of revisiting and expanding the reach of capital market law Directives on the one hand and on indirectly reforming company law rules on the other, we find a powerful illustration of the emerging culture of

interpretation. Making the 'European Company Law Scene' one of the most vibrant law- and norm-making markets worldwide⁷⁷ the European Commission has been pursuing one of the most sophisticated strategies of indirect, soft-law making by delegating far-reaching bench-marking and best-practice formulation authorities to expert committees, on whose work the Commission has since been issuing far-reaching recommendations that more often than not have been preparing Directives.⁷⁸

These ECGR developments represent thus a series of highly diversified norm-setting processes that have been resulting in a veritable explosion of corporate governance codes in Europe and elsewhere.⁷⁹ With the proliferation of corporate governance codes, influenced and pushed by international⁸⁰ and transnational activities of norm setting, discussion and thought exchange⁸¹, it has become increasingly difficult to identify a single institution or author of a set of norms. Instead, the production and dissemination of corporate governance rules has for some time now taken on the nature of migrating standards⁸² and a cross-fertilization of norms is now regarded as eminent and necessary in shaping future corporate activity. A distinct feature of this de-territorialized production of norms is the radical challenge these processes pose for our understanding of what we call law proper. With the dissemination of corporate governance codes, disclosure standards and rules, best practices and codes of conduct, not only corporate and securities law, but also other fields of law – such as labour and employment law – change. It is this strangely amorphous space that due to its intricate relation to concrete places such as nation states, spheres of political decision making, of protest and so on creates a dramatic challenge for attempts to foster institutional conditions for public policy debates.

Loyal to the new institutional economists' reading, this liquidification of institutions constituted by the decentralization of norm producers is repeated, mirrored and reflected in the hybridization of the norms themselves. Everything can become an 'institution', from a fully-fledged regulatory apparatus to a hand-shake among business partners. It is in this sense, that the study of the proliferation of corporate governance codes and company law production in general and of the rules of remuneration disclosure in particular feeds into a broader research into the changing face of legal regulation in globally integrated marketplaces, that themselves become representations of society – exactly the nightmare that Polanyi so aptly depicted.⁸³ What shines through particular developments in individual jurisdictions in this regard, is a most poignant exhibition of particular legal and political cultures and political economies of law making and economic regulation.⁸⁴

III. The Ephemeral 'Double Movement' in ECMR and ECGR⁸⁵

The process of European capital market law and corporate governance harmonisation offers itself as a case in point for an inquiry into the intricate process of European integration. At the same time, it illustrates the nature of legal evolution as reflected in

the increasingly multilevel and trans-territorialised norm production in the law of corporate governance. On the one hand, business has for a long time now come to be organised in a globe-spanning manner, with historically strong attempts to liberate itself of nation states' regulatory aspirations or constraints.⁸⁶ This is part of the nation state's larger struggle over regulatory sovereignty with regard to the economic processes that unfold within and beyond national borders. On the other hand, however, corporations remain, in many respects, embedded in a complex field of historically grown, institutionally and legally structured frameworks of national regulation and administration.⁸⁷ And, because national corporate laws are embedded in such distinct socio-economic cultures, historically grown legal and industrial regimes, scholars in comparative corporate governance have become increasingly aware of the methodological challenges in comparing different corporate governance régimes.⁸⁸ After early critiques of a functional approach to comparative law⁸⁹ had contributed to comparative legal scholarship's becoming much more nuanced, contextualised, and differentiated⁹⁰, contemporary works place great emphasis on the particular cultures of corporate governance norms, the role of institutions, policies, path dependency, and innovation.⁹¹

“Corporate governance practices are partly cultural and historical products. In this context, culture can be defined as the conceptual framework whereby individuals, generally of the same country, understand and mediate the pressures of the world and motivate as well as explain their actions. As the corporation is a meaningful and purposeful human response to economic and social pressures, culture clearly informs corporate governance practices.”⁹²

