

Harmonization, Regulation and Legislative Competition in European Corporate Law

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A. Harmonization of the Corporate Law in the European Community

[1] The European Community is also a community of Law. (1) Nevertheless the European Community is not focused on the creation of one European Law in contrast to the Laws of its Member States. Instead the European Community focuses on the harmonization of the national legal system only to the extent that is required for the functioning of the common market (art. 3 I h EC). The harmonization of Corporate Law (art. 44 EC) was regarded as a key factor of this process. (2) As a consequence Corporate Law is one of the most harmonized legal fields in the European Community. (3)

I. Concept of Harmonization

[2] The process of harmonization of Corporate Law in the European Community has to be seen in relation to the right of establishment of companies (art. 43, 48 EC). (4) The freedom to create subsidiaries and branches in other Member States with different Corporate Laws could lead to different legal conditions for creditors. As a consequence, the creditors of such subsidiaries and branches are confronted with a different legal system than the creditors of the holding company. Therefore the harmonization of the national Corporate Laws was regarded as a necessary compensation for the right of establishment of companies. (5) All creditors should ideally be in same legal position and should have the same rights even if in the context of different national Corporate Laws. In theory, the differences of the national Corporate Laws should be of no importance to the choice of one Member state for the establishment of a company. (6) Instead, firms should consider economic aspects, not the corporate law of a Member State, when deciding where to incorporate. The harmonization process therefore is focused on the creation of a legal playing field. (7) Another aspect of the harmonization process was the creation of equal conditions in competition for the companies in all Member States. (8) The differences among the national Corporate Laws should not give advantages or disadvantages to certain companies. Corporate Law should therefore also have to be neutral to competition. (9)

[3] Apart from these legal aspects the harmonization process also touches upon a great number of other aspects. Investors and companies are more attracted by foreign markets which are similar to their own markets. A harmonized Corporate Law therefore attracts companies and investors to expand into the markets of the other Member States. (10) Due to the harmonization of Corporate Law, trade among Member States is expected to increase and national markets are seen to become more integrated into the European Common Market. Finally, a harmonized Corporate Law gives the European Community more influence on the international development and debate on Corporate Law. (11) Latter proves to be of vital interest these days, as hardly a week passes without further academic or policy engagement in relation to reform issues of American versus European corporate governance, in particular in the wake of Enron, Worldcom etc. (12)

II. Forms of Harmonization

[4] The harmonization of corporate law among the Member States started in 1968 with the 1st Directive. (13) The 1st directive sought to harmonize publicity requirements, the circumstances in which company transactions will be valid and the rules relating of the nullity of companies. Eight years later, the 2nd Directive followed dealing with the formation of public limited liability companies and the maintenance and alteration of their capital. (14) This directive was criticized due to the extent of the harmonization because many provisions laid down detailed procedural requirements instead of simply directing the Member States to legislate to a certain end. (15)

[5] In the beginning of the harmonization process only six Member States with six legal systems and traditions had to be considered. The legal system of these Member States based in part on common continental European legal principles. (16) Later, with the expansion of the European Community, the legal systems of new Member States had to be considered. (17) Hence, the process of harmonization became more difficult. However, until 1984 five more directives followed. (18) Due to the complexity and the amount of details of the these directives, this program was in fact not a harmonization *a minimo* but a harmonization on a high level. Therefore this process may be regarded more as being of regulatory nature than one of harmonization. (19) As a consequence the 5th directive on the structure of public limited companies and the powers and obligations of their organs (20) failed due to its general approach. (21) This directive contained 65 articles and stated a detailed regulation for the organization of the public limited company. In spite of the fact, that this directive was subsequently changed at several occasions, it was never passed by the

European legislator. (22) The same can be said of the 9th directive on links between undertakings and in particular on groups of companies which failed due to its German orientated approach. (23)

[6] So, after 1984 the harmonization process came to a turning point. The European Commission developed in its white paper "Completing the internal market" a new strategy of harmonization. (24) Instead of further fundamental harmonization projects the Commission now focused on more punctual and additional projects. (25) As a result the 11th directive on disclosure by branches and the 12th directive on single-member private limited companies (27) was passed in 1989. Although both directives had considerable implication on German Corporate Law they were of a less general and fundamental approach than the first directives.

[7] At present, there are six more directives that have not yet been passed by the European legislator. (28) The last legislative project the 13th directive concerning takeover bids failed in 2001 in the European Parliament. (29) The reasons for the failure of the further harmonization were and continue to be numerous. A long time the Member States could not agree on a model of the *Mitbestimmung* (employee co-determination). Many Member States refused to accept the introduction of the German model with its comparatively extensive competencies. (30) This debate ended temporarily in 2000 with the compromise at the Conference of Nice. (31) The statute of the European Public Company (*societas europaea* - SE) of October 2001 is the result of this long awaited political compromise. (32)

[8] The legislative process has also become more difficult due to the still growing number of Member States. (33) The recent legislative efforts are directed at conceptualizing a framework for corporate law which includes only the most important measures in contrast to a fundamental harmonization. (34)

III. Supranational corporations

[9] Finally, the process of harmonization has been reaching its limits in particular with regard to cross border corporations. Often, these corporations are not limited to one Member State but to the whole common market of the European Community. (35) The establishment in one Member State with the consequence of the application of its Corporate Law would fail to account for the supranational character of the corporation. Therefore, the process of harmonization has always been accompanied by a process aiming at the regulation and creation of supranational, i.e. European corporations. In 1970, the Commission issued its first proposal for a council regulation embodying a statute for the European Company. (36) Due to several disagreements the work on the European Company was stopped. At this time it was impossible to reach a consensus on issues like rules governing groups of companies, tax provisions, the two-tier board structure and the workers representation. (37) In 1985 with the regulation on the European Economic Interest Grouping (*EEIG*) another model for a supranational corporation was introduced. (38) In order to accelerate the introduction of the EEIG the European legislator focused only on the provisions with European background. (39) The national Corporate Laws of the Member States therefore still apply. (40) Nevertheless, the EEIG failed to be successful and has, therefore, remained of only little importance. (41)

