Structure of Regulatory Competition in European Corporate Law, The

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THE STRUCTURE OF REGULATORY COMPETITION IN EUROPEAN CORPORATE LAW

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In its opinions in the cases Centros, Überseering and Inspire Art, the ECJ has begun to open European corporate law for regulatory competition, as it has been discussed in the US for several decades. This article analyses the structural conditions of competition on the supply and demand sides of the market for corporate law, and the impact of supranational influence. In doing so, it identifies several factors that have received little attention in the incipient European debate. The supply-side analysis shows that a European Delaware is implausible because of the interdependence of competitive advantages and incentives to compete. On the demand side, an analysis of the effects of differences of financial structures indicates that a race to the bottom is more likely in Europe. The comparatively weak threat of supranational intervention in Europe makes actions and decision making an unlikely factor to affect the decisions of national actors.

A. INTRODUCTION

1. The ECJ Opens the Door

As foreshadowed by Centros\(^1\) in 1999, the ECJ has made it clear in the Überseering\(^2\) decision of 2002 that the real seat theory is incompatible with the principle of freedom of establishment. That theory, which previously dominated the conflict of laws rules in many EU Member States\(^3\), was deemed impermissible by that

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\(^1\) Case C-212/97 Centros Ltd v Eschevrig- og Selskabsstyrelsen [1999] ECR 1439.


\(^3\) The real seat theory is used in Austria, Belgium, France, Germany, Italy and Luxemburg, while various forms of the incorporation theory dominate in common law jurisdictions, the
opinion, at the very least in the strict form previously employed in Germany, where legal capacity was denied to foreign corporations that had moved their “real seat” there. Legal capacity thus needs to be assessed under the law of the state of incorporation; Member States are required to allow companies to “move in” while retaining their legal personality and their limited liability. However, the existing case law, at least explicitly, does not yet prevent the state of incorporation from preventing companies from “moving out” of a particular jurisdiction.

In the Inspire Art opinion of 2003, the ECJ found a Dutch statute to be equally incompatible with primary EU law. Dutch law subjected “formally foreign companies”, whose activity was limited primarily to the Netherlands, to special disclosure provisions and a minimum actual capital requirement of €18,000. Violations were sanctioned with stiff personal liability of managers. While founding a corporation in another state to circumvent national requirements is thus considered legitimate by the ECJ, Member States are only entitled to take measures “to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law”. Under what exact


6 Eg Baedz and Baldwin, supra n 3, para 22; contra Eva Miechler, “I. Recognition of Companies Incorporated in Other EU Member States” (2003) 32 International and Comparative Law Quarterly 521, 526 (pointing out that Uberseering was not concerned with limited liability; see also T Bachner, “Freedom of Establishment for Companies: A Great Leap Forward” (2003) 62 Cambridge Law Journal 37, 49 (“this is the end of the theory of the real seat”).

7 Thus, Case C: 81/87 The Queen and HM Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC [1989] ECR 5483, remains good law (see, eg Bayerisches Oberster Landgericht, 11 February 2004, 3 Z 175/03, (2004) 95 GmbH-Rundschau 450; Roth, supra n 5, 184; F Wooldridge, “Uberseering: Freedom of Establishment of Companies Affirmed” (2003) 11 European Business Law Review 227, 232; Miechler, supra n 6, 524). For a long time, Daily Mail had been used as a justification for the real seat theory (eg H Halbluiper, “National Doctrinal Structures and European Company Law” (2001) 38 Common Market Law Review 1385, 1391–95 (characterising this as a misreading of the case); Miechler, supra n 6, 522 (pointing out data supporting that construction)).

8 Case C–167/01 Kamer van Koophandel en Fabrieken v Amsterdam v Inspire Art Ltd [2003] ECR 10115.

circumstances that is permitted is not yet entirely clear;\(^\text{10}\) in any case, broad-sweeping measures depending solely on the fact that a company is incorporated in another Member State are not permissible.\(^\text{11}\) Essentially, the ECJ has thus opened the door to regulatory competition in the corporate law of EU and EEA countries.

2. The US Model of Regulatory Competition

Regulatory competition has been discussed in the US for several decades. The cornerstones of this debate are well known: some argue that regulatory competition has led to a race to the top (i.e. to optimal or near-optimal law), while others submit that a race to the bottom has been going on. While the first school of thought asserts that corporations need to cater to shareholder interest and attract investment and thus incorporate in a jurisdiction with good law,\(^\text{12}\) the second cites failures and inefficiencies of capital markets as reasons for the exploitation of jurisdictional competition in favour of managers.\(^\text{13}\) The empirical evidence is inconclusive: a 2001 study by Robert Daines found that Delaware corporations had a higher shareholder value (measured by Tobin’s \(Q^\text{t}\)) than


\(^{13}\) This view traces its roots back to Justice Brandeis’s dissent in Louris K. Ligget Co v Lee, 288 US 517, 559 (1933) and was famously brought forward by WL Cary, “Federalism and Corporate Law: Reflections Upon Delaware” (1974) 83 Yale Law Journal 663. It has been reaffirmed with the tools of law and economics by LA Beblchuk, “Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law” (1992) 103 Harvard Law Review 1442.

\(^{14}\) Tobin’s \(Q^\text{t}\) is calculated by dividing market value by the replacement value of assets.
others. However, a 2004 paper by Guhan Subramanian shows that this effect disappears from 1996 onwards. This can probably be explained by the market for corporate control to a significant degree, which is often considered the single most important issue affecting shareholder value, as it supposedly curbs managerial self-serving behaviour. Benefits to shareholders reaped at that front appear to have been largely eliminated by more recent Delaware case law, which effectively gives the board a "just say no" defence against takeovers and thus replicates the effects of the more effective anti-takeover statutes in other US states.

The core result of regulatory competition in the US is the supply-side dominance of the state of Delaware, where almost 60% of public US corporations are


registered.\textsuperscript{20} Beside that, incorporation patterns show a home-state bias, especially among smaller firms.\textsuperscript{21} This has led some scholars to doubt whether any other state is seriously committed to the market for corporate law.\textsuperscript{22} In any case, there seems to be some agreement that Delaware is able to extract monopoly rents from its “customers” on the demand side of the market.\textsuperscript{23}

\section*{3. Is Europe Different?}

The European debate, fuelled by 	extit{Centros} and its progeny, stands only at the beginning. This article, while largely trying to avoid the pitfalls of specific predictions on substantive outcomes in the law, investigates the institutional framework within which competition will operate. I argue that there are significant deviations from the US model which should lead us to expect a different outcome. On the supply side, I ask whether any state will be able to establish itself as a monopolist comparable to Delaware (Section B). Even though the answer is a clear no, this does not entirely rule out regulatory competition. The discussion of the demand side in Section C is concerned mostly with deviating share ownership and financial patterns, which are likely to require a substantively different corporate law and steer competition into a different direction.\textsuperscript{24} Section D investigates the influence of actual and potential federalisation or supranationalisation on the development of competition.

\section*{B. Supply Side: Perspectives for a European Delaware}

\subsection*{1. Delaware’s Past and Europe’s Future}

The historical background of how Delaware obtained its monopoly position is well known. New Jersey first offered the developing large trusts (such as Standard

\textsuperscript{20} LA Bebchuk and A Hamdani, “Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters” (2002) 112 Yale Law Journal 553, 568 (finding that in 1999 57.75\% were incorporated in Delaware, including 59\% of the Fortune 500 and 68\% corporations which had recently gone public). See Subramanian, supra n 18, 1793 (estimating a Herfindahl–Hirschman Index (HHI) of 2662, which corresponds to a market concentration that would usually cause concern to antitrust authorities).

\textsuperscript{21} Bebchuk and Hamdani, supra n 20; R Daines, “The Incorporation Choices of IPO Firms” (2002) 77 New York University Law Review 1559; See Romano, supra n 19, 278 (considering the identification of company and state as an immaterial asset which would be lost in case of a reincorporation in Delaware).


\textsuperscript{23} Bebchuk and Hamdani, supra n 20, 592–93.

