ARTICLES

Review Essay - Perspectives of Regulatory Competition in European Company Law

By Sebastian Mock[*]

Klaus Heine, **Regulierungswettbewerb im Gesellschaftsrecht, Duncker & Humblot - Schriften zur wirtschaftswissenschaftlichen Analyse des Rechts Vol. 48, Berlin 2003, 312 pages, € 76.00, ISBN 3-428-10968-6;**

Stefano Lombardo, **Regulatory Competition in Company Law in the European Union, Peter Lang - European University Studies, Frankfurt/Main 2002, 235 pages, € 42.50, ISBN 3-631-39778-X;**

Roberta Romano, **The Advantage of Competitive Federalism for Securities Regulation, AEI Press, Washington 2002, 312 pages, $ 20.00, ISBN 0-8447-4173-6.**

A. Introduction

For decades European company law consisted mainly of directives that focused on the harmonization of the national company law of the Member States. However, during the last few years European company law has been changed dramatically by the European Court of Justice (ECJ) and its interpretation of the freedom of establishment for national companies. Due to the fact that both developments are oppositional in their concepts, a controversial debate started about the future of European company law. The books under review address this problem. While Klaus Heine and Stefano Lombardo provide an economic analysis of the American market for corporate charters and examine its impacts on the future development of European company law, Roberta Romano analyzes the applicability of the experiences from the American market for corporate charters on a regulatory regime for securities regulation.

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This review essay addresses first the economical theoretical background of a legislative competition in company law. In its second part the essay analyzes the applicability of the experiences of the American market for corporate charters on a European market for corporate charters. Finally, it will conclude with an outlook on the future prospects of a European market for corporate charters.

B. Towards a Theory of Legislative Competition

The discussion of legislative competition emerged originally from the state competition for corporate charters in the United States.[1]

I. Race to the Bottom or the Top?

Since the publication of William Cary's seminal article in 1974, legislative competition in corporate law has generally been depicted either as a race to the bottom or as a race to top.[2] Notably, Heine, one of the authors here reviewed, dismisses this general assumption that a legislative competition always leads to such a race to the bottom or to the top. Instead, Heine argues for a more holistic approach and suggests that the outcome of a legislative competition depends on a whole set of conditions within a legal system.[3] In order to better understand the conditions responsible for a legal system provoking a race to the top or to the bottom, Heine analyzes the impacts of the neoclassical model, the public choice theory, and the phenomenon of path dependency.

[1] Among the relevant literature, see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware,* 83 YALE L.J. 663 (1974); Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Roberta Romano, *Explaining American Exceptionalism in Corporate Law*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 127 (1996); William J. Carney, *Federalism and Corporate Law: A Non-Delaware View of Results of Competition*, in: INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 153 (1996); and William W. Bratton & Joseph McCahery, *Regulatory Competition as Regulatory Capture: The Case of Corporate Law in the USA*, in: INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 207 (1996).

[2] For an overview see STEFANO LOMBARDO, REGULATORY COMPETITION IN COMPANY LAW IN THE EUROPEAN COMMUNITY 86-91 (2002).

[3] HEINE, REGULIERUNGSWETTBEWERB IM GESELLSCHAFTSRECHT 120 (2003)

II. Neoclassical Economic Theory and the Market for Corporate Charters

Neoclassical economic theory explains legislative competition as the analogy between markets for goods and markets for law (understood as a product).[4] In a competitive system of supply and demand, resources are allocated in an efficient way through a price system. Applied to a market for corporate charters, a competitive supply of regulation among different jurisdictions will be more efficient than a system of central monopoly supply of regulation. Firms will choose only that regulation that best fits their needs. As a consequence, less attractive regulations will become marginalized.

Proponents of legislative competition in company law usually refer to the market for corporate charters in the Untied States.[5] In his dissertation, Heine first raises the problem of the incentives for legislators to engage in legislative competition. On the supply side, Heine sees Delaware's revenue through the franchise tax for incorporations as the most important incentive for Delaware to remain the leading state for incorporations. Due to its dependence on this income, Delaware has to provide a constant improvement of its corporate law in order to avoid re-incorporations of Delaware firms in other states.[6] Heine concludes that in a European market for corporate charters, small jurisdictions would also more likely be the preferred place of incorporation. However, some commentators question the correlation between tax revenues and corporate legislation. Notably, Marcel Kahan and Ehud Kamar have shown that no state (with the exception of Delaware) is able to raise material franchise tax revenues by attracting incorporations in the American market for corporate charters. The only increase in franchise tax is caused by conducting business in a state that does not relate to the place of incorporation.[7] States therefore do not gain a significant financial benefit from competing. This, however, erodes an important assumption of the race to the bottom/top argumentative framework.

Heine then refers to the mechanism of reputation as one of the most important factors in legislative competition.[8] Although, under a system of free incorporation,

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[4] Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle,* 1 J.L. ECON. & ORG. 225 (1985). This approach is also used by Lombardo, *supra* note 2, at 59-61.

[5] Lombardo, *supra* note 2, at 83-101.

[6] Heine, *supra* note 3, at 91-94, 141-45.

[7] Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 687-700 (2002).

[8] Heine, *supra* note 3, at 145-49.

firms can change the applicable corporate law by reincorporating in another legal regime, this change inevitably leads to "sunk costs."[9] Therefore, corporations (that is, their managers) have to ensure that they choose a jurisdiction for incorporation that provides an attractive corporate law regime that can guarantee stability and foreseeability with regard to the development of applicable legal rules.[10] In this light, legislators have to invest in corporate law with a view to maintaining the law as an effective resource for incorporating firms. Together with the legislator and the firms' managers, it is most notably the legal profession that plays a decisive role in this "Delaware effect." The human capital of law firms becomes a "*hostage-like asset*"[11] on the corporations' side that protects the legislator in its further investments in the legal system.[12] In order to offer their services, the legal profession has to invest human capital in the legal system of a particular legislator. As a consequence, the legal profession would only change to and recommend another legal system to their clients when the costs of investing human capital in this new legal system are lower than the costs of losing clients due to changes in the current legal system.

