

EUROPEANIZATION OF CORPORATE LAW
– SOME REMARKS ON THE BACKGROUND OF POLISH LAW

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Summary. Europeanization of national law – including corporate law – is a complex phenomenon, aimed at obtaining coherent solutions at supranational level of legislation and practice. Changing economic and legal factors, as well as an ambivalent evaluation of effectiveness of traditional methods of harmonization, influence the tendencies in terms of methods and directions of company law. The Author attempts to identify the causes of this state of matters and to critically analyze the methods of europeanization of company law in the EU on the example of Polish corporate law.

Key words: europeanization, approximation of laws, unification of laws, regulatory competition, directive, regulation, corporate (company) law, mobility of companies, protection of investors, protection of creditors

INTRODUCTION

Europeanization of national law is a complex phenomenon. Due to time constraints, specific methods and formal aspects of Europeanization of law would be omitted. In my further considerations the term “Europeanization” should be understood as an approximation of national law and practice, aimed at obtaining solutions more coherent with these functioning in other European countries or at supranational level – whether under the influence of formal international obligations related to the membership of the country in the European Union (unification of law as an effect of issuing Council regulations applied directly in certain Member States¹; so-called formal harmonization, connected

¹As regards corporate (company) law, these are primarily: Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ L 199, 31.7.1985, p. 1; Special edition in Polish: Chapter 17 Volume 1 P. 83) and Council Regulation EC No 2157/2001 of 8 October 2001 on the Statute for a European Company (*Societas Europaea*); (OJ L 294, 10.11.2001, p. 1; Special edition in Polish: Chapter 6 Volume 4 P. 251). It is also worth remembering about advanced – however eventually abandoned – works on the Council Regulation on a European private company, which was about to be European equivalent of LLC. Widely understood company law also includes regulations on the European Cooperative Society (*Societas Cooperativa Europaea, SCE*), i.e. Council Regulation EC No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) OJ L 207, 18.08.2003, p. 1; Spe-

with directives implementation²), as a result of bottom-up activities in the law-making process, creation of so-called *lex contractus* either its application³.

This text is aimed at determination of evolving directions and methods of Europeanization of law and the “pros and cons” balance of this process – carried out on the example of corporate (company) law⁴ with particular emphasis on the Polish law.

cial edition in Polish: Chapter 17 Volume 1 P. 280), Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (OJ L 207, 18.8.2003, p. 25; Special edition in Polish: Chapter 5 Volume 4 P. 338).

² As regards company law, these are primarily: Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (codified version; OJ L 258, 1.10.2009, p. 11); this is the so-called “new publishing directive” which replaced the existing First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community); Directive 2012/30/EU of the European Parliament and of the Council 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74); this is the so-called “new capital directive” which replaced the Second Directive 77/91/EEC of 13 December 1976 on the formation of public limited liability companies and the maintenance alteration of their capital (OJ L 26, 31.1.1977, p. 1; Special edition in Polish: Chapter 17 Volume 1 P. 8); Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (codified version; OJ L 110, 29.4.2011, p. 1); Sixth Council Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies (OJ L 378, 31.12.1982, p. 47; Special edition in Polish: Chapter 17 Volume 1 P. 50); Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts (OJ L 193, 18.7.1983, p. 25; Special edition in Polish: Chapter 17 Volume 1 P. 58); Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ L 395, 30.12.1989, p. 36; Special edition in Polish: Chapter 17 Volume 1 P. 10); Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies (OJ L 258, 1.10.2009, p. 20); Tenth Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1); Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12); Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17).

³ On the varied approach to the definition of the aforesaid terms and their aspects, see M. Adenas, F. Wollldridge, *European Comparative Company Law* (Cambridge University Press 2012), p. 7ff; S. Grundmann, *Europäisches Gesellschaftsrecht* (Heidelberg, C.F. Müller 2003); E. Werlauff, *EU Company Law. Common Business Law for 28 States* (Copenhagen, DJØF Publishing 2003), p. 4ff.

⁴ The terms “company” and “corporation” will be used interchangeably hereunder to refer to a capital company in the “continental” sense, i.e. to entities with juridical personality (legal entities), managed by bodies identified within their own structure, characterised by the exclusion (in

LOOKING BEYOND – TO WHAT EXTENT AND WHAT KIND
OF EUROPEANIZATION?