\textsuperscript{24} Needless to say, there are also some obvious factors potentially affecting markets, eg cultural preferences. I address these briefly in Section C.4 and take them as an exogenous influence that will most likely reduce the demand for out-of-state incorporations.
Oil of Ohio) advantages they could not get in other states, most of all the power to hold shares in other corporations. It also introduced the franchise tax. When Governor Woodrow Wilson sought to become president, he could not uphold this policy against public opinion, and New Jersey’s Seven Sisters Act of 1913 reversing that policy drove the trusts to Delaware, which had previously copied New Jersey corporate law. Its neighbour’s blunder made Delaware the home of most large American corporations overnight, and it has managed to hold on to that position since then.

For the European debate, it suffices to point out that Delaware’s position was the result of historical accident, which only could happen because of a rapid concentration process in the industrialising late-nineteenth-century US, which brought an important share of the economy first to New Jersey and then to Delaware. New Jersey’s and later Delaware’s unusual position is crucial for regulatory competition in the US. At present, there is no reason to believe that anything on a comparable scale would happen in Europe, which could grant anyone in the EU or EEA a huge first-mover advantage through a massive migratory wave among large firms; no single issue that is only addressed by the law of one state is likely to become that important. We shall see that, without the peculiar incentive structure put into place by that great migration, many of the properties of regulatory competition are fundamentally changed, particularly with respect to the issue which states are well-positioned to offer law favoured by the competitive process (Section B.2), which, other than in the US, does not appear to coincide with the question which states have incentives that will require them to do so (Section B.3).


27 Kahan and Kamar, supra n 22, 731; Roe, supra n 25, 609–10.

28 Grandy, supra n 26, 689; Kahan and Kamar, supra n 22; Roe, supra n 25, 610.

29 Eg Cary, supra n 13, 664; Drury, supra n 25, 7–8.

30 Delaware’s market share even increased from 35% in 1963 to 40% in 1973 and reached about 50% in 2000. See Subramanian, supra n 18, 1804.

2. Network Externalities and (Purportedly) good Delaware Law

(a) Delaware

Delaware’s competitive advantages are said to result from network externalities, stemming from the use of the Delaware product by a large number of purchasers. The Delaware Chancery Court and Supreme Court largely specialise in corporate law, and are noted for the absence of a jury trial and their speedy judicial process.

Specialisation—which requires a critical mass of registered corporations—allows for the purported good substantive quality of Delaware law. Whether one considers Delaware’s law beneficial to shareholders or not, regulatory competition has led US corporate law away from a regulatory approach. Delaware may not usually have been the leading innovator, but it was always a quick adopter of innovations. This goes with another network externality, the sheer mass of its case law. One of the arguments for Delaware’s lead, besides the judges’ good understanding of the needs of business practice, is predictability, resulting from many decisions having been made in the past.

(b) The Large Member States’ Edge in Substantive Law

For an EU or EEA Member State to become a European Delaware, it would have to offer similar advantages. Originally, only a few, albeit important, legislation issues may have given Delaware the decisive edge over New Jersey, but today the case law, which has had time to mature both quantitatively and qualitatively, is its advantage, for which the large number of Delaware corporations have provided a sufficient number of disputes. Other states, with a smaller number of corporations, would be virtually unable to catch up, as the

34 Kahan and Kamar, supra n 22, 708; Roe, supra n 23, 594.
35 Eg Black, supra n 33, 590. Sometimes it takes only weeks or months to get the preliminary injunction decided on, which can be crucial in a takeover battle.
37 Romano, supra n 12, 9; cf. Cary, supra n 13, 668; Romano, supra n 19, 240.
38 Romano, supra n 12, 39; Romano, supra n 19, 250; but see Black, supra n 33, 589 (arguing that large states have an equally developed case law or would be able to develop it quickly); E Kamar, “A Regulatory Competition Theory of Indeterminacy in Corporate Law” (1998) 98 Columbia Law Review 1908, 1913–23, 1939–40; Bebchuk and Ferrell, supra n 17, 1190–91; Bebchuk and Hamdani, supra n 20, 601–4 (all arguing that the indeterminacy of Delaware law creates income for the bar).
number of legal disputes is certain to be much smaller. Thus, the development of attractive substantive law usually requires a long-term evolutionary process, which leaves some leeway for trial and error over time.

As a general matter, a developed corporate law should be a competitive advantage. Admittedly, statutory law that is perceived to be attractive could be copied with relative ease, translation problems aside. However, both in common law and civilian jurisdictions, the crucial issue is how that law is put into effect in practice. One should not rashly conclude that common law jurisdictions have an inherent advantage in providing a better developed body of law. Even without a formal doctrine of stare decisis, civilian courts cannot merely apply legal codes without learning from experience and displaying certain patterns of consistency in their interpretation of the law. In general, and particularly in corporate law, precedent and judge-made law are also of considerable practical importance in continental European jurisdictions. A related factor in many civil law jurisdictions is doctrinal work by legal academics, which influences courts to some degree.

Again, the development of case law and experience with applying statutory rules is a matter of trial, error and evolution. What degree of development and experience can be reached will depend on characteristics of the particular state, the sophistication of its courts and legal academics. Most of all, legal systems that have to deal with a larger number of cases are better positioned to reach a higher level of development more quickly.

Other than just copying a statute, the development of a corporate law system in that sense cannot easily be transplanted. Consider, for example, Austrian jurists working in corporate and commercial law, and Austrian courts deciding in that field who, as a matter of practice, regularly absorb German case law and scholarship as the corporate and commercial laws of the two countries are very similar. Issues are often raised much earlier in a larger legal system, whereas certain fact patterns and disputes may not yet have come to pass in a smaller one.

42 An example that has gained some international attention is the German Holznässa doctrine. See, eg M Lübke, “Corporate Groups: Competences of the Shareholders’ Meeting and Minority Protection – the German Federal Court of Justice’s recent Gelatine and Macsr francais Cases Redefine the Holznässa Doctrine” (2004) 5 German Law Journal 1057-79.
43 See generally David, supra n 41, 143-44.
even though they are important when they finally do. In that, the Austrian corporate lawyer’s perspective on German corporate case law and academic writing resembles the approach of the courts of other US states to the ones in Delaware, whose decisions often provide persuasive authority. However, even though transplantation of German doctrines to Austria does take place, Austrian corporate law usually lags behind.

In view of the firmly entrenched and well-developed corporate law traditions in EU Member States, no single one among them should be able to provide a better developed case law as a competitive advantage to start with. In particular, those states with the smallest population and total economic output, which should in theory have the best financial incentives to enter into a maximisation of revenue from incorporations (as we shall see in Section B.3), are in the worst starting position to develop a competitive advantage in case law, while larger Member States, such as the UK, Germany or France, should be ready to leap ahead. Without at the same time also catching up in the number of firms, a smaller state would not normally be able to capture a market niche by providing highly developed case law.

Conceivably, the overall assessment of the persons deciding about the state of incorporation of the particular case law may also be negative, in which case a judicial clean slate would actually be an advantage. An example could be the German doctrine of equity substitution (Eigenkapitalersatz), which provides for the subordination of loans given by shareholder to companies in times of crisis in order to protect creditors. It was originally developed by the courts, but is today often criticised as overregulation.\(^1\) When New Jersey and Delaware fought for predominance in US corporate law in the early twentieth century, the case laws of US states were not quite as developed as today’s European legal traditions and corporate governance structures, and were closer to being a clean slate. However, after the mass migration of firms from New Jersey, Delaware had the critical mass of large firms to allow it to develop the case law and experience in dealing with issues of corporate law which is today seen as one of its core advantages. By contrast, none of Europe’s diverse corporate governance traditions appears to be endowed with both a similar number of firms and a relatively clean slate allowing it to begin developing a system of corporate law favoured by the

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market. It is more likely that a large country (which starts out with a lot of firms) could have some success if the law it already has is considered favourable by those who are deciding where to incorporate.

(e) Will Legal Procedure Become an Important Factor in Competition?