The advantage of applying neoclassical economic theory to the market for corporate charters lies especially in its providing an analogy to the market for products. The observations from the market for products can also be applied to the market for corporate charters. Despite the advantages of this approach, Heine generally doubts the explanatory value of a neoclassical economic theory assessment of the state competition reality. As a consequence, he questions the usefulness of this theory with regard to its normative implications. Although gains or losses in total welfare can be measured, Heine doubts that those observations can be a basis for concrete legislative activities.[13] Nevertheless, Heine sees in the neoclassical approach only a limited potential to determine singular effects and behavior in a legislative competition.

Finally, Heine analyzes the process of accumulation of knowledge in a market for corporate charters.[14] Assuming that in the beginning of the competition the knowledge about the most desirable corporate law is divided among the

[9] Romano, *supra* note 4.

[10] Heine, *supra* note 3, at 149-52.

[11] ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 43 (1993).

[12] Heine, *supra* note 3, at 147.

[13] Heine, *supra* note 3, at 234.

[14] Heine, *supra* note 3, at 152.

participants in the market, a legislative competition provides a basis for combining this knowledge of the individual market participants. For instance, legislators usually do not know what regulations are in the best interest of the entities in the market. In a situation of free choice of entities for the law of incorporation, these entities will choose the system that provides the best legal framework for their interests. In return, legislators are getting feedback about the quality of their regulation as a basis for further innovation or correction of their policy.[15] Although this approach can be used to explain the development of legal provisions in a system of legislative competition, Heine cautions that this approach might provide only limited guidance for normative implications. However, this restricted usefulness for normative implications is not based on the feedback from the market but from the complexity of *law as product*. In order for the enactment of legal reforms to have an effect in the market – as in the case of corporate law reforms – a whole range of factors play a role in an often lengthy process. The precise effect of a certain legal reform is, therefore, very hard to determine. And yet, a legislator might resort to several legal options in order to gain information for further reforms, based on the observation of the success of individual options in the market.

III. Public Choice Theory

In contrast to the neoclassic economical approach just described (understanding "law as product" and analyzing legislative competition from the *demand* side), public choice theory focuses on the *supply* side of this competition, analyzing peoples' action in collective decision making. In a legislative competition of corporate law this process is especially influenced by several interest groups, which appear as rent-seekers (for example, politicians, shareholders, managers, attorneys, and judges).[16] The rent-seeking behavior of these groups could lead to a one-sided legislation ("governmental failure") by influencing the legislative and judicial process, and, as a result, to a decrease in the overall welfare.

Applied to the legislative competition in corporate law, the question is whether the effect of a one-sided legislation will increase due to the fact of a larger number of legislators for corporate law.[17] Heine concludes that the problem of one-sided legislation can be better limited by the implementation of a legislative competition

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[15] Heine, *supra* note 3, at 164-67.

[16] Heine, *supra* note 3, at 174-87.

[17] William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997).

than without such a competition.[18] However, it can also be doubted that the influence on a single legislator by interested groups would be smaller. Nevertheless, a legislative competition can be necessary – especially in the absence of regulation. Heine refers here in particular to the lack of takeover legislation in European corporate law and the corporate law of most Member States. National interest groups prevented not only the introduction of national legislation, but also – through the participation of Member States in the legislative process of the European Union – the introduction of such legislation on a European level.[19] The latest example is the Thirteenth Directive on takeover bids,[20] which was – after more than a decade of discussion – finally adopted in 2004 after several proposals and amendments. Due to the several political compromises in the final version of the directive, the creation of a level playing field in the European Union has to at least be doubted.[21]

While underscoring these positive effects of legislative competition in corporate law, Heine's overall assessment is more cautious. He generally concludes that the insights from public choice theory for legislative competition for corporate law remain very limited.[22] For instance, under the application of public choice theory, arguments can be made in favor and against the sensitivity of the rent-seeking problem in small jurisdictions.[23]

IV. Path Dependency Phenomenon

Heine discusses the problem of path dependency, which he finds central to the analysis of legislative competition.[24] Path dependency is a historical process that is

[18] Heine, *supra* note 3, at 191. Concerning the problem of workers codetermination systems, Lombardo comes to the same result. See Lombardo, *supra* note 2, at 167-70.

[19] Heine, *supra* note 3, at 192-94.

[20] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids,
2004 O.J. (L 142) 12. For an account of the history see Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, in 3 WASH. U. GLOBAL STUD. L. REV. 867 (2004).

[21] See Vanessa Edwards, *The Directive on Takeover Bids – Not Worth the Paper It's Written On?*, 1 EUR. CO. & FIN. L. REV. 416 (2004); Silja Maul & Athanasios Kouloridas, *The Takeover Bids Directive*, in 5 GERMAN L.J. No. 4 (1 April 2004), 355-66.

[22] With the same conclusion also see Jeffrey N. Gordon, *Corporations, Markets and Courts,* 91 COLUM. L. REV. 1931 (1991), 1971.

[23] Heine, *supra* note 3, 168-74.