[10] At the conference of Nice in December 2000, the Member States finally agreed on the introduction of the European Company (*SE*). (42) Even when the SE is primarily governed by the regulation and provisions of its statute, the national laws of corporations will still be applied. (43) It will not be before 2004, when the regulation on the SE comes into force, that one will may assess the SE's success. (44)

B. Legislative Competition and Harmonization

[11] Ideas of legislative, regulatory competition stand in stark contrast to the system of harmonization. Instead of harmonizing, equalizing and unifying several legal systems, the different conceptions of legislative competition involve a complex interplay of regulation on of different legal systems. (45)

I. Benefits of legislative competition

[12] The most important advantage of a legislative competition has to be seen in the innovation process which is set free by the competition dynamics of different legal orders. Without legislative competition, legislators tend to stagnate in the legislative process, often explained with recourse to economic theories of path-dependencies and historically rooted trajectories of development. (46) As a consequence of historically embedded institutional processes and determining factors, less innovation takes place, and the legislator tends to be unable to quickly respond to changing market conditions and firm demands. This leaves the issue of how to assess an individualized legal system from, say, the perspective of an investor or a firm, strangely oblique. The quality and acceptance of a given legal system can be assessed from inside this system only with strong limitations. In a system with a certain degree of legislative competition, corporations are believed to choose that legal system which optimally corresponds to their demands. Less attractive legal systems will - in theory - not be chosen. In order to make one's own national law more attractive on a 'market for norms', the legislator is in need to determine the needs of this market and as a consequence to

change his legal system appropriately. Against this theoretical background it is believed, that corporations can have an indirect influence on the legislative process. A system of legislative competition allow for a bottom-up harmonization in contrast to a top-down harmonization. (48)

[13] The problem of stagnation has been a constant burden on the legislative processes in the European Community. Due to the growth in number of Member States, compromises have always been difficult to reach. With the envisioned, further expansion of the European Union, the number of Member States will grow to twenty seven. At the conference of Nice, the Member States tried to handle this problem by simplifying the legislative process. But these amendments and institutional reforms will most likely not be able to solve this stagnation problem. (49) While the future chances for following directives and other legislative acts are uncertain, the already existing Directives and regulations concerning corporate law will - taken by themselves - be hard to change.

II. Race to the bottom or to the top? (50)

[14] The process of legislative competition is often criticized concerning the issue of an allegedly ensuing "race to the bottom". (51) As an illustration for a 'race to the bottom' the Corporate Law in the United States is regularly mentioned with regard to the elevated number of incorporations in Delaware. (52) Due to the absence of a federal corporate law in the United States, corporate law is largely a matter of the states. As a consequence one half of the largest industrial firms are incorporated in Delaware. (53) Critics have qualified this development as a race to bottom with regard to the protection of shareholders and creditors. In contrast to this view, Professor *Winter* argued early that in fact the consequence of a free choice of incorporation was a 'race to the top'. *Winter* and, since then, a number of other re-known corporate law scholars, (55) argued that markets constrain the firms' management to choose a regime most beneficial to shareholders. (56) Investors would therefore not invest in firms that are incorporated in legal systems with a lesser degree of protection for creditors and shareholders. The lesser interest of investors and shareholders would have a negative impact on stock prices, eventually leading to a takeovers or bankruptcy. Relying on extensive empirical studies, Professor *Romano* has argued that the process of concentration can also reduce the costs of transactions. (57) Delaware has indeed developed a 'legal capital' consisting of a store of legal precedents forming a comprehensive body of case law, judicial and lawyers' expertise in corporate law and administrative experience in the rapid processing of corporate filings. (58) Legislative competition can therefore lead to a maximum level of legal certainty. This certainty can lower a firm's transaction costs because the firm can operate on a densely labored field of corporate law expertise. Moreover, due to the high proportion of franchise taxes in relation to the total revenue, Delaware is fundamentally dependent on this income and therefore cannot afford to lose firms to other states. This results in considerable pressure on Delaware's law and policy makers with regard to its corporate law rules. While Delaware's aim is, therefore, to maintain a high level of susceptibility of its laws for market innovation, other states are pressured to imitate Delaware in this respect. (59)

C. National vs. European Corporate Law?

[15] A legislative competition depends on several legal and institutional conditions, the existence of whom can rightly be called into question with regard to the European Union. While one of the most important conditions remains the freedom-of-choice rule, (60) Legislative/regulatory competition can in fact function only if a corporation can actually choose the applicable law without any restrictions concerning its administrative (real) seat.

I. Right of establishment and legislative competition

[16] The European Community Treaty guarantees the right of establishment (Art. 43 ff. EC) as one of the four Fundamental Freedoms. According to art. 48 EC, the right of establishment applies also to companies or firms. As a consequence companies or firms have to be recognized in all other Member States. (61) Nevertheless due the application of the seat theory (*siège réel*), some Member States deny the recognition of a company or firm of another Member State when the place of the central management and control of the corporation differs from the Member State where it was founded. (62) Therefore a company from a Member State can only move its central management and control to another Member State when it changes its statute. (63) As a consequence, under present German law these companies are regarded as dissolved. (64) This means that due to the application of the real seat theory the free movement of the central management and control of a company without changing its statute is limited. Nevertheless, many Member States have been applying the real seat theory while denying a restriction of the right of establishment. (65)

[17] Because of the absence of an overriding European regulation and the great importance of this issue for the freedom of establishment of firms in the EU, the European Court of Justice (ECJ) has been confronted with this issue at several occasions. In its first decision (*Daily-Mail*) of 1989, the ECJ held that the right of establishment does not include the right of a company incorporated under the legislation of a Member State to transfer its central management and control to another Member State. (66) The Court held further that the problem of transferring a

company from one Member State to another had to be solved by future legislation or conventions. (67) The *Daily Mail* judgement was therefore considered as a confirmation of the real seat theory. (68) In 1999, the European Court of Justice apparently changed its opinion in the much disputed *Centros*-Case. In this case a Danish authority had denied to register a branch of Centros (a private limited company incorporated in the United Kingdom) in Denmark. The Danish authority argued that because Centros did not trade in the United Kingdom it was in fact seeking to establish a principal establishment in Denmark thereby circumventing the national rules concerning, in particular, Danish minimum capital requirements. The ECJ stated that the denial of the Danish authority was contrary to the right of establishment. Because, however, this case concerned only a branch of a company incorporated under the law of another Member State, many Member States held on the real seat theory. (70) Only in Austria the *Oberste Gerichtshof* denied the further application of the seat theory as a consequence of the judgement of the European Court of Justice. (71)