Indeed, the considerably short history of European company and capital market law regulation provides numerous illustrations of this observation. In spite of a strong push for streamlining in some areas, particularly in capital market law due to increased demands for transparency and more efficient management control⁹³, it is likely that national obstacles will continue to crowd the route towards a European wide company law⁹⁴, structural challenges that have certainly also held a fully harmonized securities market at bay.⁹⁵ European company law reflects the persisting challenges to European integration in that it highlights the difficulties of creating a body of law for social actors who have been relying on national rules, institutions, and customs within the nation state.⁹⁶ This process has nothing but consistently highlighted the immense political and socio-economic obstacles growing out of Member States' different 'varieties' and 'models' of capitalism,⁹⁷ often associated with substantive costs in bringing about an effective regulatory régime for companies operating and investing on the European market.⁹⁸

Any attempt, therefore, at assessing and evaluating the regulatory goals of the ECGR and capital market law agenda needs to begin with the premise that such rules are now developed in and emerging from a multilevel process of norm-production. With this, a

study of European company law necessarily has to take into consideration the impact of different localities and types of norm-production on the emergence of European wide rules and standards, but also the persisting patterns of political opposition against reform.⁹⁹ The German rules governing worker participation in business corporations have, in that respect, become a notorious example of a régime deeply embedded in the country's political economy. To touch on one part of the legal framework would likely result in a turmoil involving numerous other norms and institutions governing co-determination.¹⁰⁰ Likewise, the long and painful struggle over a European takeover régime did clearly reflect the complexities of a regulatory, socio-economic minefield made up of cultural predispositions, institutional traditions (*Volkswagen*¹⁰¹) and established networks—all of which make any capital market law-oriented reformer frown, at best.¹⁰²

'New' or alternative modes of governance have been emerging in response and reaction to the regulatory challenges that inevitably arise from these distinct variances in 'Member States' regulatory design. The most remarkable regulatory innovation in recent years is without doubt the so-called *Open Method of Coordination* [OMC], which, after emerging during the 1990s in the realm of politically contested national, economic and employment policies, had been formally adopted at the 2000 Lisbon Summit. Its defining feature has been the proceduralisation of regulatory governance by benchmarking and disseminating non-binding objectives and standards across a growing body of regulatory areas.¹⁰³ 'In the years following the Lisbon Summit, the OMC [...] appeared to have become the governance instrument of choice for EU policymaking in complex, domestically sensitive areas, where diversity among the Member States precludes harmonisation but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.'¹⁰⁴ The departure of the OMC from the more rigid norm-generation and enforcement program of the 'Community Method' has been both welcomed and criticised.¹⁰⁵ What Francis Snyder identified as 'the challenge of sites' facing the European Constitutionalist project¹⁰⁶, indeed constitutes the framework for the proliferating norm-generation processes of ECGR. As we will see in the example of regulating the disclosure requirements for executive compensation, this area of ECGR is marked by a deep, underlying tension between increasingly decentralised, indirect regulatory forms on the one hand and vaguely defined and yet broadly conceived policy goals against which the adequacy and the success of lower-level norm-setting processes will be measured, on the other. At the same time, EU internal corporate governance negotiations are increasingly becoming disembedded from the exclusionary European context as they are complemented, irritated and shaped by those norms and principles ('best practices' and 'guidelines' that are disseminated on the transnational level, promulgated, for example, by actors such as the OECD).¹⁰⁷

Seen, thus, under the magnifying glass, ECGR can be described to unfold as a particular open-ended and contestable practice.¹⁰⁸ Even a cursory overview of the emerging features of ECGR suggests strong corollaries between ECGR and emerging general forms

of 'new'¹⁰⁹ or 'experimental' EU governance¹¹⁰ on the one hand and between ECGR and transnational governance forms in corporate and labour law on the other.¹¹¹