A similar point can also be made with respect to legal procedure. Within Europe, there are certainly considerable differences between the different national court systems, regarding both expertise and speed in decision making. Appeals and preliminary rulings of the ECJ may delay procedures for many years. However, the presence of juries as a factor of uncertainty in corporate law, as it may sometimes be in the US outside Delaware, is unimportant in Europe. It also seems unlikely that the specialisation of judges will give any state a competitive edge. Here, too, the advantages should normally be on the side of larger Member States, where a larger number of cases will facilitate specialisation.

Advantages both in substantive law and in the efficiency of the judicial process can only fully come to bear when there is little doubt in which court a corporate dispute will be litigated. Even in the US, derivative suits are not always brought in the state of incorporation.\(^{45}\) Most of all, diversity jurisdiction allows disputes between citizens of different states to be brought in the federal courts,\(^ {46}\) which will then adjudicate on the basis of the state law applicable in the particular case.\(^ {47}\) Still, where the case for venue in another state could be made, suits are typically brought in Delaware itself.\(^ {48}\) The reasons usually given for this are the known advantages of the Delaware courts, but also the expectation of attorneys to receive contingency fees.\(^ {49}\) Furthermore, according to an explicit provision of Delaware law, every nonresident person accepting a director’s position in a Delaware corporation is deemed to have consented to the Delaware courts’ jurisdiction.\(^ {50}\)

\(^{43}\) Macey and Miller, supra n 36, 494–95.


\(^{46}\) *Erie RR v Tompkins*, 304 US 64 (1938) (finding that state law applies). According to the internal affairs doctrine, the law of the state of incorporation applies to disputes within the company (including those between shareholders and directors). Eg Restatement (Second) of Conflict of Laws, s 302; *First National City Bank v Banco Para el Comercio Exterior de Cuba*, 162 US 611, 621 (1983); cf *Kamen v Kosher Financial Services, Inc.*, 500 US 90, 106 (1991); see Macey and Miller, supra n 36, 495; Carney, supra n 11, 313; Kersting, supra n 11, 2–11; Kieninger, supra n 11, 107; S Lombardo, “Conflict of Law Rules in Company Law after Überseering: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union” (2003) 4 *European Business Organization Law Review* 301, 312–13.

\(^{47}\) Macey and Miller, supra n 36, 496; cf Romano, supra n 12, 41.

\(^{48}\) Macey and Miller, supra n 36, 497.

\(^{50}\) 10 Delaware Code, s 3114.
Jurisdiction might have a different impact in Europe. Under Article 60 of the "Brussels-I Regulation" on jurisdiction, a legal person is domiciled and hence may be sued (Article 2) in the Member State where it has (a) its statutory seat, (b) its central administration or (c) its principal place of business. Thus, corporations may, in extreme cases, be sued in one of three states. However, Article 22(2) provides an exception to this rule, according to which

"in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat . . ."

have exclusive jurisdiction. In order to determine the location of the corporate "seat", the regulation points to the respective rules of private international law. Since the regulation does not purport to harmonise that field, it is by no means clear that this will always be the state of incorporation. Article 22 also applies to lawsuits challenging the legality of shareholder decisions, which includes, for example, the German Anfechtungsklage (suit challenging shareholder decisions for their validity), which is frequently sought as a battleground for corporate law disputes by minority shareholders. In the case of out-of-state companies, such proceedings may not necessarily be held in the state of incorporation. By contrast, jurisdiction over suits against directors or shareholders is determined by

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51 Regulation 44/2001 EC [2001] OJ L12/1. Generally, the regulation applies only to "civil or commercial matters" (Art 1(1)). Thus, it may not apply to disputes for company registers. In a different context, that ECJ found that German and Austrian courts were acting in a non-judicial function when acting in that function as registers. Case C-86/00 HSB Wohnbau [2001] ECR 5333; Case C 182/00 Lautz GmbH and Others [2002] ECR 60547 (ECJ dismissing requests for preliminary opinions). Cf G Eckert, "Internationale Zuständigkeit nach der EuGVVO bei Kapitalgesellschaften" (2003) 14 ecode 76, 78; R Hußge, "Art 60 EuGVVO", in H Thomas and H Putzo (eds), "Zivilprozessordnung mit Gerichtsverfassungsgesetz, den Einführungsgesetzen und einsprachlichen Vorschriften (EuGVVO, EuHG, Zivilprozessordnung, Ausübung von Rechten, BGH)" (München, Beck, 25th edn, 2003), para 11.

52 Kersching, supra n 11, 47.

53 Cf Roth, supra n 5, 191 (criticising that this reference to private international law fails the purpose of harmonisation); Rammeloo, supra n 3, 39 ("the everlasting trench war between the incorporation theory and the real seat theory reappears at the level of international competence"). The ECJ in Überseeing does not explicitly require EU Member States to have specific conflict of laws rules, but only to recognise legal capacity. Even UK private international law does not exclusively rely on incorporation: according to (2001) SI 2001/3929, sch 1, para 10, a company has its seat in the UK if "it was incorporated or formed under the law of a part of the United Kingdom", or if “its central management and control is exercised in the United Kingdom". See L Collins, A Briggs, J Hill, JD McLean and CG Morse, Dicey and Morris on the Conflict of Laws (London, Sweet & Maxwell, 13th edn, 4th suppl, 2004), ss 11-060, 11-346.


55 German Aktiengesetz, ss 243 55.
those persons’ own domicile (Article 2),

which will often not be the state of incorporation. As a result, it seems likely that courts beside the ones of the state of incorporation will have to decide on the interpretation of corporate law in more cases than in the US.

At present, the courts of no particular Member State seem to have a clear competitive advantage. The interests of the parties involved can vary considerably; for example, small shareholders might be interested in bringing suit in their own home state, if the company is also active there, instead of relying on the courts of the state of incorporation; lawsuits out of state may result in considerable costs. Moreover, one could imagine that (in particular large) corporations will attempt to avoid uncertainty with respect to jurisdiction by including arbitration clauses in their corporate charter, as far as permitted by the applicable national law.

Still, it is theoretically conceivable for a Member State to combine the supply of a favourable corporate law with the advantage of a speedy trial. Again, the better starting position should lie with larger Member States, which should be able to provide network externalities for their already large number of corporations. For other states, any attempts to invest in the creation of network externalities may be deterred by their costs and risks, as it is by no means certain that a high market share will be achieved. If uncertainties in jurisdiction persist, and even more so if a widespread practice of arbitration develops, advantages in legal procedure are unlikely to become significant factors in regulatory competition that would necessarily be “bundled” with attractive substantive law.

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56 Krogholler, supra n 54, Art 22, para 40; Eckert, supra n 31, 80.
57 Enriquez, supra n 31, 1271 (stating that not even the UK has judges “even faintly as specialized and reliable”), but see Armour, supra n 40, s 3, 22 (arguing that the UK is the only EU Member State with a specialist corporate law court).
58 S Maul and C Schmidt, “Inspire Art—Quo vadis Sitztheorie?” (2000) 58 Betriebs-Berat 2297, 2299; Tröger, supra n 31, 24. By contrast, the state of incorporation will normally be able to provide a faster decision, as it its own courts will be more familiar with its law.
60 For example, arbitration is considered problematic for lawsuits challenging the validity of shareholder decisions in German law. See (German) Bundesgerichtshof, 29 March 1996, II ZR 124/95, (1997) 132 Entscheidungen des Bundesgerichtshofes in Zeitschriften (BGHZ) 278–90.
61 Cf Borchuk and Hamdani, supra n 20, 388; Kirchner et al, supra n 59, 21 22 (discussing recoupment of investments in attractive corporate law).
3. Supply-side Economic Incentives

(a) Motivation for Competition

In the US debate, the motivation why decision makers should be interested in a large number of incorporations, instead of promoting their own economic policy, is quite clear. American literature usually states two factors which make a large number of incorporations seem desirable for a state, those being fees, most of all franchise taxes, and business opportunities for the local bar. The incentives created by these are a prerequisite of regulatory competition and thus of a race in any direction.