[18] In 2002 the European Court of Justice was confronted in a preliminary ruling from the German Federal Court of Justice (*Bundesgerichtshof*) in the *Überseering* case. *Überseering* BV (a Dutch corporation registered in Amsterdam and Haarlem and later bought by two German individuals) and NCC (a German corporation) concluded a construction contract. Later *Überseering* BV sued the NCC for damages. Due to the fact that the real seat of *Überseering* BV had been moved to Germany, the German courts had denied the legal capacity of the *Überseering* BV. The ECJ held that the legal capacity of a company that was formed in accordance with the law of a Member State in which it has its registered office and which exercises its freedom of establishment in another Member State has to be recognised by this Member State.

[19] Nevertheless, the Court did - again - not decide explicitly on the general application of the real seat theory. Pursuant to the rules of the preliminary proceedings (art. 234 EC) the Court can only decide the question that was raised in the case pending before a court of a Member State. The question in the *Überseering* case of the German *Bundesgerichtshof* concerned *only* the recognition of the legal capacity of the *Überseering* BV but not the general applicability of the real seat theory. (73) As a consequence, the even more relevant question of whether or not the liability of shareholders is determined by the law of the Member State where the company was incorporated or by the law of the Member State where the company has its administrative main seat still remains open to debate. A company that was incorporated in another Member State but moved its central management and control to another Member State could be recognised with regard to its legal capacity but not concerning the liability of the shareholders. Such corporations could be classified under German Law as commercial partnerships (§§ 105 ff. German Commercial Code - *Handelsgesetzbuch*, HGB) or as partnerships under the German Civil Code (§§ 705 ff. German Civil Code - *Bürgerliches Gesetzbuch*, BGB) with the consequence that the shareholders of these companies are personally liable for the obligations of the company (§ 128 German Commercial Code). (74) With this classification in mind, the real seat theory's probably most important element could still be applied, this not even being in contradiction to the judgement by the European Court of Justice. (75) In its *Überseering* judgement, the Court held that general interests, such as the protection of the interests of creditors, minority shareholders, employees and even taxation authorities, can justify restrictions on the freedom of establishment while they *cannot* lead to the denial of the legal capacity. (76) But even if restrictions on the freedom of establishment might generally justify the application of personal liability provisions of shareholders, the connected restrictive effect of unjustifiably limiting the freedom of establishment can hardly be denied. (77)

[20] With the judgement of the ECJ in *Überseering*, the circumstances of an legislative competition have fundamentally changed. Due to the Court's displayed, wider understanding of the right of establishment, companies can now move their central management and control from one Member State without the need for further proceedings. In effect, the ECJ has given the right of establishment a radically new, wider interpretation. A company can now be found in a Member State without having later any further relations to it, this having been a central obstacle to legislative competition in the past. (78)

II. Comparative Reflections on the American System of Market for Corporate Charters

[21] In the United States, the process of legislative competition on corporate law emerged with the *Paul v. Virginia* (79) decision of the U.S. Supreme Court. (80) The *Überseering* decision might have the same impact on the further development of European Corporate Law. Nevertheless the scope of a possible legislative competition remains limited in the EU. Due to the directives of the European Community (see A.II.) the Member States cannot change the aspects that are already regulated by these directives. Only in the law of private limited companies (in Germany: *Gesellschaften mit beschränkter Haftung*, *GmbH*) the harmonization process has not advanced due to the fact that many directives do not apply to these kind of corporations. (81) Finally it has to be considered that apart from strictly legal elements, cultural and structural differences among the Member States might limit the extent of this competition. (82)

III. Principle of subsidiarity

[22] The recently adopted, wider interpretation of the right of establishment by the ECJ stands in considerable contrast to its former understanding (see *supra* A.I.). As a consequence, the European legislator might be tempted to adopt approaches to company law harmonization which would limit the effect of the *Überseering* judgement. Even if the European Community has no general legislative competence for corporate law (due to the principle of subsidiary - art. 5 EC), Art. 44 II EC authorizes the European Community to enact directives (art. 251 EC) to coordinate to the necessary extent the safeguards for the protection of the interests of members of companies and others. In the past, this competence has generally been given a wide scope of interpretation. The ECJ did subscribe to this approach in its *Daihatsu*-Decision. As a consequence there are only very less limitation for the European legislator in the further harmonization process. (84) The legislative competition among the Member States could therefore be fundamentally limited by a new harmonization process. (85)

IV. Protection of creditors and shareholders

[23] The possibly emerging competition of national corporate laws in the aftermath of the Court's *Überseering* decision might lead to more innovation and experimentation in the legislative processes of the Member States. Apart from the expected benefits of this legislative competition, it remains vitally important to account for a necessary level of protection of creditors, shareholders and other stakeholders. (86) In the European Community, a unified securities law such as in the United States does (still) not exist. (87) Although several directives on securities law has already been rendered in the past, (88) European Securities Law cannot yet provide for a sufficient protection of creditors and shareholders. (89) The harmonization of Securities Law has mainly focused only on the abolishment of restrictions on the movement of capital. (90) Moreover, the number of private limited companies in Germany is still greater than the number of public limited companies. (91) The focus on a further expansion and consolidation of a European capital market remains - for the time being - less developed.

[24] The protection of creditors and shareholders could also be reached by a finally harmonization of the European Corporate Law. But a harmonization to that extent would determine the European Corporate Law for several decades and would make as a result further innovation more difficult. Moreover the necessary consensus for this harmonization would be hardly to reach. Therefore, alternatively, the benefits of a legislative competition and the necessary protection of shareholders and creditors could be combined by focusing on a *a minimo* harmonization. Only the aspects of compelling importance for the protection of creditors and shareholders should be harmonized. All other aspects should remain in the competence of the national legislator. (92)

[25] The harmonization of a liability for the misuse of limited companies (e.g. 'piercing the corporate veil' (93)) might prove appropriate for a consideration of Member States' objections to a renunciation of the real seat theory. (94) A possibly more promising measure could be the final enactment of the 14th directive on cross-border transfer of company seats . (95) The proposal of the directive states a specific procedure for the transfer of the seat of a company. The company would have to register in the new Member State and change its charter in accordance with the corporate law of this Member State. Moreover the company would have to give a guarantee to its creditors before transferring the seat.