[24] Heine, *supra* note 3, 194-232. See also Klaus Heine & Wolfgang Kerber, *European Corporate Laws, Regulatory Competition and Path Dependency*, 13 EUR. J. L. & ECON. 47 (2001).

characterized by self-reinforcing sequences of events. Technologies or institutions remain at a certain stage although they appear as inefficient and, therefore, in need of change or abolition. From this perspective, even small events that happen early in a developmental sequence can have a disproportionately large effect on later events. While during early stages of a sequence the developmental potentials are still open and permissive for influencing factors, their potential to change becomes more restrictive as one moves down the path. And finally, as one moves further down the path, changes become bounded on events earlier in the sequence.[25]

Heine sees two possible applications of this theory in the legislative competition for corporate law. At first, he argues that the theory of path dependency can be used to explain that the corporate laws of the United States, the European Union, and Japan have not yet converged.[26] Although this might be true from a general point of view, developments in the last few years, concerning movements like shareholder value and corporate governance, showed, nevertheless, that the historical basis of national corporate laws has become less important for the determination of further legal developments.[27] Moreover, many legal reforms in Germany were inspired by developments in other legal systems. So, for instance, the German bankruptcy law reform of 1994 took legal institutions like the concept of *corporate reorganization* (as codified in §§ 217-269 *Insolvenzordnung* - German Bankruptcy Code) from bankruptcy law in the United States. This is striking as no such concept existed in German bankruptcy law prior to this reform.[28] Similarly, in the current debate about the reformation of the Capital Maintenance Directive[29] many new concepts

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[25] Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999). For a German perspective see Reinhard H. Schmidt & Gerald Spindler, *Path Dependence and Complementarily in Corporate Governance*, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 114 (2004). For a general approach to path dependency see W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116 (1989).

[26] Heine, *supra* note 3, at 195 ff.

[27] For this approach see especially Henry Hansman & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001), reprinted *e.g.* in: CONVERGENCE AND DIVERGENCE IN CORPORATE GOVERNANCE 33 (JEFFREY N. GORDON & MARK J. ROE, EDS., 2004).

[28] For an overview of the adoption of Chapter 11 Bankruptcy Code in Germany, see PETER TERHART, CHAPTER 11 BANKRUPTCY CODE: EINE ALTERNATIVE FÜR DEUTSCHLAND? (1996).

[29] Second Council Directive 77/91/EEC of 13 December 1976 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 58 of the Treaty, 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, Official Journal L 26, 31/01/1977 p. 1 ff.

are being discussed that have their origin in other legal systems; this will change the legal systems of the Member States of the European Union dramatically.[30]

More importantly, Heine analyzes how the legislative competition of corporate law can be used to reduce the effect of the phenomenon of path dependency. The first implication, Heine concludes, is a free choice of incorporation.[31] Heine postulates that a harmonized or even unified legal system has to be applied, on top of this corporate law of the Member States, in order to avoid inconsistencies.[32] Those inconsistencies can occur through the application of the corporate law of one Member State in the legal system of another Member State.[33] If the Member States only compete in the area of corporate law those inconsistencies will increase because other aspects of their legal system will remain unchanged due to the lack of mechanisms to overcome the phenomenon of path dependency. The effect of the adoption of efficiency-enhancing provisions might, therefore, be limited. Heine concludes that legislative competition in a single field of regulation must also be seen in the context of path dependency of the entire legal system.[34] These conclusions of Heine can also be seen in the actual reform discussion in several Member States. The German debate on the reform of the system of capital maintenance is not limited to corporate law but also covers bankruptcy law, contract law, and other legal measures like suspending corporate officers because of unfitness.[35]

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[30] For the current state of the reform see European Commission, *Modernization of Company Law and Enhancement of Corporate Governance in the European Union - A Plan to Move Forward*, available at: http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm.

[31] Heine, *supra* note 3, at 229.

[32] Heine, *supra* note 3, at 231.

[33] The application of a corporate law with low protection of creditors in a legal system with a strong protection of creditors in corporate law might, therefore, cause an insufficiently low level of creditor protection. As a consequence, the costs of capital for this corporation might, therefore, increase and diminish the increase in efficiency by the application of this corporate law. This effect is also known in conflicts of law as the problem of *characterization*. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAW 49-55 (4th ed. 2001); CHRISTIAN VON BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT – BAND I 712 (2nd ed. 2003).

[34] Heine reaches this conclusion for the problem of path dependency and legislative competition in corporate law, but acknowledges that further research might be necessary in order to apply this as a general conclusion for the theory of path dependency. See Heine, *supra* note 3, at 229, 238.

[35] See especially Karsten Schmidt, *Editorial: Verlust der Mitte durch "Inspire Art"? - Verwerfungen im Unternehmensrecht durch Schreckreaktionen der Literatur*, 168 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht [ZHR] 493 (2004). For contract law see Holger Fleischer, *Gesetz und Vertrag als alternative Problemlösungsmodelle im Gesellschaftsrecht*, 168 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht [ZHR] 673 (2004).

C. Legislative Competition in European Company Law

The EC Treaty refers in two different ways to company law. Art. 43, 48 EC provide the freedom of establishment within the European Community. However, Art. 44 (2) (g) EC establishes the competence for the European legislator to harmonize national company laws.

I. Harmonization versus Legislative Competition

Although Art. 43, 48 EC provide the freedom of establishment and the right of free movement for legal persons within the European Community, these rights have not been fully recognized and were mainly limited by conflict of law rules *(real seat theory)*. Under the application of the real seat theory, an entity is not recognized in another Member State when the place of the central management and control of the entity differs from the Member State where it was founded. Therefore, an entity from a Member State could only move its central management and control to another Member State if it changed its statute. This means that, due to the application of the real seat theory, the free movement of the central management and control of an entity without changing its statute was limited. However, this limitation was changed recently by the *Überseering* and *Inspire Art* decisions of the ECJ.[36] Contrastingly, European company law has been mainly determined, from its very beginning, by the harmonization of national company laws under Art. 44 (2) (g) EC.[37] This harmonization of European company law was based on the concepts of the *race to laxity* hypothesis and the *standardization* hypothesis. The race to laxity hypothesis starts from the assumption that a legislative competition in corporate law would lead to a steady increase of creditor and shareholder protection by the legislator in order to attract more entities to incorporate in the legislator's jurisdiction. The standardization hypothesis is based on the assumption that a

[36] For commentary on the *Überseering* and *Inspire Art* decisions by the ECJ, see Kilian Bälz & Teresa Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, in 3 GERMAN L.J. No. 12 (1 December 2002), available at http://www.germanlawjournal.com/article.php?id=214; Christian Kersting & Clemens Philipp Schindler, *The ECJ's Inspire Art Decision of 30 September 2003 and its Effects on Practice*, in 4 GERMAN L.J. No. 12 (1 December 2003), 1277-1291, available at: http://www.germanlawjournal.com/article.php?id=344. For a comprehensive analysis of the real seat theory see Martin Schulz, *European Challenges for German Corporate Law: An Analysis of the recent Jurisprudence of the European Court of Justice on the Freedom of Establishment and its Impact on German Company Law and Conflicts of Laws*, in: ANNUAL OF GERMAN & EUROPEAN LAW, VOL. II (RUSSELL MILLER & PEER ZUMBANSEN, EDS., 2005) [forthcoming].