1. The intensity and directions of Europeanization of national law are subject to considerable changes, just as the European project itself, exhibited to a serious test in recent years. In the area of company law the attitude to the process of approximation of laws is influenced by failure of federal concepts and experience of global crisis, as well as by evaluation of effectiveness of some traditional methods of harmonization. Some authors write openly about the crisis of European company law⁵. In this regard several clear trends may be pointed out.

First of all – after the initial period of striving for harmonization of as many as possible elements of company legal structure – often based on German or French models – the attention of the European legislator has turned into the issues relevant for the cross-border mobility of companies, capital flows and protection of investors rights. The activities of the EU in this regard still assume (at least as a principle) introduction of fragmentary regulations, yet the projects of “codification” of European company law do not have – as it seems – much chance of success⁶. Still valid is the statement of Marcus Lutter, who claims that

despite considerable efforts made in the process of approximation of laws and some successes, the EU regulations are still like islands on the ocean of national law. These regulations are incapable of independent existence without fulfilling their gaps with national law⁷.

Secondly – also the methods of approximation of laws preferred or applied by the European authorities are changing. After spectacular failure of the drafts of directives related to the structure of joint stock company and to the law of groups of companies or the draft of regulation on the European private company, an increasing importance belongs to optional instruments and so-called *soft law*. An unusually interesting project, in both methodical and substantial way, is the *European Model Company Act*, inspired by the American *Model Business Corporation Act* and constituting – as it is written by Adam Opalski – “an interesting alternative to the traditional methods of approximation of company law in EU”⁸.

principle) of the personal liability of the members (investors), the freedom of transacting in the member’s rights (stock or shares) and governed by the general principles of proportionality and subject to the power of the majority (majoritisation).

⁵ See J. Armour, W.G. Ringe, “European Company Law 1999-2010: Renaissance and Crisis.” *ECGI Working Papers Series in Law*, Working Paper No 175/2011.

⁶ See the remarks below on the proposal of the so-called SUP Directive.

⁷ See M. Lutter, *Europäisches Unternehmensrecht* (Berlin 1996), p. 6.

⁸ See A. Opalski, “Refleksje na temat europeizacji prawa spółek i jej wpływu na prawo polskie.” In *Wpływ europeizacji prawa na instytucje prawa handlowego*. Ed. J. Kruczałak-Jankowska, p. 190. See idem, “Europejska modelowa ustawa o spółkach – inspiracja do reform prawa spółek? Uwagi na przykładzie prawa grup spółek.” In *Tendencje reformatorskie w prawie handlowym. Między teorią a praktyką*. Ed. J. Olszewski (Warszawa, C.H. Beck 2015), p. 13ff. The author represents Poland in the team drawing up the EMCA. See also T. Baums, P.K. Andersen, “The

Thirdly, towards freedom of transfer of the company's seat ("emigration" of the company) within the EU, driven through and well established by the case law of European Court of Justice⁹, more and more importance has the "bottom-up" process of adjustment of laws, referring to the well-known "Delaware effect" and to the slogan „race to the bottom”.

2. Obviously, the phenomenon of approximation of laws within the EU will still be present in our legal reality. Among the issues, which require the most relevant attention of the national and European legislator, the commonly mentioned are: (a) further increase of companies mobility within the EU; (b) development of corporate governance instruments; (c) diversification of powers and protection of shareholders influencing the company's activity and minority shareholders; (d) introduction of so-called monistic management system (as an optional instrument); (e) mechanisms of creditor's protection, including the introduction of a model of creditor's protection alternative to the institution of statutory share capital; (f) extension of provisions on groups of companies law. However, it seems that in practice the importance of the process of formal harmonization would be decreasing and incomparable with the changes introduced by new Member States or candidate countries in pre-accession period and perhaps – as indicated – comparable effect will be available by other methods. It seems to be related to various causes and circumstances.

Firstly, no matter how visible is the ambition to create coherent, "codified" and extensive regulatory complexes¹⁰, especially after the doings of European Parliament¹¹ and so-called "directives of new attitude", it becomes less and less necessary and possible. As Henry Hansmann (Yale) and Reinier Kraakman (Harvard) point out in an evocatively titled study *The End of History for Corporate Law*¹², modern systems of company law are already – at least in the layer of preliminary theoretic and constructive assumptions – far unified. Besides,

European Model Company Law Act Project." *ECGI Working Papers Series in Law*. Working Paper No 097/2008.