D. Concluding Remarks

[26] The harmonization of Company law in the European Community has, from its beginning, focused on the prevention of the so-called Delaware-effect in the European Community. (96) Due to the *Überseering* decision by the European Court of Justice, this effect might now soon become reality. Instead of finally harmonizing the national corporate laws as a response to the effect a legislative competition might have, the European legislator should consider the benefits of it and the influence it could have on the further development of the European corporate law. The next steps in the legislation process will define the extent to which a legislative competition should and can occur.

* Thanks to Peer Zumbansen for helpful comments.

(1) *Walter Hallstein* Angleichung des Privat- und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 28 (1964), 211 (228 ff.); European Court of Justice, Opinion of the Court of 14 December 1991, I-6079 no. 21.

(2) See, recently, *Günter Christian Schwarz* *Europäisches Gesellschaftsrecht* (Baden-Baden 2000), no. 2; *Mathias Habersack* *Europäisches Gesellschaftsrecht* (Munich 1999), no. 15; the still classical text is *Clive Schmitthoff* (Ed.) *The Harmonisation of European Company Law*, (London 1973); for a recent, brilliant assessment see *Jan Wouters*

European Company Law: Quo Vadis?, *Common Market Law Review* 37 (2000), 257-307; Simon Deakin Regulatory Competition versus Reflexive Harmonisation in European Company Law, in: Daniel C. Esty/Damien Geradin (Eds.), *Regulatory Competition and Economic Integration. Comparative Perspectives* (Oxford University Press: Oxford/New York 2001), 190-217.

(3) *Klaus J. Hopt* Europäisches Gesellschaftsrecht – Krise und Neue Anläufe, *Zeitschrift für Wirtschaftsrecht [ZIP]* 19 (1998), 96-106; *see also Jan Wouters* European Company Law: Quo Vadis?, *Common Market Law Review* 37 (2000), 257-307, albeit with a more skeptical outlook.

(4) *Mathias Habersack* Europäisches Gesellschaftsrecht, no. 2.

(5) *Marcus Lutter* Die Entwicklung des Gesellschaftsrechts in Europa, *Europarecht [EuR]* 10 (1975), 44 (p. 48); *Jörn Pipkorn* Die Entwicklung des europäischen Gesellschafts- und Unternehmensrechts, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR]* 136 (1972), 499 (511).

(6) *Jörn Pipkorn* Die Entwicklung des europäischen Gesellschafts- und Unternehmensrechts, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR]* 136 (1972), 499 (511); *Günter Christian Schwarz* Europäisches Gesellschaftsrecht, no. 7.

(7) *Wolfgang Schön* Mindestharmonisierung im europäischen Gesellschaftsrecht, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR]* 160 (1996), 220 (232).

(8) *Jörn Pipkorn* Die Entwicklung des europäischen Gesellschafts- und Unternehmensrechts, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR]* 136 (1972), 499 (511); *Günter Christian Schwarz* Europäisches Gesellschaftsrecht, no. 8; *Christiaan Timmermanns* Die Europäische Rechtsangleichung im Gesellschaftsrecht, *Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ]* 48 (1984) 1 (15 ff.); *Ivo E. Schwartz* Zur Konzeption der Rechtsangleichung in der Europäischen Wirtschaftsgemeinschaft, *Festschrift für Walter Hallstein* (Frankfurt am Main 1966), 474 (478 ff.); *see also* Preamble of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (para. 3) (g) of the Treaty on the annual accounts of certain types of companies, *Official Journal L* 222, 14/08/1978 11 ff.

(9) *Uwe Blaurock* Europäisches und deutsches Gesellschaftsrecht – Bilanz und Perspektiven eines Anpassungsprozesses, *Zeitschrift für Europäisches Privatrecht [ZEuP]* 6 (1998), 460 (463).

(10) *Richard M. Buxbaum/Klaus J. Hopt* *Legal Harmonization and the Business Enterprise* (Berlin 1988), 201.

(11) *Günter Christian Schwarz* Europäisches Gesellschaftsrecht, no. 11; *see e.g.* Commission, Communication from the Commission – accounting harmonization: a new strategy vis-a-vis international harmonization, *COM* (95) 508.

(12) *See, e.g., Margaret Blair* Post-Enron Reflections on Comparative Corporate Governance (2002), http://papers.ssrn.com/paper.taf?abstract_id=316663; *Jeffrey N. Gordon* Closing Remark: What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections, *University of Chicago Law Review* 69 (2002), 1233-1250; *Klaus Lang* Unglücksfälle oder Systemkrise?, *Die Mitbestimmung* (2002), 10-15; *Günter Christian Schwarz/Björn Holland* Enron, WorldCom...und die Corporate-Governance Diskussion, *Zeitschrift für Wirtschaftsrecht [ZIP]* 23 (2002), 1661-1672; *Sigurt Vitols* Risse in der Glitzerfassade, *Die Mitbestimmung* (2002), 21-32.

(13) 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; *Official Journal L* 65, 14/03/1968 p. 8 ff.; a comprehensive overview of this and the pursuant directives is provided by *Mathias Habersack* Europäisches Gesellschaftsrecht, *supra* note 4, and by *Jan Wouters* European Company Law: Quo Vadis?, *Common Market Law Review* 37 (2000), 257-307.

(14) 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.

(15) *Vanessa Edwards* *EC Company Law* (Oxford University Press: Oxford/New York 1999), 51.

(16) *Vanessa Edwards* *EC Company Law*, 14; *E.g. for the system of stated capital: Herbert Wiedemann*

Gesellschaftsrecht I (Munich 1980), 558; *Marcus Lutter* Kapital, Sicherung der Kapitalaufbringung und Kapitalerhaltung in den Aktien- und GmbH-Rechten der EWG (Karlsruhe 1964), 498 f.

(17) *Günter Christian Schwarz* Europäisches Gesellschaftsrecht, no. 37.