[37] For an overview of the state of the art of the harmonization of European Company Law see Lombardo, *supra* note 2, at 25-55.

standardized corporate law would decrease the contractual costs of international business and would advance the creation of a single market.[38]

Lombardo rejects both assumptions by considering the business corporation as a nexus of contracts.[39] The business corporation as an investor-owned firm has often been qualified as a nexus of contracts among shareholders, creditors, suppliers, customers, and employees.[40] The relationships among those participants are commonly qualified in terms of agency problems.[41] From this perspective, corporate law is, therefore, meant to intervene in order to mitigate these agency problems.[42]

Lombardo argues that a legislative competition for corporate law would not inevitably lead to a race to laxity because rational parties would use their contractual bargaining power to prevent a deterioration of protection standards.[43] Instead, Lombardo argues, a system of free incorporation would lead to an efficiency-enhancing contractual relationship for all involved groups of participants. Concerning the standardization rational, Lombardo also refers to the contractual nature of the involved interests that make harmonization unnecessary. Parties can choose among several options and will thereby provide a more efficient market-driven standardization.[44]

II. European Company Law and the Conflict of Laws

For those reasons, Lombardo sees the key factor to reaching the integration goals pursued by the EC Treaty not in a harmonization of substantive and procedural company law, but in the conflict of laws rules for initial incorporations and for re-incorporations. Therefore, Lombardo regards a system of efficient free

[38] For further details see Lombardo, *supra* note 2, at 41-44.

[39] Lombardo, *supra* note 2, at 201-02.

[40] See the classical account by Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

[41] The basic agency problems that arise in the corporate context are agency problems between shareholders and managers, agency problems between majority and minority shareholders, and agency problems between shareholders and third parties. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[42] Lombardo, *supra* note 2, at 109.

[43] Lombardo, *supra* note 2, at 201.

[44] Lombardo, *supra* note 2, at 202.

(re)incorporation as the major legal prerequisite of a European market for corporate charters.[45] In such a system the relevant participants would be empowered to choose the contractual agreements they prefer and would, as a consequence, lead resources toward efficiency.

As mentioned above, free (re)incorporation did not exist for the longest time in Europe because most Member States applied the *real seat theory* in their conflict of laws rules. As induced by a series of decisions by the ECJ since 1999, freedom of establishment and, as a consequence, national corporate laws have become more important for the development of European company law. After the Court's *Centros*[46] decision in March 1999, the Court followed up with its decision in *Überseering*,[47] and finally in *Inspire Art*.[48] These decisions dramatically redefined the relationship between the conflict of law rules and the freedom of establishment.[49] Whereas the ECJ held in *Überseering* that a company's legal personality and its capacity to be part to legal proceedings must be respected by all Member States, it extended this obligation to the entire company law of the state of incorporation in its *Inspire Art* decision of 30 September 2003. The ECJ interpreted the freedom of establishment clauses to provide for a system of free (re)incorporation within the European Community.[50] In its most recent decision – *Lasteyrie du Saillant* – the ECJ went on to reject Member States' limitations on the transfer of the residence for tax purposes to another Member State.[51] The recent development in Europe is

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[45] Lombardo, *supra* note 2, at 203.

[46] EC Case C-212/97 [1999] ECR I-1459. From the abundance of case notes, see *e.g.* Ebke, 48 AM. J. COMP. L. 623 (2000); Wymeersch, in: CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUXBAUM 629 (2000); and Halbhuber, 38 COMM. MARKET L. REV. 1385 (2001).

[47] EC Case C-208/00 [2002] ECR I-9919. On the *Überseering* decision, see *e.g.* Wulf-Henning Roth, 52 INT'L & COMP. L.Q. 177 (2003); Ebke, 58 Juristenzeitung 927 (2002); Eidenmüller, 23 ZIP 2233 (2002); Kilian Baelz & Teresa Baldwin, 3 GERMAN L.J. No. 12 (1 December 2002), available at http://www.germanlawjournal.com/article.php?id=214.

[48] EC Case C-167/01 [2003] ECR I-10155. See *e.g.* Erich Schanze & Andreas Jüttner, Die Aktiengesellschaft 661 (2003); Silja Maul, 58 BetriebsBerater 2297 (2003); Christian Kersting & Clemens Philipp Schneider, 4 GERMAN L.J. 1277 (1 December 2003), available at http://www.germanlawjournal.com/article.php?id=344.

[49] For a general overview see Sebastian Mock, *Harmonization, Regulation and Legislative Competition in European Company Law*, 3 GERMAN L.J. No. 12 (1 December 2003), available at http://www.germanlawjournal.com/article.php?id=216.

[50] HERIBERT HIRTE, *Abkehr von der Sitztheorie*, in: HANDBUCH ZUM GRENZÜBERSCHREITENDEN GESELLSCHAFTSRECHT (HERIBERT HIRTE & THOMAS BÜCKER, EDS., 2005).

[51] EC Case C-9/02 [2004] – *Lasteyrie du Saillant*, (German translation reprinted in 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2439 (2004)).

particularly interesting when compared with the legal regime in the United States that has often served as a guiding example for an efficient system of legislative competition.