On the 'inside' of the European integration process, recent years have seen a tremendous drive towards the creation of ever-more flexible forms of indirect regulation, benchmarking and rule/standards production through expert groups and advisory committees. As Simon Deakin has recently argued¹¹², expert groups such as the *European Corporate Governance Forum*¹¹³, while importantly building on recent experiences with the Winter I and II groups and their vital contribution to break the deadlock over the Takeover Directive, nevertheless reinforce and further accentuate the drive towards a 'right' standard in corporate governance regulation despite the declarations that many years of debating the convergence and divergence of corporate governance standards¹¹⁴ should support the view that 'no one size fits all'.¹¹⁵

Paradoxically, the operational method of the OMC, originally designed to promote greater flexibility and pressure to foster a race to the top in social standards, transforms itself in the context of the ECGR into an engine towards 'best practice in corporate governance'. The utilitarian, soft-law approach as here employed, leads to considerably different results than would have been hoped for in other areas of the OMC. With view to the earlier described tensions between different regulatory trajectories of corporate governance – consisting of an amalgamation of company law, securities regulation, taxation and insolvency law – the pursuit of 'best practices' is determined by a considerably narrower scope of functional concerns. At this point, the goals of this pursuit are fused too fast and probably too uncritically with the functional orientation of the post-Lisbon Innovation and Competitiveness Agenda. By emphasizing the need to ensure the economic performance and, connected herewith, the integrity and stability of financial institutions¹¹⁶, corporate governance as a regulatory field is taken out of the more complex regulatory context we have seen unfold over the course of the 20th century.¹¹⁷

As the globalisation of corporate activity and finance undermines any attempt at effectively re-domesticating corporate governance into the previously contained political economies of nation-states, the more appropriate conceptual approach would be to argue for the need for a transnationalization of corporate governance regulation. In the case of ECGR this would mean to first recognise the need for a differentiated assessment of different nation-state regulatory experiences and their presently continuing variations and innovations¹¹⁸, which lies at the heart of our revisiting Polanyi's critique of disembeddedness and his positing of the 'double movement'.¹¹⁹ The next step would then not consist in 'translating' specific regulatory instruments onto the transnational sphere, but, instead, in fostering a radically functionalist understanding of corporate governance. Such an approach would go beyond the now abundant references to 'best practices', which owe their content more to the ideological battles out of which they are emerging than to a truly functionalist governance model. Such a model would have to be developed with the complete corporation, its markets,

governance structures, dynamics and contextual performance practices in mind. Building on work regarding 'reflexive law' in the area of corporate governance and corporate environmental responsibilities¹²⁰, a more adequate governance approach would have to start with the corporation itself, complementing simultaneously continuing assessments of the organisational functionalities of the corporation.¹²¹ While such functionalist approaches to corporate governance are only now emerging¹²², their promise lies in their pursuit of governance models that are evolving directly out of the practice, management and operation of complex business entities on uncertain markets.

While this approach would place great emphasis on self-regulation, which would in turn create additional pressure on the regulatory systems with a mandatory-law approach to corporate law¹²³, *reflexive corporate governance* would eventually emerge as a more adequate and flexible approach to corporate law regulation while – at the same time – not necessarily being insulated from ongoing assessments of this hybrid regulatory enterprise. Instead of reacting to the long, tiresome and frustrating harmonisation attempts in European company law with a turn to expert rule and market governance, reflexive corporate governance would allow for a clearer view of how political governance and corporate self-regulation can be mutually reinforcing and optimizing by constantly exposing regulatory choices and practices to scrutiny. The prime advantage of this approach would be that the regulatory challenges facing today's transnational corporations could be assessed in correlation with the ongoing transformation of the political economies in which companies are legally constituted.¹²⁴ A reflexive approach to corporate governance is even more pressing as the dramatically unfolding debate over a present transition from a 'real economy' to a 'financial economy'¹²⁵ suggests that neither a return to embedded capitalism corporate governance regulation nor a undeterred belief in the 'end of history of corporate law'¹²⁶ with its dubious promises of triumphant shareholder value maximization are a viable option. This means that what would previously have been an interest-pluralist assessment of choices in corporate governance regulation with view to allegedly opposed and eventually irreconcilable stakeholder interests can now be transposed into a more comprehensive and contextual analysis of the corporation's functions, in particular, of its embeddedness in operational and regulatory practices.