(18) Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies Official Journal L 295, 20/10/1978 p. 36 ff.; Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies Official Journal L 222, 14/08/1978 p. 11 ff.; Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies Official Journal L 378, 31/12/1982 p. 47 ff.; Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts Official Journal L 193, 18/07/1983 p. 1 ff.; Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents Official Journal L 126, 12/05/1984 p. 20 ff.

(19) *Jeanne Boucourechliev* Die Harmonisierung des Gesellschaftsrechts in der Europäischen Union: Erreichtes und Perspektiven, Recht der Internationalen Wirtschaft [RIW] 45 (1999), 1 (2).

(20) Proposal for fifth directive on the coordination of safeguards which for the protection of the interests of Members and outsiders, are required by Member States of companies within the meaning of article 59, second paragraph, with respect to company structure and to the power and responsibilities of company boards, COM (1972) 887 final, Official Journal 13/12/1972 C 131, p. 49 ff.

(21) Klaus J. Hopt Europäisches Gesellschaftsrecht – Krise und Neue Anläufe, Zeitschrift für Wirtschaftsrecht [ZIP] 19 (1998), 96 (101 f.).

(22) See the overview *Vanessa Edwards* EC Company Law, 387 ff.

(23) *Jeanne Boucourechliev* Recht der Internationalen Wirtschaft [RIW] 45 (1999), 1 (3); *Heribert Hirte* Kapitalgesellschaftsrecht (3rd ed. - Cologne 2001), no. 40c; *Vanessa Edwards* EC Company Law, 390 f; Germany already has a sophisticated codified law on groups of companies while other Member States apply takeover laws to guarantee the protection of shareholders and creditors.

(24) Commission Completing the internal market: white paper from the Commission on the European Council (Milan, 28-29 June 1985), COM (1985), 310 final.

(25) *Mathias Habersack* Europäisches Gesellschaftsrecht, no. 72.

(26) 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 Official Journal L 395, 30/12/1989 p. 36 ff.

(27) Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies; Official Journal L 395, 30/12/1989, p. 40 ff.

(28) See the overview *Mathias Habersack* Europäisches Gesellschaftsrecht, no. 72.

(29) For the historical development *Heribert Hirte* in *Kölner Kommentar zum Wertpapiererwerbs- und Übernahmegesetz* (Cologne 2002), Einl. note 60 ff.; *Klaus-Heiner Lehne* Die 13. Richtlinie auf dem Gebiet des Gesellschaftsrechts betreffend Übernahmeangebote - gescheitert, aber dennoch richtungweisend für das künftige europäische Übernahmerecht, in: *Heribert Hirte* (Hrsg.), *WpÜG. Das Wertpapiererwerbs- und Übernahmegesetz mit Übernahmekodex und City Code* (Cologne 2002), 33-44; for the latest development see: Proposal for a directive of the European Parliament and of the Council on takeover bids, COM/2002/0534 final; see also *Franz-Jörg Semler* Die zweite Runde ist eröffnet: Neuer Kommissionsvorschlag für eine EU-Übernehmerichtlinie, *Betriebsberater* [BB] 57 (2002), issue 46 p. I

(30) *Daniel Zimmer* Internationales Gesellschaftsrecht (Heidelberg 1996), 138; this did form one of the decisive stumbling blocks on the road to a European Company Statute (*Societas Europaea* - SE), see now the comprehensive study by *Gunther Mävers* Die Mitbestimmung der Arbeitnehmer in der Europäischen Aktiengesellschaft (Nomos: Baden-Baden 2002).

(31) Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees Official Journal L 294 , 10/11/2001 p. 22 ff.; see also *Meinhard Heinze* Die Europäische Aktiengesellschaft, Zeitschrift für Unternehmens- und Gesellschaftsrecht [ZGR] 31 (2002), 66 (77).

(32) See text, *infra* III. From an abundant literature, see, e.g., Heribert Hirte Die Europäische Aktiengesellschaft, Neue Zeitschrift für Gesellschaftsrecht [NZG] 5 (2002), 1-10; Klaus J. Hopt Europäische Aktiengesellschaft - per aspera ad astra?, Europäische Zeitschrift für Wirtschaftsrecht [EuZW] 13 (2002), 1; Georg F. Thoma/Dieter Leuering Die Europäische Aktiengesellschaft - Societas Europaea, Neue Juristische Wochenschrift [NJW] 55 (2002), 1449-1454; Terence L. Blackburn The Societas Europea: The Evolving European Corporation Statute, Fordham Law Review 61 (1993), 695-772.

(33) *Mathias Habersack* Europäisches Gesellschaftsrecht, 74.

(34) On November 4, 2002 the High Level Group of Company Law Experts gave its key recommendations and priorities for a further development. (http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf). This trend has markedly be described as ‚reflexive harmonization‘, see *hereto Simon Deakin* Regulatory Competition versus Reflexive Harmonisation in European Company Law, in: Daniel C. Esty/Damien Geradin (Hrsg.), Regulatory Competition and Economic Integration. Comparative Perspectives (Oxford University Press: Oxford/New York 2001), 190-217; its conceptual connection must be seen with the Commission's so-called Open Method of Coordination, which emerged at the Lisbon Council in 2000, see for an analysis and critique *Diamond Ashiagbor* Soft Harmonisation: Labour Law, Economic Theory and the European Employment Strategy, (Ph.D. Thesis, European University Institute: Florence 2002); for an analysis comparing the involvement of corporate governance commissions, civil society participation and soft law in corporate law making on the national and EU level cf. *Peer Zumbansen* The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation, Juridikum (2002), 32-40, also in 1 ANNUAL OF GERMAN & EUROPEAN LAW (2003), Berghahn Books (Oxford/New York), *forthcoming*.

(35) *Jörn Pipkorn* Die Entwicklung des europäischen Gesellschafts- und Unternehmensrechts, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR] 136 (1972), 499 (511); *idem*, Die Entwicklung des europäischen Gesellschafts- und Unternehmensrechts, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR] 141 (1977), 330 (359); see also the Preamble of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) Official Journal L 294, 10/11/2001 p. 1 ff.

(36) Proposal for a council regulation embodying a statute for the European Company Official Journal C 124, 10/10/1970 p. 1

(37) *Vanessa Edwards* EC Company Law, 400 f.