(b) Hypothetical European Franchise Taxes

Delaware’s franchise tax\(^{62}\) makes up, in conjunction with incorporation fees, 15–20% of the state budget.\(^ {63}\) It is usually considered the main economic incentive, making the state almost totally dependent on the incorporation business and thus on the advantages it offers. At the same time, Delaware is the only state imposing a franchise tax of more than a nominal amount and receiving significant total revenue from it,\(^ {64}\) both of which is the result of its de-facto monopoly.\(^ {65}\) The reason why Delaware’s incentive structure works is its small size and insignificant economic power.\(^ {66}\) Naturally, this gives corporate lobbyists an edge over other interest groups.

By contrast, in Europe a franchise tax would run afool of the Directive on Indirect Taxes on the Raising of Capital.\(^ {67}\) It allows the Member State to impose a tax on the raising of capital of companies whose effective centre of management is located on its territory (Article 2). Article 10(c) prohibits taxes and charges, “in respect of registration or any other formality required before

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\(^{62}\) The tax is collected annually, with the amount depending on the number of authorised shares, corporate assets and authorised capital. On the calculation of the tax base, see e. Delaware Code, s. 503.

\(^{63}\) Roe, supra n 23, 594; Drury, supra n 23, 9. For a detailed overview on the amount of tax revenue collected since 1960, see Romano, supra n 12, 7–8.

\(^{64}\) The annual amount ranges from US $35 to US $165,000.

\(^{65}\) In the rest of the US, 45 states only have either a low fee, which is independent from the company’s size, a tax depending on the amount of the firm’s business activity in the state or both, including those states which are by some considered Delaware’s main competitors. Kahan and Kamar, supra n 22, 687 93; cf. Bebchuk and Hamdan, supra n 20, 576 77. Usually, an incorporation in Delaware is thus considerably more expensive than in the home state (Romano, supra n 19, 257).

\(^{66}\) Cf Romano, supra n 19, 239 (finding a correlation between the speed of adopting new corporate law innovations and franchise tax as a percentage of the state’s total tax revenue). But see Kahan and Kamar, supra n 22, 700 n 64.

the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form. According to the ECJ, this prohibition also covers fees which are imposed on an annual basis. Income from corporate tax cannot provide an equivalent incentive either, as tax treaties normally provide for taxation of business profits in the state where the enterprise has a permanent establishment. Furthermore, residence within the meaning of tax treaties is normally determined by the place of effective management.

One should not rush into the conclusion that a legislative removal of the franchise tax by European law would create a strong incentive for EU Member States to compete for charters. Delaware only receives more than nominal revenues from franchise tax because of its pre-existing monopoly position and advantages. Any other state would risk a loss of many firms by imposing such a large fee. By contrast, no single EU Member State has a remotely comparable monopolistic position or competitive advantage. Logically, such a position is necessary to create a sufficient incentive to create a corporate law suited to the needs of the target group in the first place, most of all to overcome political resistance. Without the incentive, there is no monopoly rent; without the monopoly, there is little incentive, and the chances of overcoming this by a large one-time investment are small and remote. Hence, if no historic accident—as came to pass in Delaware—brings a European state into a similar position, budgetary incentives for the creation of a European Delaware are absent. If any state should try to create them by imposing similarly high franchise taxes, this would be very detrimental to attracting incorporations and would thus destroy any competitive advantage. Even if the Directive on Taxes on the Raising of Capital were repealed, a similar incentive effect would remain highly unlikely.

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69 Cf OECD Model Convention with Respect to Taxes on Income and on Capital, Art 7; cf BR Cheffins, Company Law: Theory, Structure and Operations (Oxford University Press 1997), 433–36 (arguing that tax revenue would not create a significant incentive in the UK unless companies also physically relocate there); Tröger, supra n 31, 16 (speaking of an “unwarranted concern” that incorporation choices could be affected by corporate tax).


72 Cf Tröger, supra n 31, 19. 

73 Cf Kahan and Kamar, supra n 22, 728–35 (discussing political resistance in the American context); but see Grundmann, supra n 11, 793–96 (discussing Europe and expecting incentives already because of minimal tax effects and other factors such as prestige; however, one could counter this argument by pointing out that in any European country, political resistance is likely to be much greater than in Delaware).
(c) Advisory Business

The incorporation of a large number of firms also creates a lot of income potential for Delaware's small, but influential bar.\textsuperscript{74} Advisory activity related to incorporations reportedly accounts for about $167 million of additional income.\textsuperscript{75} The close personal association between members of the legislature, the judiciary and the bar is said to create a strong alignment of interests among decision makers within the state;\textsuperscript{76} other than larger states with significant industry, Delaware lacks local interest groups such as unions or companies which are important employers\textsuperscript{77} and which could push policy making into another direction. On top of this, Delaware is not home to many shareholders, for which reason some scholars argue that voter preferences do not force legislators to implement a shareholder-friendly corporate law.\textsuperscript{78} The maintenance of its current line of policy thus seems assured. Even if legislators and judges do not reap the full benefits accruing to the state and its bar,\textsuperscript{79} legislators are subject to pressures from lobbies, and judges may (at least to some degree) be kept in line by the threat of statutory regulation limiting their freedom of choice in adjudication.\textsuperscript{80}

It has been suggested that professional organisations of lawyers and accountants in the UK (the latter in view of the requirement of UK companies to conform to UK GAAP in their financial statements\textsuperscript{81} or lawyers in other European countries\textsuperscript{82} might lobby for making the respective company law attractive to foreign incorporators. This kind of economic incentive seems more plausible than a hypothetical franchise tax. However, the relative economic importance of the Delaware corporate law is disproportionately large. Still, it is rather small if put into a broader perspective: the total amount of additional revenue for lawyers in that state does not even reach the gross revenue of a single large New York law firm.\textsuperscript{83} Admittedly, Delaware firms face competition from national law firms,\textsuperscript{84} while legal education and languages still provide for a strong

\textsuperscript{74} Cf Macey and Miller, supra n 36, 486-87.
\textsuperscript{75} Kahan and Kamar, supra n 22, 697.
\textsuperscript{76} This was noted already by Cary, supra n 13, 690-92; but see Macey and Miller, supra n 36, 492-94. (pointing out revenue by investment bankers and non-Delaware lawyers).
\textsuperscript{77} Roe, supra n 25, 594.
\textsuperscript{78} Bebelhuk, supra n 13, 1452.
\textsuperscript{79} Easterbrook and Fischel, supra n 12, 217.
\textsuperscript{80} Black, supra n 33, 384. The case of Smith v van Gorkom, 488 A 2d 858 (Del 1983) is particularly notable, as—which is an unusual outcome in Delaware—directors were ordered to pay damages in spite of the business judgment rule (Allen and Kraakman, supra n 19, 254). A legislative change followed promptly, allowing companies to opt out of a judicial review of duty of care (DGCL s 102(b)(7)).
\textsuperscript{81} Cheffins, supra n 69, 437-38; Armour, supra n 40, s 3, 31.
\textsuperscript{82} Dannmann, supra n 71, 522. 23.
\textsuperscript{83} Kahan and Kamar, supra n 22, 697-98.
\textsuperscript{84} Daines, supra n 21, 1584-86; Enriques, supra n 31, 1264.
separation of European legal markets, which may make a large number of incorporations attractive to the respective bar associations. However, as with respect to franchise taxes, for such incentives to make a really large impact that is sure to surpass the interests of other groups in most European states, especially larger ones, a Delaware-style monopoly position will probably be necessary. For a business location such as the UK, even this is not plausible. Although the possibility that it will become UK policy to encourage incorporations of foreign businesses cannot be ruled out, the UK will thus lack the economic incentives to be as responsive as Delaware to the interests of the groups deciding on incorporations.

4. Small States and Microstates vs the UK

Which state could become Europe’s preferred site for incorporations in the long run? In spite of all the considerations, at the moment one might actually think that British private limited companies were often preferred to companies in other states, especially the German Gesellschaft mit beschränkter Haftung (GmbH). In addition to the fact that the ECJ’s opinions in Centros and Inspire Art arose from disputes over companies incorporated in England and Wales, there are reports about sharp increases in the numbers of English companies being set up with the purpose of doing business in Germany. Also, companies formed in the UK have been known to gain popularity in the Netherlands.