III. The American Market for Corporate Charters

Lombardo argues that the establishment of a system of free incorporation in the European Community would lead to an efficiency-enhancing effect like in the American market for corporate charters. He bases his argumentation on a more efficient allocation of resources and concludes, therefore, that the underlying assumptions for the harmonization of corporate law in the European Union have to be considered misguiding.[52]

In light of numerous attempts to compare the American situation of state competition with that of Europe, it remains to be seen whether the recent ECJ decisions will liken the European internal market to the American market for corporate charters. Besides obvious obstacles to unlimited mobility such as transaction costs and different degrees of embeddedness of corporate actors in local and regional production regimes, the remaining differences in the legal framework of the European Union and the American legal systems outside of corporate law further limit the effects on the free movement of companies that one might expect in light of the Court's latest case law.[53]

In the United States the relations of corporations with third parties are often not the subject of state regulation, but of federal, and therefore, harmonized or unified (even if not perfectly) legislation.[54] This is particularly true in the case of creditor protection. The Uniform Commercial Code (UCC), which has been adopted by most states,[55] governs the debtor-creditor relationship and provides, to a large extent, a nationwide *ex ante* creditor protection system that allows creditors and debtors to agree on and to enforce credit contracts. Moreover, the *ex post* protection of creditors by bankruptcy law is traditionally a federal matter in the United States.[56] As a consequence, all creditors can rely on harmonized or federal

[52] Lombardo, *supra* note 2, at 202.

[53] See Peer Zumbansen, *supra* note 20.

[54] Many regulations are based on model laws that are drafted by commissions and only later enacted by the states individually. Therefore differences can occur when single states do not enact later drafts of the model laws.

[55] For an overview of the UCC see http://www.law.cornell.edu/uniform/ucc.html.

[56] U.S. Const. art. I § 8 cl. 4.

legislation to define their legal position.[57] American securities regulation is mainly dominated by federal law with the Securities Act of 1933 and the Exchange Act of 1934. Finally, with regard to accounting standards, the General Accepted Accounting Principles (US-GAAP) provide a uniform system of accounting standards.[58]

Due to this large degree of uniformity, the U.S. market for corporate charters is basically limited to the regulation of agency problems between managers and shareholders. As a consequence, the conflict of law rules are also more precise in the U.S. market for corporate charters. Under the internal affairs doctrine the subject matter of corporate law concerns only the internal affairs of the corporation in their internal organization and governance. Transactions with third parties and, in particular, contracts between creditors and shareholders are not covered by this doctrine. As a consequence, they do not form part of the market for corporate charters.[59]

IV. The European "Market" for Corporate Charters

This limitation to the regulation of agency problems between shareholder and manager does not exist in the European market for corporate charters. The regulation of the relation of the corporation with third parties will have an influential position in the European market for corporate charters.

Although in Europe there is a harmonization of particular aspects of securities regulation,[60] it is still far away from providing a uniform system of investor protection like in the United States.[61] This is especially so because in Europe the

[57] Nevertheless, differences remain and especially in the case law of the different courts of appeal. However, forum shopping occurs basically only in corporate reorganizations under Chapter 11. See Marcus Cole, "*Delaware is not a state*"*: Are We Witnessing Jurisdictional Competition in Bankruptcy*, 55 VAND. L. REV. 1845 (2002); Robert K. Rasmussen & Randall S. Thomas, *Whiter the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283 (2001). For the limits of the general protection of bankruptcy law, see Lombardo, *supra* note 2, at 96-99.

[58] However, a general obligation to comply with US-GAAP does not exist in the United States. Only businesses under coverage of the federal securities laws are required to comply with US-GAAP in their financial statements (Sec. 5 Securities Act 1933; Sec. 12, 13, 15(d) Exchange Act). Nevertheless, accountants tend to adopt SEC accounting practices even for firms not legally subject to them.

[59] See *Restatement (Second) of Conflicts of Law* (Philadelphia: American Law Institute, 1971), § 302.

[60] For an overview see Lombardo, *supra* note 2, at 53.

[61] Nevertheless, the lack of a harmonized or unified regime of securities regulation does not have to be regarded as a prerequisite for a European market of corporate charters (see section C(III), above).

enforcement of securities laws remains in the ambit of the Member States. A central authority like the U.S. Securities and Exchange Commission does not exist in the European Union. Accounting standards have not yet been unified. In fact, the new European Regulation on the application of international accounting standards[62] requires an application of international accounting standards, but only concerning the *consolidated accounts* of publicly traded companies. A further application of the international accounting standards to annual accounts or to the accounts of not-publicly-traded companies is only optional for the national legislators.[63] So, for instance, German accounting law does not require any further application of international accounting standards.[64]

Most importantly, the bankruptcy law of the Member States is not harmonized or unified. Even though the European legislator enacted a regulation on insolvency proceedings,[65] only the procedural aspects and the conflicts of law rules were harmonized. Substantive bankruptcy law has so far been left out. Art. 3(1) of the Regulation on insolvency proceedings states that jurisdiction shall be given to the courts of that Member State where the debtor's main interest is identified. Although this is presumed to be the registered office for companies (Art. 3(1) of the Regulation on insolvency proceedings), the company can prove the transfer of the real seat and might, therefore, be enabled to choose a preferable bankruptcy law.[66]

Finally, the distinction between corporate and bankruptcy law in the conflict of law rules is difficult to accomplish and to a large extent still unsettled.[67] In a

[62] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, 2002 O.J. (L 243), 1 available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32002R1606&model=guicheti.

[63] As a consequence, the applicability of International Financial Reporting Standards will be different in every Member State. Due to the fact that the applicable law of accounting is determined by the law of incorporation, this fact might also become an important circumstance for firms in the choice of a Member State for incorporation. For the applicable laws of accounting see ANDRÉ WESTHOFF, *Rechnungslegung*, in: HANDBUCH ZUM GRENZÜBERSCHREITENDEN GESELLSCHAFTSRECHT (HERIBERT HIRTE & THOMAS BÜCKER, EDS., 2005).