⁹ See, for example, the judgements of the ECJ of: 9 March 1999 in *Centros Ltd. v. Erhvervsog Selskabsstyrelsen* (C-212/97); 5 November 2002 in *Überseering BV v. Nordic Construction Company Baumanagement GmbH* (C-208/00); 30 September 2003 in *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art. Ltd.* (C-167/01) or 12 July 2012 in *Vale Epitesi Kft* (C-378/10). At judgements are available at <http://curia.europa.eu>.

¹⁰ By the way, the concept of "full" or "prevailing" unification is the legal systems of the member states seems debatable. As S. Deakin puts it, ("Legal Diversity and Regulatory Competition: Which Model for Europe?" *European Law Journal* (12)2006, p. 440), "In the European context harmonisation of corporate and labour law, contrary to its critics, has been a force for preservation of diversity, and of an approach to regulatory interaction based on mutual learning between nation states."

¹¹ See, for example, the resolutions of the European Parliament of: 14 June 2012 on the future of European company law (2012/2669(RSP)) and of 29 March 2012 on a corporate governance framework for European companies (2011/2181(INI)).

¹² See Hansmann, H., Kraakman, R. "The End of History for Corporate Law." *Harvard Law School Discussion Paper* No 280. http://www.law.harvard.edu/programs/olin_center/

Member States are relatively reluctant to the propositions of regulations contrary to their own legal traditions. For obvious reasons, the “top-down” harmonization activities are therefore narrowed to specific issues. The exceptions of recent times include the proposition of a new directive on a one-person company with limited liability (so-called SUP; *Societas Unius Personae*)¹³, which however due to the extensive range of adjustment and a profound degree of interference with the national sphere met with a cool, or even critical adoption of a number of stakeholders and Member States.

Secondly, the term of Europeanization, understood as a program of radical change and profound approximation of corporate laws, mainly according to the German-French model, realized in the 60’s and 70’s of the last century, has been eroded. The crisis and analysis of the world trends (primarily based on the Anglo-American model) have convicted the necessity of maintaining some regulatory restraint and the need to take into greater account the trend of liberalization (“deregulation”). Some authors – for example Georg Spindler – write openly about the “Americanization” of company law.

What is more – for today, there is lack of coherent, unified vision of the formula and of the role of European company law among the actors of the decisions-making process in the EU. An eloquent and clear example are serious discrepancies between the European Parliament, representing the “extensive” attitude, and the European Commission, which – referring to the report of, so-called, *Reflection group*¹⁴ – in the “*Action Plan: The European company law and corporate governance – and modern legal frameworks for more involved shareholders and sustainable enterprises*”¹⁵ has already presented much more cautious approach to possible directions and forms of interaction.

Furthermore, it is difficult to find out any qualitatively new ideas or concepts within European company law (regardless to the ones referring to correction of the principles of Corporate Governance and to the increased mobility of companies in the EU). Certainly, this fresh impetus to the development would not be the planned recodification of directives on company law, which – hopefully – have not ended with an attempt to create a “system” of European company law. What may be recalled in this context are, in my opinion, accurate establishments of the Reflection Group, according to which, the European law should intervene only at a particular point, while respecting the principles of proportionality and subsidiarity and only in situations, in which it is considered to be necessary to remove the barriers of cross-border economic activity.

¹³ See the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies (COM (2014) 212 FINAL).

¹⁴ *Report of the Reflection Group on the Future of EU Company Law*, Brussels, 1 April 2011.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12.12.2012 (COM (2012) 740 FINAL).

Besides, there is noticeable instability of political and legal decisions taken at the EU level. The only constant trend seems to be – as it has been already mentioned – increasing the mobility of companies within the EU and broadening the access to the information on contractors from other Member States. It should be noted that the political and legal decisions of the EU bodies in the first range are somehow enforced by the European Court of Justice. In other issues (structure of assets and capital of joint stock company, rules of creditors protection, groups of companies law etc.) such an stability, concerning basic directions of development of company law, does not exist. An excellent example are the twists and turns of the discussion on the protection of company's creditors¹⁶.