One reason that is often cited for the attractiveness of the UK is the lack of a minimum legal capital requirement for private limited companies, since the Second EU Directive does not apply to this type of corporation. The British

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85 But see Easterbrook and Fischel, supra n 12, 217 n 8 (pointing out that out-of-state lawyers are permitted to represent Delaware corporations and to take residence and practice there). In Europe, it seems equally likely that the economic incentive to create a source of income for the local bar will decrease with an increasing transnational integration of law firms.
86 Cf Kahan and Kamar, supra n 22, 698 (estimating additional revenue to lawyers from incorporations in US states other than Delaware).
87 S Deakin, “Regulatory Competition versus Harmonization in European Company Law”, in DC Eady and D Geradin (eds), Regulatory Competition and Economic Integration: Comparative Perspectives (Oxford University Press, 2001), 190, 205.
88 Cf Armour, supra n 40, s 3, 31 (suggesting that London law firms may become an influential interest group in the development of UK corporate law).
90 Luxestijn-Clearé, supra n 10, 597; De Kuiper, supra n 10, 122–24 (discussing Dutch companies moving into UK law).
approach can be described as “lax” or “liberal” (depending on the perspective),\(^94\) and UK courts enjoy a high reputation.\(^95\) However, with minimum capital requirements and formalities being subject to a discussion on the European level and undergoing reform in various Member States,\(^96\) those factors alone probably will not create permanent competitive advantages for the UK.\(^97\)

One of the cornerstones of the American debate is the small size and economic power of Delaware—and the lack of opposed interest groups resulting from this, which are seen as an essential requirement for the strength of economic incentives to provide corporate law tailored to the “needs of the market”.\(^98\) It seems reasonable to assume that law makers generally have an incentive to increase franchise tax revenues if it helps to secure their political success,\(^99\) which will be diminished if it is fairly unimportant relative to the revenue of other taxes and to the influence of other groups with a stake in corporate law. In a country such as the UK, which is itself an important business location, it is safe to assume that the impact of franchise tax revenues on re-election prospects would be minute.\(^100\)

However, other states could step in. Just comparing population size,\(^101\) Delaware is larger than the founding EU Member State of Luxembourg and the new members Malta and Cyprus. A larger number of small EU states compares in terms of GDP. Moreover, as the Freedom of Establishment also applies within the European Economic Area (EEA),\(^102\) the smaller nations of Iceland and

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\(^94\) Cf Cheffins, supra n 69, 440–43; Micheler, supra n 6, 529.


\(^96\) For example, France recently reduced minimum capital to €1 in the Société à Responsabilité Limitée (SARL) and has considerably deregulated the process of setting up a company. See Loi n° 2003-721 du 1er août 2003 pour l'Initiative économique, Journal officiel n° 179 du 5. 8. 2003, 13419, Art 1. Similar legislation has been introduced in Spain. See EM Kieninger, “The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared” (2004) 6 German Law Journal 711, 709. The German Ministry of Justice has recently released a proposal to reduce minimum capital for German GmbHs from €25,000 to €10,000. Entwurf einer Gesetze zur Neuregelung des Mindestkapitals der GmbH (MindestkapG), available at http://www.bmj.de/media/archive/908.pdf, accessed 28 May 2005.

\(^97\) Armour, supra n 40.

\(^98\) See, eg Bobchuk, supra n 13, 1432.


\(^100\) See also D Charny, “Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the 'Race to the Bottom' in the European Communities” (1991) 32 International Law Journal 423, 447 (not seeing a danger of a race to the bottom in larger EU member states); Kieninger, supra n 96, 758–59.


\(^102\) EEA Treaty, Arts 31 and 34.
Liechtenstein enter the scene. In principle, it is thus easy to find eligible candidates.103

One important objection is that sovereign states in Europe retain broader authority over taxes than US states. The total tax revenue of a sovereign European nation is larger than in a US state of comparable population. Even for Luxembourg to obtain the same proportion of tax revenue from incorporation business (which it cannot because of the prohibition), it would have to exceed Delaware’s revenue by a factor of three in absolute numbers.104 The same marginal tax revenue should thus be of much smaller overall importance when it is weighed against other policy concerns.

For example, Eva-Maria Kieninger has pointed out that Liechtenstein, as an EEA member, is not subject to the Directive on Indirect Taxes on the Raising of Capital,105 and that it in fact imposes a special tax of 0.1% of net assets (or a minimum of 1000 Swiss francs) on legal entities registered in the principality.106 Between 1995 and 1998, revenues from that tax amounted to 15–20% of total tax revenue.107 Thus, if Liechtenstein actively promotes its qualities as a possible site of incorporation for public companies, it might in theory become the state closest to the competitive structure of Delaware.108 However, Liechtenstein’s current advantage seems to be largely based on its character as a tax haven, while no particular advantages in corporate law are visible.109 Furthermore, the proportion of total tax revenue has decreased significantly since 1985.110 The prospects of a “Liechtenstein effect” are thus still uncertain.

5. Conclusion

The analysis of the supply side in the European market should lead us to the conclusion that the likelihood of a European Delaware is very small. Even assuming away the EU law prohibition of a franchise tax, significant incentives for any state to cater to the market are unlikely to develop, as possible advantages remain small relative to total tax revenue and thus too small to overcome countervailing political interests. Moreover, in order to benefit from incorporations, a state would have to establish a quasi monopolistic position in the market. The reason why Delaware could obtain such a position is found in the economic history of the US, which is unlikely to be repeated in Europe.

103 See also McCabery and Vermeulen, supra n 95, 22.
104 Kieninger, supra n 3, 191.
105 EEA Treaty, Art 4(1), annex XII; cf Kieninger, supra n 11, 188; Kieninger, supra n 96, 754–55.
106 Gesetz über die Landes- und Gemeindesteuern (Steuergesetz) vom 30.1.1961, LGBl 1961/7, Art 84.
107 Kieninger, supra n 11, 187.
108 But see Treger, supra n 31, 21 n 63.
109 Ibid at 69.
110 Kieninger, supra n 11, 187 (showing a decrease from 26.6% in 1985 to 15.4% in 1998).
C. The Demand Side: the Developing Product and its Purchasers

1. Impediments to Market Development

The market for corporate law in Europe differs markedly from the one in the US not only on the supply side, but also with respect to demand. The most obvious differences are language barriers and a lack of familiarity of members of the legal profession with the law of other Member States; another is the requirement to comply with accounting standards of the state of incorporation. English-speaking jurisdictions may have an edge because their language is widely understood, making their law more easily accessible; however, one could also imagine the development of various submarkets of states sharing the same language and related legal traditions, such as German-speaking or French-speaking countries. Still, both the cost of decision makers to inform themselves about foreign law will often exceed the expected value of the advantages of an out-of-state incorporation; decision makers might decide to remain “rationally ignorant”. Competition might also be impeded by a widespread sentiment of suspicion about “pseudo-foreign” corporations, which could result in additional risk penalties when taking on debt.

Another factor could be differences in legal traditions. One might expect an aspiring European Delaware to adopt the Delaware General Corporation Law (DGCL), which could be seen as the best available law (at least in terms of guaranteeing incorporations), having successfully undergone the test of regulatory competition. In theory, it could be enacted by European states as far as allowed by European directives. However, the DGCL, as a common law statute, is not designed as a comprehensive code, but leaves core issues such as fiduciary duties largely to the courts. Certain mechanisms of shareholder protection may therefore be hard to transplant. This supply-side problem aside, even the DGCL may be less well-adapted to the demand it would meet in Europe, given that economic, legal and cultural circumstances differ from the ones in the US. The most efficient law for Europe or for individual countries may require different answers.