[64] Gesetz zur Einführung internationaler Rechnungslegungsstandards und zur Sicherung der Qualität der Abschlussprüfung (Bilanzreformgesetz), vom 4. Dezember 2004, Bundesgesetzblatt I S. 3166.

[65] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; 2000 O.J. (L 160), 1.

[66] See Heribert Hirte & Sebastian Mock, *Wohin mit der Insolvenzantragspflicht?*, Zeitschrift für Wirtschaftsrecht [ZIP] 27 (2005) [forthcoming].

[67] For a U.S. perspective see David A. Skeel, *Rethinking the Line Between Corporate Law and Corporate Bankruptcy,* 72 TEX. L. REV. 471 (1994), arguing that the separation of bankruptcy and company law in the

restructuring of a corporation, the corporate and bankruptcy law competences of directors, shareholders, and trustees can be controversial.

Moreover, many provisions of bankruptcy law also refer to the capital structure of corporations. Recently, this problem arose with regard to the conflict of law qualification of the liability of directors under *wrongful trading* (Sec. 214 Insolvency Act 1986) in bankruptcy proceedings of English limited companies before German courts.[68] The *Amtsgericht* (First Instance Court) in Hamburg held that the limited liability of an English private limited company does not apply when the real seat of the company is in Germany. The shareholders of the company are, therefore, personally liable for the debts of the company. This decision is important because it was the first decision by German courts concerning foreign corporations with real seat in Germany after the *Überseering* decision of the ECJ. This decision initiated the – still unsolved – problem of the application of German bankruptcy provisions on foreign corporations.[69]

A similar problem is the conflict of law qualification of a subordination of loans from shareholders to the company that are granted just before bankruptcy.[70] Those problems show that the conflict of laws rules for the European market for corporate charters are, therefore, less precise than the conflict of laws rules in the U.S. market for corporate charters. As a consequence, they provide less certainty for the determination of the applicable law.

The current bankruptcy regime under the European Regulation on insolvency proceedings[71] shows a tendency towards a unilateral determination of the applicable bankruptcy law by the management of the company by transferring the real seat of the company.[72] Due to the mandatory character of bankruptcy law,

United States has led to problems that undermined both areas of the law. Skeel therefore suggests that the law of corporate bankruptcy has to be returned to the states.

[68] See Amtsgericht (AG) (First Instance Court) Hamburg, NEUE ZEITSCHRIFT FÜR INSOLVENZRECHT [NZI] 5 (2003), 442. For a detailed discussion of the qualification of the Sec. 214 Insolvency Act 1986, see SEBASTIAN MOCK & CHARLOTTE SCHILDT, *Insolvenz*, in: HANDBUCH ZUM GRENZÜBERSCHREITENDEN GESELLSCHAFTSRECHT (HERIBERT HIRTE & THOMAS BÜCKER, EDS., 2005); Hans C. Hirt, *The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance*, 1 EUR. CO. & FIN. L. REV. 71 (2004).

[69] For an overview on this debate see Mock & Schildt, *supra* note 68.

[70] Mock & Schildt, *supra* note 68.

[71] See note 62.

[72] The case law on the regulation on insolvency proceedings shows that the courts of the Member States interpret the requirements of art. 3 in a very broad way. For an overview see Christoph G. Paulus, *Zu-*

creditors cannot choose a bankruptcy law *ex ante* and, therefore, also cannot preclude this transfer of the seat through contractual terms. As a consequence, creditors cannot – at least concerning bankruptcy law – prevent a race to laxity due to their lack of contractual bargaining power. Creditors will therefore be less willing to enter contractual relations with companies from other Member States. The higher risk for creditors will also impose higher costs for companies to transfer their seats to another Member State. The gain in efficiency by choosing the company law of another Member State will therefore be reduced.[73] An efficiency-enhancing contractual relationship between creditors and the company is, therefore, less likely to occur.

Finally, the development of company law in the American market for corporate charters seems to have become more restrictive in recent years. The recent *Inspire Art* decision by the ECJ limited, to a large extent, the possibility for Member States to apply national company law to companies that transferred their real seat from another Member State.[74] As a consequence, the Member States seem to have even less ability to object to a (re)incorporation within the European Community than the state legislators have in the United States. Within the European Community, a limitation of free (re)incorporation – like, for instance, in section 2115 (a) (2) of the *California Corporate Code*[75] – would have to be considered a violation of the freedom of establishment following the *Inspire Art* decision of the ECJ. Moreover, the recent scandals of WorldCom, Enron, and others led to an increase in the influence of federal legislation on corporate law. Fiduciary duties of directors are no longer solely the subject of state law but also of federal law.[76] A complete revision of the achieved harmonization of European company law, as demanded by Lombardo,[77] might, therefore, be a step in the wrong direction.

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ständigkeitsfragen nach der Europäischen Insolvenzverordnung, Zeitschrift für Wirtschaftsrecht [ZIP] 24 (2002), 729.

[73] Heine also concludes that the lack of uniformity in securities regulation and bankruptcy law will limit the efficiency of a legislative competition in the European market for corporate charters. See Heine, *supra* note 6, 231 ff.

[74] *Inspire Art*, *supra* note 48; Hirte, *supra* note 50.

[75] Cal. Corp. Code § 2115(a).

[76] Most significantly, the Sarbanes-Oxley Act introduced several duties for board members. As well, Sec. 10A(i) Exchange Act (15 U.S.C. § 78j-1) imposes duties for the audit committee; Sec. 13(k) Exchange Act (15 U.S.C. § 78m) prohibits loans to directors and officers.

[77] Lombardo, *supra* note 2, at 201-05.