IV. The Transnational Transformation of the Legal Order

A. Law and Transnational Rule-Making

The recent respective developments in ECMR and ECGR suggest an intriguing transformation of the role of legal regulation. While scholars in the different variations of new institutional economics¹²⁷ on the one hand and of behavioural economics on the other¹²⁸ provide for important insights into the sticky nature of institutions and mindsets that shape economic development, there has been relatively little attention given to the evolving forms and instruments of legal regulation. This is particularly

regrettable as a more engaged dialogue between law and the named theoretical orientations in economics would likely result in more satisfying answers to the questions that seem to stubbornly seem to surround the institutionalist explanations of complex situations.¹²⁹ Where such dialogue is initiated on the part of open-minded economists, important insights have been gained with regard to the relevance of 'social norms', routines and practices that, due to their complex, context-driven nature, are not easily fitted into a legal rights regime as applied by a contract adjudicating judge.¹³⁰ This 'discovery of social norms by law & economics' scholars¹³¹, however, has left some stones unturned. Namely, the economist bias in the identification of social norms that underlie parties' behaviour leads to a narrow view on the nature and scope of such norms. By contrast, it would seem more promising to take the inquiry into the social foundations of contract law, as Durkheim already early on circumscribed his investigative agenda¹³², further. A decisive step into this direction would be to reflect on the connections between the 'social norms' that govern business partners' behaviour now¹³³ and then.¹³⁴ For one, such a drawing of connections would allow us to appreciate on the evolutionary character of the legal form. As the studies by Macaulay and others that eventually found their way into the famous Materials on 'Contract Law in Context' at Wisconsin¹³⁵ show, the discovery of informal agreements, routines and attitudes among 'contracting' parties was not understood as undermining or substituting law. Instead, the importance of these studies has to be seen in their authors' insistence that these findings must be taken to transform and, eventually, improve law. Instead of juxtaposing law and social norms, the 'relational contract' and 'law in context' scholars emphasized the intertwined nature of both. The current assessments of social norms that govern business people's behaviour are at great distance from these earlier findings.¹³⁶

As relational contract law sought to integrate the constantly changing and evolving nature of social relations into the legal form in order to understand law as relational (or, "social"¹³⁷), we are currently faced with the question how law adapts to or, more appropriately, how law formulates legal responses in a fast evolving, functionally differentiated, complex environment. There is another opportunity not yet grasped by contemporary 'social norms' scholars in the law and economics camp. This concerns the rediscovery of studies in 'legal pluralism' and 'legal anthropology' from the 1970s and 1980s. Such an exercise is promising in at least two respects. For one, the legal pluralists and anthropologists contributed greatly to a better understanding of the semi-autonomous nature of legal fields: as pioneered in her 1976 article¹³⁸, Sally Moore's analysis of law being constituted in part by social norms, routines, customs and practices and in part by hard legal regulation, the notion of law as a semi-autonomous field proved of vital importance in opening our eyes for the intricate relations between the regulator and concrete, local, intimate social spaces.¹³⁹ Striving for alternatives to the at times heavy-handed social engineering by the legal machinery, scholars called for extra-legal activism¹⁴⁰ and delegalization.¹⁴¹