Exogenous cultural and linguistic influences, which do not apply in the US regulatory debate, are likely to reduce demand for out-of-state corporate law in Europe. In the rest of Section C I will look at two crucial differences which have

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11 Heine and Kerber, supra n 26, 62 (speaking of sunk costs of human capital eg of lawyers who invested in expertise in their own law); Kirschner et al, supra n 39, 13 (discussing costs of handling foreign law); Enriques, supra n 31, 1264. On cultural and language barriers see Kieninger, supra n 11, 171–72; M Siems, “Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century” (2002), 27 European Law Review 47, 54; Dammann, supra n 71, 192–93; see also Bachner, supra n 6, 19; Maul and Schmidt, supra n 58, 2298–99.
12 Kirschner et al, supra n 39, 23; McCahery and Vermeulen, supra n 95, 20.
received little attention, but may imply markedly different results of competition in Europe than in the US. First, the European discussion centres on different types of companies. Secondly, different groups of persons are likely to appear as decision makers on the demand side of the market. As shall be seen, we should expect a smaller demand for out-of-state charters, a more fragmented market, and probably a higher likelihood of a race (or “leisurely walk”) to the bottom.

2. Competition for Incorporations of Different Types of Firms

(a) Regulatory Competition and Newly Founded Private Corporations

While the US discussion is focused on large public corporations, in Europe, the market for corporate law has almost exclusively been a concern of privately held, newly founded corporations (if one considers the reports on increasing numbers of incorporations in the UK with the purpose of doing business elsewhere114 and the reported cases of the ECJ and national courts115 to be representative). So far, mainly the founders of new firms have been interested in making use of the law of other EU Member States.116

(b) High, but Decreasing Costs of Corporate Law Arbitrage for Large Firms

Even though the ECJ has already eliminated major impediments to regulatory competition, and even though a shift in actual business activity may often be effectuated by creating a branch office,117 reincorporation into another law is still wrought with difficulties. While US corporate laws typically include statutes on reincorporations118 and cross-border mergers,119 the corporate laws of countries traditionally following the real seat theory usually do not have such provisions, and sometimes even interpret such decisions by shareholders as resolutions to liquidate.120 The European commission tried to remedy this with its 1997 proposal for a Directive on the Transfer of a Company’s Seat,121 which, however,

111 Hinte, supra n 89, R 421.
113 Cf Kirchmer et al, supra n 39, 22–23.
115 Eg DGCI, s 390.
116 DGCL ss 252, 256, 258.
117 For a European overview, see MM Siems, “The European Directive on Cross-border Mergers: An International Model?” (2003) Columbia Journal of European Law (forthcoming), s II; see also Sorensen and Neville, supra n 9, 191–92; Kieninger, supra n 11, 148–49; Danemann, supra n 11, 198–99; Danemann, supra n 71, 73; Eisinger, supra n 71, 1261; cf Drakul, supra n 87, 293.
presumed an identity of statutory and real seat and has now been made redundant by the ECJ’s decisions.¹²²

Still, lawyers often manage to devise complex and costly transactions to circumvent legal barriers.¹²³ In practice, cross-border mergers seem to have become a practical vehicle for a transfer of seat on the continent. For example, the Austrian Supreme Court recently permitted a particular type of merger where an Austrian company was amalgamated into its sole shareholder, a German company.¹²⁴ Also, there have been reports of mergers of Italian and French companies into a German GmbH¹²⁵, and of a German GmbH into its Austrian parent.¹²⁶ A German court has asked the ECJ to issue a preliminary ruling on whether the legal restrictions on statutory mergers to German corporations are compatible with the freedom of establishment.¹²⁷ Even though ECJ case law still seems to allow Member States to prohibit the “emigration” of companies,¹²⁸ it is probably unavoidable that the court will soon put an end to this. In any case, the EU Council has already approved the Commission’s proposed Directive¹²⁹ on Cross-Border Mergers,¹³⁰ which will—after approval by the European Parliament—provide for a more straightforward way of transfer of registered office.

Member states will be unable to maintain impediments in tax law. The Directive on the Taxation of Mergers prohibits the taxation of hidden reserves in cross-border mergers.¹³¹ In the recent Lasteiyrie du Saillant case, the ECJ found that the taxation of unrealised gains, where a natural person moved to another Member State, was not permissible under the freedom of

¹²² Straube, supra n 117, at 643, 649.
¹²⁴ Oberster Gerichtshof 20.3.2003, 6 Ob 283/02i, (2003) 24 Zeitschrift für Wirtschaftsrecht 1085. Also in the US, cross-border merger are frequently used to engineer a reincorporation in another state. See, eg Subramanian, supra n 18, 1795, 1803.
¹²⁸ Under the predominant interpretation, Daily Mail permits such restraints; see supra Section A.I.
¹³¹ Directive 90/343 EEC [1990] OJ L225/1, 20, Art 4(1); see Dommann, supra n 71, 491. In the US, reincorporation into another state is normally considered a “reorganization” (IRC s 368(a) (2004)) not giving rise to taxation. Cf Subramanian, supra n 18, 1802. On tax impedments in Europe, see Meilicke, supra n 14, 304; HF Hügel, “Steuerliche Hindernisse bei der internationalen Sitzverlegung” (1999) 28 Zeitschrift für Unternehmens- und Gesellschaftsrecht 71.
establishment. There can be little doubt that this also applies where a company reincorporates or moves to another Member State.

(c) Consequences

Given all this, we can safely say that company law arbitrage is already becoming easier and less costly. What will it mean for the market for corporate law? Potential consequences offered by for close corporations in the US discussion are diverse. Some scholars have suggested that states may be specialising in different products. The needs of Berle–Means firms may be relatively homogeneous, other than those of privately held firms. Some scholars suggested that there may be product specialisation, eg for firms with large shareholders, who may be interested in retaining more control over management (which is why more legal control may be beneficial in the absence of pressure from capital markets). Roberta Romano argued that for public corporations, a legislative standard template may be optimal, while the optimal arrangement for close corporations could be assessments by judges in individual cases. Ian Ayres suggested that the high costs of an out-of-state incorporation are to blame for the lack of competition for the charters of closed corporations, which includes tax issues, and the risks of having to litigate in another state and to comply with Federal Securities Law. Franchise tax revenues from small companies may be too insignificant for any state to develop incentives to seriously compete for

132 Case C-09/02 Hughes de Lastyrie du Saillant v Ministère de l’Economie (not yet reported).
135 Cf R Romano, “State Competition for Close Corporation Charters: A Comment” (1992) 70 Washington University Law Quarterly 409, 413; Romano, supra n 12, 26.
137 BD Baysinger and HN Butler, “Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law” (1985) 10 Journal of Corporation Law 131, 159–60. This conjecture is supported by evidence that corporations frequently reincorporate in Delaware in the course of an IPO or another major transaction. Romano, supra n 19, 250; Easterbrook and Fischel, supra n 12, 216; contra Romano, supra n 19, 266–73; cf Macry and Miller, supra n 36, 478.
138 Romano, supra n 12, 26–28.
140 Most importantly to the Securities Act of 1933 (15 USC ss 77a-77z-3) and the Securities Exchange Act von 1934 (15 USC ss 78a–78mm).
charters, allowing courts more latitude to implement their own ideas in corporate law cases.\textsuperscript{141}

Assuming, for the moment, that European competition remains restricted to new corporations, we would expect—indeed, independently of whether the “race” is going to the top or the bottom—a development of law deviating from the US, as conflicts of interest of decision makers are quite different in newly founded corporations. First, one should expect a much more fragmented market. If conflicts of interest between companies with various capital and ownership structures are actually more diverse than in a market of Berle–Means firms, one would expect suppliers of corporate law to cater to those needs. Heterogeneity of legal and business cultures is likely to bolster this effect.\textsuperscript{142}

Furthermore, even in the US, no state has achieved a near-monopoly situation for closed corporations, as Delaware has for publicly held ones;\textsuperscript{143} in Europe, the costs of out-of-state incorporation are likely to be even higher, resulting from the need to inform oneself about foreign law, potentially having to litigate in another legal culture and having to comply with foreign accounting standards. With relatively small stakes in newly founded firms, administrative costs will often outweigh the benefits of out-of-state incorporation (at least when the objective of the firm is to run a serious business), and incentives to lobby for an improved law will be much smaller as well.

Hence, high costs of out-of-state incorporation should deter a large number of “purchasers” from the market for out-of-state corporation law, resulting in an exacerbated home-state bias, and thus a relatively low demand (corresponding to the comparatively small supply identified in Section B). As a result, the rewards any state can reap from tailoring its corporate law to the market will be reduced even more, which will further decelerate the race.