D. European Company Law and Beyond

The ECJ's *Überseering* and *Inspire Art* decisions both established the factual freedom of incorporation within the European Union (see section C (II), above). Both Heine and Lombardo see this free choice of incorporation laws as the essential step in establishing a legislative competition in European company law.[78]

I. Towards a Framework for a European Market for Corporate Charters

Moreover, Heine also concludes that an additional legal framework will be necessary to ensure that legislative competition among the EU Member States will lead to a race to the top and not to the bottom. On the supply side of corporate law, Heine postulates the creation of an incentive for national legislators to engage in the legislative competition. Such an incentive could be a franchise-tax based system that allows the Member States to receive revenue gains from the increase in the number of incorporations. Lombardo sees free choice, even in the absence of such incentives, as a preferable choice to a system of harmonized regulation. Even if the Member States do not engage in legislative competition, a free choice of incorporation within the European Union would provide a richer set of forms from among which firms could choose.[79]

Besides the freedom of choice of incorporation, Heine also sees the freedom of choice of the forum of corporate litigation as a necessary step. The benefits from choosing the preferable corporate law of one Member State might be reduced by a mandatory forum for corporate litigation in another Member State. Heine therefore suggests that those conflicts could be solved by arbitration.[80]

In addition to the free choice of incorporation for companies, Heine sees the freedom of establishment of lawyers and judges as a necessary prerequisite for the innovative process of developing corporate law in this legislative competition.[81] Only the free transfer and a subsequent concentration of human capital in one or several jurisdictions would create innovation and flexibility.

Recent developments since the *Überseering* decision of the ECJ have shown that, due to the unique environment of the European market for corporate charters,

[78] Heine, *supra* note 3, at 239; Lombardo, *supra* note 2, at 203.

[79] Lombardo, *supra* note 2, at 203.

[80] Heine, *supra* note 3, at 256-58.

[81] Heine, *supra* note 3, at 246.

additional steps are necessary to avoid externalities and, as a consequence, a race to the bottom (see section C(IV), above). In Heine's view, contractual agreements between the corporation and third parties could mitigate such externalities, in a partial application of the real seat theory or in a harmonization of additional areas of law.

For the emerging problem of the application of different bankruptcy laws[82] a contractual solution cannot be achieved, since most jurisdictions do not recognize freedom of contract with regard to bankruptcy law. A partial application of real seat theory can certainly avoid externalities but would also require a detailed regulation by the Member States. Significantly, such regulations would have to meet the substantial requirements the ECJ set in the *Inspire Art* decision. Therefore, a harmonization of parts of bankruptcy law might be the only alternative to avoid those externalities.[83]

II. Regulation of Capital Markets

Besides corporate law, the European legislator had addressed the law of the capital markets through several directives in the last few decades.[84] In addition, the ECJ rendered several decisions enhancing the freedom of capital under the EC Treaty by striking down national laws protecting national interests.[85] This recent development in European company law raises the question whether the regulation of capital markets in the European Union should be left to the Member States in order to establish a legislative competition or be subject to further harmonization by the European legislator.

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[82] See section C(IV), above.

[83] For a mandatory introduction to the liability for wrongful trading in the Member States, see Mathias Habersack & Dirk A. Verse, *Wrongful Trading – Grundlage einer europäischen Insolvenzverschleppungshaftung?*, 168 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht [ZHR] 174, 214 (2004). Nevertheless, Habersack and Verse propose that only the general duty to enact a wrongful trading should be implemented by the European legislator. The details of such regulation should instead be left to the Member States. Nevertheless, a legislative competition – if to a smaller extent – would occur.

[84] For an overview see Lombardo*, supra* note 2, at 53.

[85] For an overview see Johannes Adolff, *Turn of the Tide?: The "Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets*, 3 GERMAN L.J. No. 8 (1 August 2002), available at http://www.germanlawjournal.com/article.php?id=170;. For the situation in Germany see Kristian Wellige, *Weg mit dem VW-Gesetz!*, Europäische Zeitschrift für Wirtschaftsrecht [EuZW] 14 (2003), 427.

Roberta Romano analyzes the rational for securities regulation and the implementation of a competitive federalism for securities regulation in the United States. In general, Romano questions the need for a regime of a single legislator.

The conventional public good analysis characterizes, as a public good, firm-level information as the basis for investment decisions. However, information will be under-produced because a person obtaining information cannot restrict another person's ability to obtain and use it, and the low costs of retransmission of information makes it difficult for the producer to capture its value. On the other hand, information might also be overproduced because the first person capturing the information will be able to obtain a trading gain.

Due to the minimal guidance of this analysis, Romano refers to a signaling hypothesis of information disclosure. Firms have a strong incentive to distinguish themselves from others by providing information. As a consequence, even firms with less favorable information have to disclose it to avoid making an adverse impression on investors ("no news is always bad news"[86]). Finally, Romano states that the need for addressing a market failure does not require a regime of a single regulator. Even in a single regulator system, an underproduction of information to investors would increase the demand for a disclosure regime. This conclusion is supported by studies showing that an increase in the level of voluntary disclosure reduces firms' costs of capital.[87]

In contrast to a single regulator system, Romano sees advantage in a system of legislative competition, and especially in the feedback such competition would create for the legislator.[88] Usually, legislators cannot identify which regulation will benefit investors in capital markets. In a system of legislative competition, firms will choose the regime that is preferred by investors in order to meet their needs for disclosure and protection. The increase or decrease of the number of firms choosing the preferable regime for investors would be a direct indicator for the legislator about the attractiveness of their legal system. As a consequence, policy mistakes could be more swiftly identified and innovation would be fostered. Finally, such a system would also prevent a redistribution of wealth from one sector to other preferred individuals or organizations. Due to the reduced control of legislators in such a system, unrelated political considerations would also be less influential. The latest debate about the accounting practices for stock options in the United States

[86] ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 15 (2002).

[87] *Id.*, 26-29.