(38) Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) Official Journal L 199, 31/07/1985 p. 1 ff.

(39) The European legislator recognized that all aspects of a corporation could not be regulated by a regulation (*Mathias Habersack* Europäisches Gesellschaftsrecht, no. 66; *Günter Christian Schwarz* Europäisches Gesellschaftsrecht, no. 970).

(40) Art. 2 I EEIG Regulation.

(41) Due to the application of national law beside the provisions of the regulation the EEIG could not provide the sufficient flexibility and legal certainty that was expected by introducing supranational corporations. (*Meinhard Heinze* Die Europäische Aktiengesellschaft, Zeitschrift für Unternehmens- und Gesellschaftsrecht [ZGR] 13 (2002), 66 (67); *Mathias Habersack* Europäisches Gesellschaftsrecht, no. 66).

(42) Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) Official Journal L 294, 10/11/2001 p. 1 ff.

(43) Art. 9 I c SE-Regulation; *Francoise Blanquet* Das Statut der Europäischen Aktiengesellschaft (Societas Europaea SE) Zeitschrift für Unternehmens- und Gesellschaftsrecht [ZGR] 13 (2002), 20 (50 f.).

(44) Art. 70 SE Regulation.

(45) A concise analysis, bridging the legal and economic debates on regulatory competition, can now be found in

Eva-Maria Kieninger Wettbewerb der Rechtsordnungen im Europäischen Binnenmarkt, (Mohr Siebeck: Tübingen 2002); see already *Meinrad Dreher*, Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa?, Juristenzeitung [JZ] 54 (1999), 105-112; *Hanno Merkt*, Das europäische Gesellschaftsrecht und die Idee des 'Wettbewerbs der Gesetzgeber', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 59 (1995), 545-568.

(46) See, e.g., *Mark J. Roe* Some Differences in Corporate Structure in Germany, Japan, and the United States, *Yale Law Journal* 102 (1993), 1927; *idem*, Path Dependence Political Options and Governance Systems, in: Klaus J. Hopt/Eddy Wymeersch (Hrsg.), *Comparative Corporate Governance. Essays and Materials* (Walter de Gruyter: Berlin/New York 1997), 165-184; *Jeffrey N. Gordon* Pathways to Corporate Governance? Two Steps on the Road to Shareholder Capitalism in Germany, *Columbia Journal of European Law* 5 (1999), 219-241; *Klaus Heine/Wolfgang Kerber* European Corporate Laws, Regulatory Competition and Path Dependence, *European Journal of Law and Economics* 13 (2002), 47-71.

(47) See, e.g., *Roberta Romano* The Genius of American Corporate Law, (The American Enterprise Institute Press: 1993); the classical and still not resolved debate over an alleged 'race to the bottom' arose with *William L. Cary* Federalism and Corporate Law: Reflections Upon Delaware, *Yale Law Journal* 83 (1974), 663-705.

(48) *Wolfgang Schön* Mindestharmonisierung im europäischen Gesellschaftsrecht, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* [ZHR] 160 (1996), 220 (233).

(49) *Eckhard Pache/Frank Schorkopf* Der Vertrag von Nizza, *Neue Juristische Wochenschrift* [NJW] 54 (2001), 1377 ff.

(50) *William L. Cary* Federalism and Corporate Law: Reflections Upon Delaware, *Yale Law Journal* 83 (1974), 663-705; *Ralph K. Winter* State Law, Shareholder Protection, and the Theory of the Corporation, *Journal of Legal Studies* 6 (1977), 251-292; *Roberta Romano* The State Competition Debate in Corporate Law, *Cardozo Law Review* 8 (1987), 709-757; *Lucian Arye Bebchuk* Federalism and the Corporation: the desirable limits on state competition in corporate law, *Harvard Law Review* 105 (1992), 1435-1510; *Roberta Romano* Explaining American Exceptionalism in Corporate Law, in: *International Regulatory Competition and Coordination*, 127-152; *William J. Carney* Federalism and Corporate Law: A Non-Delaware View of Results of Competition, in: *International Regulatory Competition and Coordination*, 153-183; *William W. Bratton/Joseph McCahery* Regulatory Competition as Regulatory Capture: The Case of Corporate Law in the USA, in: *International Regulatory Competition and Coordination*, 207-237.

(51) See already *supra*, note 47, and *infra*, notes 50 ff.

(52) *William L. Cary* Federalism and Corporate Law: Reflections Upon Delaware, *Yale Law Journal* 83 (1974), 663-705.

(53) *Roberta Romano* Explaining American Exceptionalism in Corporate Law, in: *International Regulatory Competition and Coordination*, 127 (128); *Eva-Maria Kieninger* Wettbewerb der Rechtsordnungen im Europäischen Binnenmarkt, (Mohr Siebeck: Tübingen 2002), 2 f.

(54) *William L. Cary* Federalism and Corporate Law: Reflections Upon Delaware, *Yale Law Journal* 83 (1974), 663-705

(55) See *infra* notes 54 ff.

(56) *Ralph K. Winter* State Law, Shareholder Protection, and the Theory of the Corporation, *Journal of Legal Studies* 6 (1977), 251 (256).

(57) *Roberta Romano* The State Competition Debate in Corporate Law, *Cardozo Law Review* 8 (1987), 709 (719).

(58) *Roberta Romano* The State Competition Debate in Corporate Law, *Cardozo Law Review* 8 (1987), 709 ff.

(59) *Roberta Romano* Explaining American Exceptionalism in Corporate Law, in: *International Regulatory Competition and Coordination*, 127 (129).

(60) *Roberta Romano* Explaining American Exceptionalism in Corporate Law, in: *International Regulatory Competition and Coordination*, 127 (141); *Hanno Merkt* Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 59 (1995), 545 ff.

(61) *Uwe Eyles* Das Niederlassungsrecht der Kapitalgesellschaften in der Europäischen Gemeinschaft (Baden-Baden 1990), 96 ff; *Günther Beitzke* Anerkennung und Sitzverlegung von Gesellschaften und juristischen Personen im EWG-Bereich Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 127 (1965), 1 (2); *Christiaan Timmermanns* Die Europäische Rechtsangleichung im Gesellschaftsrecht, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 48 (1984), 1 (38 f.).