3. Controlling Interest Groups and Ownership Structures

(a) The Predominance of Large Shareholders

Independent of whether we are discussing small or large, established firms, the direction of regulatory competition in corporate law is ultimately determined by which persons and interest groups are in the position to create demand within the market, i.e. who decides whether and where to reincorporate, and what interests determine the decisions. In the US, reincorporations (to Delaware) are normally enacted before an IPO;\textsuperscript{144} at that point in time, the decision, on the one

\textsuperscript{141} Ayres, supra n 139, 378.
\textsuperscript{142} Armour, supra n 40, s 2, 5.
\textsuperscript{143} Cf Kahan and Kaman, “Price Discrimination in the Market for Corporate Law” (2001) 86 Cornell Law Review 1205, 1227 (reporting that only 6% of nonpublic corporations are incorporated in Delaware).
\textsuperscript{144} Cf Roman, supra n 19, 250; Easterbrook and Fisher, supra n 12, 216.
hand, is arguably driven by the controllers’ need to commit to a corporate law regime which is sufficiently attractive to investors, but on the other hand is potentially influenced by their interest in gaining private benefits of control.

In the close corporation setting discussed in the previous section, differences from the US situation should not be all that great. In many cases, there will be a small circle of founders, who take the company’s shares and often also manage the firm. Admittedly, the possible conflicts of interests in various firms are quite diverse, but in many cases, the line-up will be one of arm’s length bargaining between several partners setting up a business as a common endeavour. At least initially, there will be few control problems and information asymmetries. One should therefore think that the law only needs to provide a transaction-cost-reducing template of default rules which are useful in practice and reduce the costs of contracting. However, if only one of the founders manages the firm while the others merely provide financing, there could be considerable information asymmetries. Both in Europe and in the US, it seems unlikely that those are resolved by regulatory competition. If the lawyer drafting the agreement and advising where to incorporate represents the majority, which is quite probable, a corporate law favouring insiders has a competitive advantage if future conflicts are not anticipated by the minority when the firm is initially created. A specific country’s law could thus be attractive to new incorporations by favouring the majority as long as this does not give it an excessively bad reputation.

By contrast, there may be considerable differences between the US and Europe concerning large, publicly traded corporations, where problems of asymmetric information are exacerbated. For reasons hotly debated in the comparative corporate governance literature, US and (continental) European share ownership patterns are very different. In the US, an IPO usually leads to the development of a Berle–Means structure in the long run, where a multitude of small shareholders is juxtaposed to a strong board of directors. Similarly, large British firms mostly have dispersed ownership. Share ownership structures on the continent deviate from the Anglo-Saxon model in the persistence of

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14) Winter, supra n 12, 254–58.
15) Cf Bebchuk and Ferrell, supra n 17, 131–40 (arguing that states have incentive to cater to managerial interest by allowing excessive takeover defences).
17) Cf Romano, supra n 135, 115.
18) The main contenders are the “legal origins” theory (see R La Porta, F Lopez-de-Silanes, A Shleifer and R W Vishny, “Law and Finance” (1998) 106 Journal of Political Economy 1393) and the political theory (see MJ Roe, Political Determinants of Corporate Governance (Oxford University Press, 2005)).
blockholdings, and the importance of debt finance is often thought to be greater. Continental systems are usually considered to be characterised by “control-oriented finance”, as opposed to Anglo-Saxon “arm’s-length finance”: the latter emphasise mechanisms of markets instead of control by core shareholders. Different decision-making structures resulting from this are likely to yield different outcomes of competition. While the US debate on regulatory competition is mostly concerned with conflicts of interest between dispersed shareholders and managers, regulatory competition may affect the agency conflict between controlling shareholders and minority investors in large, publicly traded companies.

(b) Reincorporation—Who Decides?

Under US corporate law, a reincorporation in another state normally requires both a proposal by the board of directors and a shareholder vote; the latter alone is not enough. The requirement of a proposal by the board implies, as Lucian Bebchuk pointed out, that there will hardly ever be an initiative to reincorporate (and the board could block one by activist shareholders) if there were not some advantages also for management itself. If pressures from the market for takeovers or the managerial labour market are too weak to force them to initiate a move to a state with shareholder-friendly law, a slant towards managerial interest is therefore likely. The necessity of a shareholder vote remedies this problem only to a limited degree, as shareholders are unable to effectively pursue their interests because of collective action problems and information asymmetries. Dispersed ownership structures and additional mechanisms of entrenchment make it hard for shareholders to replace an unwilling board.

159 See eg R La Porta, F Lopez-de-Silanes and A Shleifer, “Corporate Ownership around the World” (1999) 44 Journal of Finance 471; R La Porta, F Lopez-de-Silanes, A Shleifer and RW Vishny, “Legal Determinants of External Finance” (1997) 32 Journal of Finance 1131; M Becht and A Köell, “Blockholdings in Europe: An International Comparison” (1999) 43 European Economic Review 1049; Koë, supra n 149, 49 56; but see RG Rajan and J Zingales, “What Do We Know about Capital Structure? Some Evidence from International Data” (1995) 50 Journal of Finance 1421 finding that it turns out that the debt ratios of German companies on debt are overstated when differences in accounting standards are taken into account, but also finding that the debt ratio of French companies was considerably higher than both that of British and German ones); A Antoniou, Y Guney and K Paulyal, “Determinants of Corporate Capital Structures: Evidence from European Countries”, EFMA 2002 London Meetings (2002), available at http://ssrn.com/abstract_id=302833, 6 (stating that leverage is only slightly higher in German companies than in British ones, but considerably higher in French ones).

160 See eg E Bergløf, “A Note on the Typology of Financial Systems” in K Hopt and E Wyneersch (eds), Comparative Corporate Governance (Berlin/New York, Walter de Gruyter, 1997), 151, 159 64.

161 Bebchuk, supra n 13, 1458; cf Clark, supra n 19, 416–17 (discussing mergers, which are often used to arrange a reincorporation).

162 Bebchuk, supra n 13, 1460–61.

163 Ibid, 1461 67 (describing how particular types of market failure make a race to the bottom likely).

164 Ibid, 1170–73.
Similar reasoning can be applied to UK companies with dispersed ownership: reincorporations clearly favouring managers to the detriment of shareholders may be even less likely than in the US. First, institutional investors in the UK are known to own a larger total proportion of public firms than their American counterparts, and take a more “activist” stance vis-à-vis directors. Secondly, a reincorporation to anywhere on the European continent would probably alarm British shareholders more than a move within the US would alarm their American counterparts. One should thus not necessarily expect UK firms to make much use of the potential offered by regulatory competition.

Concentrated ownership structures are likely to have different effects on regulatory competition for continental European firms. Of course, a reincorporation is also unlikely to be effected on the continent without the assent of management; but with the presence of controlling shareholders or even mere blockholders, an unwilling management is at much greater risk of being replaced. In practice, with no effective separation of ownership and control in place, majority shareholders or cooperating blockholders alone will be able to decide to reincorporate: in the US and the UK, at least the two sides of the conflict of interest (managers and dispersed shareholders) have to strike a bargain. On the European continent, large shareholders will often be able to decide unilaterally. With legal impediments to cross-border reincorporations being removed, they will often be able to decide on moves into other jurisdictions single-handedly, without needing the votes of dispersed shareholders, as rational apathy will frequently give them the majority they need, even if it is a super-majority. Investors may not always realise this problem, resulting in a disappointment in their economic expectations because of information asymmetries or boundedly rational behaviour. Thus, one should be at least cautious with respect to the argument that minority shareholders need not be protected when buying shares of a foreign company.

(c) What Incentives Determine Reincorporation Decisions under Concentrated Ownership?