3. As a result, it may be assumed that in a long-term perspective the main "power" of the development of company law will not be the formal harmonization obligations related to the implementation of further directives, but so-called *de facto* harmonization – the reception of certain foreign solutions, actuated by the phenomenon of competition of company laws¹⁷, with the above mentioned remark on the differences in the mechanism of competition in legislations of the EU and the USA. An important factor of changes may also occur to be the influence of regulations models accepted and positively verified in other Member States.

¹⁶ See the findings of the SLIM project (Simpler Legislation for the Internal Market) and the High Level Group of Company Law Experts formed in 2001 and led by Prof. Jaap Winter (see the Report of High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe dated 4.11.2002) as well as contained in the Communication from the Commission to the Council and the European Parliament – Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward (COM (2003) 284 final). – ultimately abandoned by the European Commission (Results of the External Study on the Feasibility of an Alternative to the Capital Maintenance Regime of the Second Company Law Directive and the Impact of the Adoption of IFRS on Profit Distribution http://ec.europa.eu/internal_market/company/docs/capital/feasibility/markt-position_en.pdf).

Among the issues that, in the near future, should be given special attention of the national and EU legislators, there are usually: (a) the instruments of corporate governance; (b) the introduction of the so-called one-tier management and control system (e.g. as an optional instrument); (c) further diversification of powers and the principles of the protection of members (shareholders) having a decisive influence over the company's operations and minority members (shareholders); (d) the mechanisms of protection of the company creditors (e.g. including under-founded companies and the so-called foreign letterbox companies), including the introduction of an alternative protection model with regard to the institution of share capital; (e) the extension of the so-called corporate group law (the law governing groups of companies).

¹⁷ The advocates of the radical concept of regulatory competition expect that it would replace the formal harmonization procedures. See D.C. Esty, D. Geradin, "Regulatory Co-operation." *Journal of International Expenditures* 2003, p. 235ff; K. Gatsios, P. Holmes, "Regulatory Competition." In *The New Palgrave of Economics and the Law*. Ed. P. Newman (London 1998), p. 271. More sceptically (and realistically): J. Wouters, "European Company Law: Quo Vadis?" *Common Market Law Review* 37(2000), p. 256ff; H. Merkt, "Das Europäische Gesellschaftsrecht und die Idee des 'Wettbewerbs der Gesetzgeber'." *Rabels Zeitschrift* 59(1995), p. 545ff. Specifically, against the idea of Delaware-like regulatory competition in S. Deakin, *Legal Diversity...*, p. 440.

A special, new form of Europeanization, which will enhance the impact of solutions submitted to the common legal tradition or simply accepted as optimal, is a Model Company Act, which is now being discussed by the expert bodies. Eventually, more and more important role in law-making activity at national level – especially in the area of company law – will have the results of comparative law research¹⁸.

LIGHTS AND SHADOWS OF EUROPEANIZATION OF NATIONAL COMPANY LAW – ON THE EXAMPLE OF POLISH LAW

Coming to the attempt to summarize and evaluate the title phenomenon from the perspective of Polish law, it should be claimed, that the general balance of changes related to harmonization and Europeanization of national law is positive, as far as I'm considered. The process of Europeanization still remains one of the leading factors of development and modernization of national company law (in this case – Polish law). Although the Polish company law has survived the period of communism in “hibernation” of some sort and without any clear signs of “spoiling” of the good pre-war legislation by the ideas of communist authorities, maladjustment of the Commercial Code 1934¹⁹ to the conditions of modern economy was evident at many points. The new codification²⁰, based on the assumptions of continuation, modernization and Europeanization of Polish law, has introduced a number of new legal solutions, so as it has abruptly guided Polish economic legislation from the level of XIXth century to the XXIst. It should be noted that under the influence of obligations related to harmonization of Polish law with European law some new, extensive regulations have appeared referring to the processes of emission, redemption, purchase of own stocks (shares), or completely rebuilt and extended regulation of mergers, division and transformation of companies.

Notwithstanding the foregoing, it is worth emphasizing that certain problems associated with the harmonization of national law with European law are somehow inscribed in the nature of the relation between two legal orders (related to the point, custom nature of the solutions of European law, necessity to reach a particular *effect utile*, dynamic nature of Treaty guarantees interpreted by the TSUE *etc.*). On this example, you may also point the typical defects, which negatively influence the image of the effects of Europeanization of national law.