(62) Besides Germany also Belgium, Spain, Greek, France, Luxembourg and Portugal apply the seat theory. See *Günter Christian Schwarz* Europäisches Gesellschaftsrecht, no 164.

(63) Daniel Zimmer Internationales Gesellschaftsrecht, 200.

(64) Heribert Hirte Kapitalgesellschaftsrecht, no. 1026.

(65) *E.g.* in Germany Oberlandesgericht (OLG) Hamm, Recht der Internationalen Wirtschaft [RIW] 43 (1997), 874-875; Oberlandesgericht (OLG) Düsseldorf 49 [JZ] 2000, 203; *Hans Jürgen Sonnenberger* Europarecht und Internationales Privatrecht, Zeitschrift für vergleichende Rechtswissenschaft [ZvergIRW] 118 (1996), 3 (21); *Staudinger-Großfeld* Internationales Gesellschaftsrecht (Berlin 1998), no. 130 ff.

(66) EC Case C-81/87 [1989] ECR I-5483.

(67) The European Court of Justice also referred to Art. 293 EC stating that the Member States shall enter into negotiations with each other for the mutual recognition of companies or firms. These negotiations ended in 1968 in the Convention on the mutual recognition of companies and bodies corporate. Due to the denial of the Netherlands to ratify this convention it never came into force.

(68) Bayerisches Oberstes Landgericht (BayObLG) Wertpapiermitteilungen [WM] 46 (1992), 1371; Oberlandesgericht (OLG) Hamm Zeitschrift für Wirtschaftsrecht [ZIP] 18 (1997), 1696 (1697); *Staudinger-Großfeld* Internationales Gesellschaftsrecht, no. 123 ff.; *Carsten Ebenroth/Uwe Eyles* Die innereuropäische Verlegung des Gesellschaftssitzes als Ausfluss der Niederlassungsfreiheit, *Der Betrieb* [DB] 42 (1989), 413 (417); but see *Peter Behrens* Niederlassungsfreiheit und internationales Gesellschaftsrecht *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 52 (1988), 498 (517 ff.); *Brigitte Knobbe-Keuk* Umzug von Gesellschaften in Europa, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR] 154 (1990), 325 (329 ff.).

(69) EC Case C-212/97 [1999] ECR I-1459; the ECJ's website lists far more than 100 comments, articles and books on Centros. See, e.g., *Simon Deakin* Regulatory Competition versus Reflexive Harmonisation in European Company Law, in: Daniel C. Esty/Damien Geradin (Hrsg.), *Regulatory Competition and Economic Integration. Comparative Perspectives* (Oxford University Press: Oxford/New York 2001), 190-217, 200 ff.; *Barbara Trefil* European Company Law: Comments and Metacomments on Centros, in: 2 German Law Journal No. 18 (1 December 2001), available at: http://www.germanlawjournal.com/past_issues.php?id=117, reviewing *Harald Halbhuber* Limited Company statt GmbH? Europarechtlicher Rahmen und deutscher Widerstand – Ein Beitrag zur Auslegung von Art. 48 EG und zum Europäischen Gesellschaftsrecht (Baden-Baden: Nomos Verlagsgesellschaft 2001).

(70) *E.g.* in Germany: Landgericht (LG) Potsdam, Zeitschrift für Wirtschaftsrecht [ZIP] 20 (1999), 2021 ff.; Oberlandesgericht (OLG) Hamm, Zeitschrift für Wirtschaftsrecht [ZIP] 23 (2001), 791 ff.; see also *Werner F. Ebke*, Centros – Some realities and some mysteries, *American Journal of Comparative Law* 48, 623 (657).

(71) Österreichischer Oberster Gerichtshof (OGH), Recht der Internationalen Wirtschaft [RiW] 46 (2000), 378 ff.; see also *Werner F. Ebke*, Centros – Some realities and some mysteries, *American Journal of Comparative Law* 48, 623 (657).

(72) EC Case C-208/00 [2002] Zeitschrift für Wirtschaftsrecht [ZIP] 23 (2002), 2037 ff.; see the commentary by *Kilian Baelz/Teresa Baldwin*, available at: http://www.germanlawjournal.com/current_issue.php?id=214 (*this issue*); *Schanze/Jütters*, in: Die Aktiengesellschaft 2003, Issue No. 1 *forthcoming*.

(73) The need for the preliminary ruling in this case was already doubted because of the fact that the Überseering BV would be a partnership under German Law. The commercial partnership has the legal capacity (§§ 105 II, 124 German Commercial Code). Also the partnership under the Civil Code has due to the judgement of the Bundesgerichtshof the legal capacity (BGHZ 146, 341 ff.). See *Holger Altmeyen* Parteifähigkeit, Sitztheorie und "Centros", *Deutsches Steuerrecht* [DStR] 38 (2000), 1061; but see *Stefan Leible/Jochen Hoffmann* Vom "Nullum" zur Personengesellschaft – Die Metamorphose der Scheinauslandsgesellschaft im deutschen Recht, *Der Betrieb* [DB] 55 (2002), 2203 (2206).