Such a growing understanding of the tensions between 'lifeworld and system' (Habermas), 'the raw and the cooked' (Lévi-Strauss), or 'core and periphery' (Sousa-Santos) would soon become instrumental in the critical assessment of the role of legal regulation in a highly pluralistic society during the middle of the 20th century, which until then had remained very much within the intellectual and conceptual confines of Max Weber's distinction between substantive and formal rationalities of law. In his astute analysis of law's evolution from substantive to formal rationality along with the emergence of the bureaucratic rule of law, Weber identified on the one hand the stabilizing role of law for the conduct of commercial (and other) affairs, while, on the other, recognizing the potentially harmful effects of the ever-recurring anti-formal tendencies on the body and practice of law.¹⁴² Weber's sensibility to the contestations, the anti-rational, material challenges to the allegedly formal edifice of law turned out to be foretelling of the ensuing evolution of legal regulation well into the highly sophisticated regulatory architectures of Western welfare states¹⁴³, plagued by a purposive and intentional regulatory overdrive.¹⁴⁴ It comes as no surprise, then, that the reflection on the place of law in a canon of voices of social ordering that lawyers and social theorists in North America were concerned with¹⁴⁵, was somewhat echoed by the critique of 'instrumental' and 'regulatory' law in an overly zealous Welfare State apparatus in Western Europe.¹⁴⁶

On both sides of the Atlantic, the responses to the financially and normatively exhausted Welfare State¹⁴⁷ soon split into progressive¹⁴⁸ and conservative¹⁴⁹ camps, and this context is worth bearing in mind when assessing today's academic and political proposals in the wake of the financial crisis. In the context of the late 1970s and early 1980s, that saw a far-reaching crumbling of social-democratic policy and a growing scepticism with Keynesian economics, a fairly ambitious theoretical proposal was made that aimed at the resituating of law into a more accentuated model of society: in this model, which did not lend itself to a straight-forward ideological appropriation, society is composed of intersecting, but separated communications that are each constituted by a distinct terminology ("code"). Law was to be understood as one of these social systems – along with 'economy', 'politics', 'religion', or 'art'.¹⁵⁰ On the basis of this position, Gunther Teubner introduced the concept of 'reflexive law', a form of law that would be characterized by a crucial exposure to its surrounding systems, while it remained 'operationally' closed. Due to its 'cognitive' openness, however, law must constantly receive impulses, 'irritations' and, relying on its autopoietic nature, formulate legal responses, i.e. continue its systematic operation. In the face of the weakening welfare state and the growing frustration with ineffective, undemocratic, and over-generalizing and paternalizing regulatory laws, the concept of reflexive law was offered to explain the particular challenge and form of legal regulation in a complex world. Its not uncontested¹⁵¹ core consisted of understanding law as being taken out of a learned institutional context made up of official institutions authoritatively creating state-originating laws and, instead, to be forced to reassert itself in highly diversified complex environments.¹⁵² This radicalization of law's functional orientation constitutes a new stage in the assessment of law's institutional form, as it has been learned over time.

Whereas law is still today most often associated with the state, already the legal sociological work at the turn of the century¹⁵³ as well as the legal pluralist work since the 1960s and 1970s (Moore, Griffiths, Galanter, Merry, Sousa Santos) should long have undermined this stubbornly held belief in the law-state nexus.

It is against this background that the particular challenges facing ECGR can best be illustrated, by studying them through the lens of transnational law and, more specifically, through the emerging prism of *transnational legal pluralism*. The connection of observations of the transformation of public and private international law towards 'transnational law'¹⁵⁴ and the legal-sociological and anthropological work on legal pluralism offers important insights into a better understanding of current trajectories of functionally determined regulatory areas. ECGR is a powerful illustration of such a functional field, determined both by its semi-autonomous nature with regard to its tension between law/norms and politics/market. The latter are powerfully evident in ECGR, which emerges through the co-evolution of the different functional dynamics, which drive corporate organisation. At the same time, the fast-emerging forms of new corporate organisation such as private equity vehicles and hedge funds seem to defy an organisation-oriented assessment of the firm in favour of a differently positioned analysis of contemporary corporate forms. As the 'end-of-history' thesis in comparative corporate governance scholarship and the Berle-Means paradigm of corporate organisation and its related governance issues are revisited and recontextualised¹⁵⁵, the dramatic threat of a mortgage-loan meltdown since the spring of 2008 points to the need of a comprehensive reassessment of the corporate governance approach for an understanding of the financial structures of the corporate form and the contested aspiration of financial markets regulation.¹⁵⁶