¹⁸ See M. Adenas, F. Wooldridge, *European Comparative...*, p. 42ff and 49ff.

¹⁹ Regulation of the President of the Republic of Poland of 27 June 1934 – Commercial Code (Journal of Laws No. 57, item 502 as amended).

²⁰ Act of 15 September 2000 – Code of Commercial Companies (Journal of Laws No. 194, item 1037 as amended).

First of all – moving terminology and language of the directives, without taking into account different system conditions. What may be presented as a classical example is the dispute over the meaning of the terms “written” and “in writing” used in the Directive 2007/36/WE and transferred into Polish law, actuated by adding (only in certain provisions) the term “electronic form” (art. 400 § 2, 401 § 1, art. 412¹ § 2 CCC), or – left without detailed explanation – a decision on “voting by mail” (art. 411¹ CCC).

Secondly – the transfer of solutions developed on the background of other legal systems (which itself does not raise objections), without a complete juridical “casing”. An example may be an attempt to introduce to the national and European law the institution of “proxy solicitation” and the construction of an associated power of attorney (art. 412² § 3 i 4 CCC). Insufficient incorporation of this institution into the previous system and lack of additional mechanisms of its proper functioning protection (obligation to retain the power of attorney, obligation to disclose way of voting), creates some serious doubts as to the effectiveness of the instructions given to the proxy and, in extreme terms, brings the standards of the art. 412² § 4 CCC to the rank of *lex imperfecta*.

Thirdly – an attempt to prejudge, on the occasion of implementation of directives, some doctrinal disputes, often coming even outside the formal duty of harmonization, where alignment of national legislation to European law is only a pretext to quickly push through specific legal changes. An example based on Polish law is the normative prejudgment of un-uniform (split) voting (art. 411³ CCC). This provision, associated with an unfortunate, “double” declaration of possibility to establish many proxies and split voting by them, causes major problems connected with the establishment of mutual relation of the art. 412 § 2, § 5 i § 6 CCC and the meaning of decoded norms.

Furthermore – the controversial use of decisions leeway left by the EU-law in case of implementation of the solutions radically contrary to the actual legal system and to the accepted structural assumptions. As an example, on the background of Polish law, we may point the abolition of the stocks blocking rule between the “record date” and the day of the general assembly (art. 406⁴ CCC), resulting in the rupture of formal and material legitimacy from the stocks either in a number of doubts on admissibility and the rules of others corporate rights performance (in particular the right to appeal against the resolutions undertaken during this meeting).

SUMMARY

The general evaluation of the phenomenon of Europeanization of national corporate law is positive, although not without reservations. One of the clue issues, both from the perspective of the European and national legislator, seems

to be especially assigning certain freedom of directives implementation of other acts necessary to fulfil harmonization duties. It is visible, that the less mechanic and a point is the way of implementation of directives and the more the national legislator or the authority applying the law has is focused on the aim and the function of harmonization, the more positive are effects. A separate question is the extent to which the formal approximation of laws follows the “real” Europeanization – understood as compliance with certain standards of conduct, referring to the sources of European company law in practice of law, especially in case law of national courts. This process seems to be much more complex and lengthy than a simply change of law, since it assumes the need to change the awareness of broad range of people applying law in practice.

EUROPEIZACJA PRAWA SPÓŁEK
– UWAGI NA TLE SYSTEMU PRAWA POLSKIEGO

Streszczenie. Europeizacja prawa krajowego – w tym prawa spółek – to złożony fenomen ukierunkowany na ujednoczenie rozwiązań prawnych i praktyki na poziomie ponadnarodowym. Zmieniające się uwarunkowania gospodarcze i prawne oraz ambiwalentna ocena efektywności tradycyjnych metod harmonizacji prawa wpływają na tendencje w zakresie metod i kierunków prawa spółek. Autor podejmuje próbę identyfikacji przyczyn tego stanu rzeczy oraz krytycznej analizy metod europeizacji prawa spółek w UE na przykładzie polskiego prawa spółek.

Słowa kluczowe: europeizacja, zbliżanie systemów prawnych, ujednoczenie prawa, konkurencja regulacyjna, dyrektywa, rozporządzenie, prawo spółek, mobilność spółek, ochrona inwestorów, ochrona wierzycieli