- (74) These provisions applies analogous for the partnerships under German Civil Code (see BGHZ 146, 341 ff.).
- (75) *Ulrich Forsthoff* EuGH fördert Vielfalt im Gesellschaftsrecht - Traditionelle deutsche Sitztheorie verstößt gegen Niederlassungsfreiheit, *Der Betrieb* [DB] 55 (2002), 2471 (2474).
- (76) EC C-208/00 [2002] *Zeitschrift für Wirtschaftsrecht* [ZIP] 55 (2002), 2037 ff; no. 93.
- (77) *Ulrich Forsthoff* EuGH fördert Vielfalt im Gesellschaftsrecht - Traditionelle deutsche Sitztheorie verstößt gegen Niederlassungsfreiheit, *Der Betrieb* [DB] 55 (2002), 2471 ff; *Horst Eidenmüller* Zur Vereinbarkeit der Sitztheorie mit EG Art 43, 48, speziell bei Sitzverlegung in einen anderen Mitgliedstaat, *Zeitschrift für Wirtschaftsrecht* [ZIP] 23 (2002), 82 (84); *Sebastian Gronstedt* Sitzverlegung einer ausländischen Gesellschaft nach Deutschland führt zur Anerkennung von deren aktiver und passiver Parteifähigkeit, *Betriebsberater* [BB] 57 (2002), 2033 (2034); dissenting opinion *Stefan Leible/Jochen Hoffmann* Vom "Nullum" zur Personengesellschaft – Die Metamorphose der Scheinauslandsgesellschaft im deutschen Recht, *Der Betrieb* [DB] 55 (2002), 2203 (2207).
- (78) *Simon Deakin* Regulatory Competition versus Reflexive Harmonisation in European Company Law, in: Daniel C. Esty/Damien Geradin (Hrsg.), *Regulatory Competition and Economic Integration. Comparative Perspectives* (Oxford University Press: Oxford/New York 2001), 190 (216); *Hanno Merkt* Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 59 (1995); 545 ff.
- (79) The question before the court was whether Virginia could impose restrictions on foreign companies when these restrictions were not imposed on local corporations. The Supreme Court held that a state could exclude a foreign corporation from engaging in intrastate but not in interstate business (75 U.S. 168 (1868)).
- (80) After the *Paul v. Virginia* decision of the U.S. Supreme Court the 'race to laxity' began 1896 in New Jersey. Later Maine and finally from 1899 on Delaware became the 'mother of incorporations'; An overview gives *Henry N. Butler* Nineteenth-century jurisdictional competition in the granting of corporate privileges, *Journal of Legal Studies* 129 (1985), 129 (155); *Richard M. Buxbaum* The origins of the American „Internal Affairs" Rules in corporate conflict of laws, *Festschrift für Gerhard Kegel* (Stuttgart 1987), 75 (79).
- (81) *Curt Christian von Halen* Das Gesellschaftsstatut nach der Centros-Entscheidung des EuGH (Münster 2001), 260 ff.; an overview is given by *Peter Behrens* Die Gesellschaft mit beschränkter Haftung im internationalen und europäischen Recht (Berlin 1997), 68 ff.
- (82) *Hanno Merkt* Das Europäische Gesellschaftsrecht und die Idee des „Wettbewerbs der Gesetzgeber", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 59 (1995); 545 (564 ff.); see also *Antoine Reberieux*, European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement, *Journal of Common Market Studies* 40 (2002), 111-134; *Sigurt Vitols*, Varieties of Corporate Governance: Comparing Germany and the UK, in: Peter A. Hall/David Soskice (Hrsg.), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press: Oxford/New York 2001), 337-360; *Martin Rhodes/Bastian van Apeldoorn*, Capital Unbound? The Transformation of European corporate governance, *Journal of European Public Policy* 5 (1998), 406-427
- (83) EC C-225/96 [1997] ECJ I-6858 (6864).
- (84) *Wolfgang Schön* Gesellschaftsrecht nach Maastricht, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* [ZGR] 24 (1995), 1 (19 ff.); *Mathias Habersack* Europäisches Gesellschaftsrecht, no. 23.
- (85) *Markus Müller* Systemwettbewerb, Harmonisierung und Systemwettbewerb (Baden-Baden 2000), 167.
- (86) See, again, *Martin Rhodes/Bastian van Apeldoorn* Capital Unbound? The Transformation of European corporate governance, *Journal of European Public Policy* 5 (1998), 406-427; *Simon Deakin* Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economics Perspective on Centros, *Cambridge Yearbook of European Legal Studies* (CYEL) 2 (1999), 231-260; *Antoine Reberieux* European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement, *Journal of Common Market Studies* 40 (2002), 111-134.
- (87) *Hanno Merkt* US-amerikanisches Gesellschaftsrecht (Heidelberg 1991), no. 191 ff.
- (88) See. e.g., *Philipp von Ilberg/Michael Neises*, Die Richtlinien-Vorschläge der EU Kommission zum "Einheitlichen

Europäischen Prospekt" und zum "Marktmissbrauch" aus Sicht der Praxis, Wertpapiermitteilungen [WM] 56 (2002), 635-647.

(89) The European Community does especially not have a public authority for the enforcement of these provisions.

(90) *Mathias Habersack* Europäisches Gesellschaftsrecht, 2; *Markus Lenenbach* Kapitalmarkt und Börsenrecht (Cologne 2002), no. 1.59; for the relation of corporate and securities law in German law: Assmann in GroßKomm.AktG Einl. no. 343 ff.

(91) *Thomas Raiser* Kapitalgesellschaftsrecht (Munich 2001), 21; *Hanno Merkt* Das Europäische Gesellschaftsrecht und die Idee des „Wettbewerbs der Gesetzgeber“, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 59 (1995); 545 (566).

(92) Similar *Deakin* promotes a 'reflexive harmonization' as an effective guarantor of diversity between national systems and therefore of experimentation in regulatory design (*Simon Deakin* Regulatory Competition versus Reflexive Harmonisation in European Company Law, in: Daniel C. Esty/Damien Geradin (Hrsg.), *Regulatory Competition and Economic Integration. Comparative Perspectives* (Oxford University Press: Oxford/New York 2001), 190 (216)).

(93) For the development in German Corporate Law *Holger Altmeyden* Zur Entwicklung eines neuen Gläubigerschutzkonzeptes in der GmbH, *Zeitschrift für Wirtschaftsrecht* [ZIP] 23 (2002), 1553 ff.

(94) In the first proposal of the twelfth directive Art. 2 (3) stated a unlimited liability of the sole member for obligations of the company. This provision met with restriction esp. from Germany and was later replaced with a new provision which survived as art. 2 (2) of the adopted directive. (Proposal for a twelfth council directive on company law concerning single-member private limited companies, COM (1988), 101 final; see also *Vanessa Edwards* EC Company Law, 225).

(95) Proposal for the 14th directive on cross-border transfer of company seats, *Zeitschrift für Wirtschaftsrecht* [ZIP] 18 (1997), 1721 ff.; see also High Level Group of Company Law Experts and its key recommendations and priorities for a further development, http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf.

(96) *Christiaan Timmermanns* Die Europäische Rechtsangleichung im Gesellschaftsrecht, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* [RabelsZ] 48 (1984) 1 (14).