B. Corporate Governance as Transnational Legal Pluralism

Today's corporate governance regulation, which is transnational and hybrid in nature, is a product of the above alluded-to fundamental transformations of regulatory instruments and institutions. As corporate law is being shaped by a complex mix of public, private, state- and non-state-based norms, principles and rules, generated, disseminated and monitored by a diverse set of actors¹⁵⁷ and experts¹⁵⁸, a closer look at corporate governance serves two purposes: one is the way in which the analysis of contemporary corporate governance regulation can help us assess the emerging, new framework within which corporate governance rules are evolving. Secondly, the way in which we begin to understand the emerging regulatory framework as an illustration of contemporary rule-making, we can appreciate the legal pluralist deconstruction of formal and informal legal orders in a new light. Building, on the one hand, on early legal-sociological work by Ehrlich ('living law') and Gurvitch ('social law'), this inquiry revisits the core question of any sociology of law, namely 'to investigate the correlations between law and other spheres of culture.'¹⁵⁹ Expanding the spectrum, on the other, with a view to legal pluralist work by scholars such as Moore¹⁶⁰, Galanter¹⁶¹, Macaulay¹⁶², Sousa Santos¹⁶³ or Teubner¹⁶⁴, contemporary assessments of 'hybrid legal

spaces'¹⁶⁵ that are not sufficiently captured with references to local or national contexts, might help us understand better the distinctly *transnational* emergence of regulatory regimes. The transnational lens allows us to study such regimes not as entirely detached from national political and legal orders, but as emerging out of and reaching beyond them. The transnational dimension of new actors and newly emerging forms of norms radicalizes their semi-autonomous nature in the following way: regulatory spaces are marked by a dynamic and often problematically instrumentalized tension between formal and informal norm-making processes. The much lamented, regulatory failure of traditional, state-based legal-political intervention into multinational corporations today has long been serving as an illustration of the need to develop either distinctly 'post-national', institutionalized governance forms or self-regulatory, soft instruments of voluntary binding.¹⁶⁶ Mirroring the complex, hard-to-navigate landscape of border-crossing corporate activity, the proposed conceptual approaches are greatly varied. Instead of emerging as a set of coherent regulation theories, they range from 'global jurisdiction'¹⁶⁷, 'torture as tort' and transnational civil human rights litigation¹⁶⁸, as well as from scandalization movements including global shaming¹⁶⁹, to soft law instruments, self-binding norms, codes of conduct and best practices¹⁷⁰, altogether suggesting an irreversible trend away from 'government' to 'governance'.¹⁷¹

As transnational governance regimes, then, fields such as corporate governance, labour law¹⁷², capital market law, contract law in general and consumer protection law in particular¹⁷³ are increasingly marked by the existence of opt-out clauses and self-regulation mechanisms rather than being defined by enforceable hard-law rules. No longer, it would seem, would the legal pluralist depiction of regulatory spheres as 'semi-autonomous fields'¹⁷⁴ be able to provide a sufficient starting point for a more comprehensive critique of the existing machinery of justice¹⁷⁵: today, the original legal pluralist sword might appear too dull to cut through the distinctly post-national constellation of regulatory regimes. The opposite is true: legal pluralism can forcefully build on its learned lessons in the aftermath times of the decaying Welfare state and 'legal centralism'. While not being able to directly translate the insights gained in those contexts onto the transnational sphere, they can nevertheless assist in depicting the multifaceted nature of transnational governance. This becomes particularly evident in a context, where in the context of an evolving political governance system such as in Europe, claims about 'private autonomy' and 'market freedom' are advanced that seem to echo many of the previous contestations of market intervention and judicial activism within the nation state.¹⁷⁶ Our renewed interest in different meanings of embedded markets is of crucial importance at a time, where the financialist paradigm seems to have outrun itself and where, in our search for a new basis and framework for public policy¹⁷⁷ in a highly interconnected transnational regulatory, post Welfare-state era, we cannot simply return to 'More State, less market' formulas.

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