[88] *Id.*, 48-50. See also Heine, *supra* note 3, at 152-67.

https://doi.org/10.1017/S2071832200013912 Published online by Cambridge University Press

showed, yet another time, the influence of such political considerations. The *fair value* accounting of stock options would have led to an enormous increase in the compensation costs shown on company balance sheets. As a consequence, the earnings of companies using stock options to compensate their directors and employees would have dropped in proportion to the level of compensation. For this reason especially, the U.S. business community disliked the *fair value* accounting standard and used its political influence to oppose its introduction.[89]

Although a legislative competition in securities regulation would be advantageous for those reasons, it would also create disadvantages. A single legislator regime in securities regulation provides a standard routine disclosure system that creates one efficient disclosure language.[90] Investors can compare the information of various entities even though they are governed by different corporate laws. Nevertheless, Romano sees advantage in a system of legislative competition. Alternative standards of disclosure developed by other regulators could outweigh any arising lack in uniformity.[91] The persuasiveness of these arguments mainly depends on the structure of the capital markets. Institutional investors are less dependant on uniformity of disclosure than individual investors. Romano sees here a protection of poorly informed individual investors by institutional investors that will dictate the regulatory choice of issuers.[92]

In contrast to Romano, Heine recognizes that a single regulator regime in securities regulation can mean a useful limitation of the development towards legislative competition in corporate law, which in the interests of the shareholder. He therefore prefers a single regulator approach for the regulation of capital markets in the European Union.[93] Nevertheless, Heine does not consider a single legislator to be the necessary regulator in capital markets. He suggests that publicly traded corporations could also be regulated only by stock exchange rules.[94]

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[89] For this development see Ellen J. Grossman, *U.S. vs. International Stock Option Disclosure Reform: The International Community Leads Where the U.S. Community failed*, 29 BROOK. J. INT'L L. 281 (2003); Sebastian Mock, *Accounting for Stock-based Compensation*, 16 Euro. Bus. L. Rev. 359 (2005).

[90] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 303 (1991).

[91] Romano, *supra* note 86, at 140.

[92] Romano, *supra* note 86, at 46.

[93] Heine, *supra* note 3, at 271.

[94] Heine, *supra* note 3, at 271.

Besides the discussion about the superiority of a legislative competition in securities regulation, the implementation of such a regime would also require fundamental changes in the current legal system. Romano claims that the coverage under securities law must be optional and that the choice-of-law rule has to be an issuer securities domicile rule instead of a site-of-sale rule.[95] Neither condition is, however, fulfilled in the current capital markets regime in the European Union.[96] The concept of European and national legislators in the European Union is based on the protection of investors for transactions in a certain market,[97] and is, therefore, contrary to Romano's claims.

In contrast to such developments in corporate law, there cannot be an impulse by the fundamental freedoms of the EC Treaty for the regulation of securities law. An implementation of a legislative competition in securities regulation requires a reform of national legal systems by the Member States or an implementation by the European legislator. Due to national resistance against such recent developments in corporate law – which was especially documented in the Dutch legislator's attempt to limit foreign companies in the Netherlands by a law that was finally invalided by EJC in the *Inspire Art* decision[98] – this is not likely to occur in the near future.

III. Supranational Companies

In parallel to the harmonization of the company law of the Member States, the European legislator introduced supranational companies like the European Company (*Societas Europaea*)[99] and, recently, the European Cooperative Society (*Societas Cooperativa Europaea*).[100] Heine dismisses this alternative because it

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[95] Under the site-of-sale rule, securities transactions are governed by the law of the state in which either the offer or the acceptance to buy the security took place. In contrast, under the issuer securities domicile rule the securities transaction is governed by the law of the state in which the issuer has its domicile.

[96] CARSTEN PETER CLAUSSEN, BANK- UND BÖRSENRECHT 358-61 (3rd ed. 2003).

[97] See *e.g.* Art. 1 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, 2003 O.J.(L 345) 64. For Germany see Heinz-Dieter Assmann, in: *Einleitung*, GROSSKOMMENTAR ZUM AKTIENGESETZ (Klaus J. HOPT & HERBERT WIEDEMANN, EDS., 1992), n. 690 ff.

[98] See *supra* note 48.

[99] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. (L 294) 1. See hereto Christoph Teichmann, *The European Company – A Challenge to Academics, Legislatures and Practitioners*, in 4 GERMAN L.J. No. 4 (1 April 2003), 309-331.

[100] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), 2003 O.J. (L 207) 1. See the contribution by Susanne Braun, *The European Private Company:*

prevents a legislative competition, since the creation of a single corporate form for the common market denies any choice to the market participants.[101]

Although it is true that a legislative competition cannot occur concerning the council regulations themselves as the primary source of applicable law, a legislative competition might nevertheless be based on the applicable national law. Due to the application of national law,[102] several different types of European Companies and European Cooperative Societies will exist in the European Community.[103] Even though a legislative competition among the national legislators might therefore occur, the importance of it must nevertheless be doubted. The wide interpretation of the freedom of establishment by the ECJ (see C(II), above) opened the possibility to choose among all national company laws of the Member States. The need for an additional supranational company that is also regulated by national law might, therefore, not occur. With the creation of supranational companies, the European legislator became a competitor itself in the European market for corporate charters.

A Supranational Company Form for Small and Medium-Sized Enterprises?, in 5 GERMAN L.J. No. 11 (1 November 2004), available at http://www.germanlawjournal.com

101 Heine, *supra* note 3, at 275.

102 Art. 9 Council Regulation on the Statute for a European company (SE), Art. 8 Council Regulation (EC) on the Statute for a European Cooperative Society (SCE).

103 Heribert Hirte, *Die Europäische Aktiengesellschaft*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 5 (2002), 1, 2; Marie-Agnes *et al.*, *The Societas Europaea in Relation to the Public Corporation of Five Member States (France, Italy, Netherlands, Spain, Austria)*, 3 EURO. BUS. ORG. L. REV. 733 (2002); and Sebastian Mock, *Die Europäische Genossenschaft (SCE)*, 2 ZEITSCHRIFT FÜR GEMEINSCHAFTSPRIVATRECHT [GPR] 213 (2004).