If large shareholders are not required to strike bargains with other interest groups, the first thing one might expect is reincorporation to a Member State where corporate law is more favourable to large shareholders by taking, for example, a more permissive stance on private benefits of control. The resulting

156 Deakin, supra n 87, 206–7.
158 Ibid, supra n 8, para 135. If that statement could be generalised, any mandatory minority protection would be superfluous. However, all major corporate law systems provide at least for some mandatory minority protection, which prima facie indicates that it is not superfluous. For a functional comparison, see H Hansmann and R Kraakman, “The Basic Governance Structure”, in R Kraakman (ed), The Anatomy of Corporate Law (Oxford University Press, 2004), 33, 54–61.
slant in favour of large shareholders would be even bigger than the one arguably favouring management in the US, who may need to make some concessions to shareholders. There is little reason to believe that they will have an incentive to subject themselves to a corporate law favouring the minority.\textsuperscript{199} Pressures from managerial labour markets and the threat of a hostile takeover, which are often brought forward as a constraint of managers in the US, do not apply to them. Once shares have been issued, minority shareholders, as a group, cannot withdraw their contribution to the firm, and thus lack leverage \textit{vis-à-vis} the majority.

Yet there is also a second way of how a controlling shareholder could benefit from reincorporation, namely by increasing her own wealth by maximising the total value of the firm, which might in some cases be done by reincorporating in a Member State with “particularly good law” suitable to the needs of firms with a dispersed ownership structure. This would be desirable also from the point of view of minority shareholders, and may even allow large continental shareholders to let go of their blocks by reincorporating in a Member State the law of which is rewarded with a premium by capital markets, by virtue of being good at keeping managers in check.\textsuperscript{160}

If both the “private benefits” reincorporation and the “firm value maximisation” options are available to a controlling shareholder, she will only take the “firm value maximisation” option if the total wealth she can accumulate by letting go of her control block is greater than the private benefits of control another Member State might offer. In some cases, a move to a state offering larger private benefits might even be beneficial if it also increases the total value of the firm. However, inefficient moves will very often prevail over efficient ones, since blockholders do not internalise gains accruing to other shareholders.

\textit{(d) Possible Consequences}

We have seen that countries seeking to offer attractive corporate law could employ two alternative strategies, one that seems desirable (“firm value maximisation”) and one that seems undesirable (“maximisation of private benefits”), as private benefits will almost certainly decrease firm value beyond a certain level. Conceivably, we might see states pursuing either strategy. However, if there were actually fierce competition between Member States, a movement

\textsuperscript{199} See, eg Bebchuk, \textit{supra} n 13, 1478 (finding that market mechanisms do little to oppose transfers of value to a controlling shareholder); Tröger, \textit{supra} n 31, 28 (hypothesising that “dominant stockholders may consider reincorporating for purposes of extracting higher private benefits”); Armour, \textit{supra} n 40, s 3, 25.

\textsuperscript{160} Armour, \textit{ibid} (arguing that continental European controlling shareholders might be able to “unwind” and diversify their holdings by reincorporating in the UK). There is some evidence that blockholdings may be unwinding (or have been unwinding) even without regulatory competition. See, eg D Wójcik, “Change in the German model of corporate governance: evidence from blockholdings 1987–2001?” (2003) 33 \textit{Environment and Planning} A 1431–50.
“to the bottom” could happen if it is easier to leave private benefits of control unchecked than to develop “good law” maximising firm value for competing states. Instead of using political clout within a particular country to maintain private benefits, large blockholders might capture the regulatory competition process. Thus, if, in a control-oriented system of corporate governance, pressures from capital market and even the need to resort to them are smaller, one should, at the very least, expect a greater danger of a movement to the bottom than in a corporate governance system characterised of public corporations with dispersed ownership such as the one of the US.

Admittedly, one factor that could mitigate possible negative effects of regulatory competition would be product markets. A firm with excessive private benefits will most likely be at a competitive disadvantage in the long run. Still, if one follows the theory that developed legal minority protection is correlated to or even a prerequisite for the development of dispersed ownership and capital markets, one might even predict a weakening of minority protection in some countries and, as a consequence, of stock markets as a result of regulatory competition (in the absence of significant countervailing factors). The US is not a good model with which to oppose this argument: first, dispersed ownership was firmly in place as early as 1932, allowing Berle and Means to write their pathbreaking study on the separation of ownership and control. More importantly, other mechanisms were in place that prevented the rise of controlling shareholders.

Race-to-the-top advocates might conclude that European laws will remain more strongly committed to a regulatory approach in corporate law: where the forces of capital markets are weaker in disciplining managers and controlling shareholders, an approach favouring mandatory law may be economically superior. Given that controlling shareholders will usually be able also to initiate a reincorporation, they might want to find a way of committing to a regime friendly to the minority, eg by enhanced supermajority requirements in the company’s charter. However, such a commitment to a specific mandatory


corporate law regime would be difficult and probably come with costs of reduced flexibility. It seems much more likely that companies would rather subject themselves to a strong regime of securities regulation, which would not necessarily affect the development of corporate law.

Following the hypothesis that Delaware law is tailored to the needs of typical American publicly traded firms, one would expect the European market to exhibit more fragmentation and less uniformity also because of ownership patterns, even once it extends also to large corporations. As long as many large public companies continue to deviate from what has been called the “standard model” of corporate law, the market should be expected to demand a high degree of diversity to accommodate a great variety of idiosyncratic structures and problems, which precludes the existence of a one-size-fits-all solution.

4. Stakeholder Protection, Creditor Power, and Codetermination

The US discussion only barely touches upon the effects of corporate law on other stakeholders beside shareholders, such as creditors and employees, who cannot directly influence the choice of law decision. However, regulatory competition in Europe cannot eschew this issue, as most of all the interests of employees and creditors are much more an issue of corporate law than they are in the US.

Were stakeholders able to protect their interests by complete contingent contracts or by insurance, they could penalise a detrimental corporate law regime by a premium, eg. higher interest rates in the case of creditors. In that case, there would be an incentive for shareholders to take those interests into account when deciding on incorporation. However, when market failures or information asymmetries rule out complete contracting, there is little incentive to take nonshareholder constituencies’ interests into account in ex post reincorporation decisions. Furthermore, while some authors suggest that US corporate law ties shareholders’ hands to prevent the expropriation of other constituencies’ quasi-rents, this is not feasible in the presence of large

17 Posner and Scott, supra n 121, 111; Easterbrook and Fischel, supra n 12, 215–16.
19 Cf Bebchuk, supra n 13, 1455 (stating that scholars of both directions of the race see shareholder value maximisation as the objective of corporate law policy).
20 Cf ibid, 1492 (arguing that state law will be unable to provide the efficient rule as nonshareholder constituencies do not participate in the incorporation decision).
21 Cf Lombardo, supra n 47, 322 30.
22 Cf Bebchuk, supra n 13, 1485.
shareholders with control over management. Thus, a race to the bottom with respect to nonshareholder constituencies seems quite likely, eg with respect to tort creditors, whose interests are normally not aligned with any other constituency, not even contractual creditors with whom they compete on insolvency quotas.

This may be different with respect to at least some contractual creditors in view of financial structures on the European continent. According to the conventional wisdom, institutional creditors such as banks are more concentrated in Europe (even in the UK) than in the US. First, the position as a firm’s main bank may give it particularly strong bargaining position and even some decision-making power within the firm, which may make regulation unnecessary. Secondly, it may give them the power to favour corporations which are incorporated in a creditor-friendly Member State. This may mean that competition will result in a law that is hospitable to large institutional creditors. Where the interests of this group and trade creditors are aligned, the latter will also benefit from the large creditors’ powerful position. However, where their interests differ, trade creditors may suffer if they are not powerful or not sophisticated enough to protect themselves by risk premia, insurance and the services of credit rating agencies. To some degree, even tort creditors may benefit from the power of institutional creditors. However, it seems unavoidable that they suffer on issues where their interests are opposed to the ones of financial institutions (eg concerning securitisation of debt). This will also depend to what exact legal mechanisms regulatory competition will extend (see Section D.3).

With respect to employees, it is obvious that a lot of legislation intended to safeguard their interests (such as protection against dismissals) lies outside the scope of corporate law and are only subject to regulatory competition if firms


are able to relocate plants at low cost (or indirectly through product market competition). However, employees are affected only when legal mechanisms attach to the corporate form, such as the codetermination systems in place in several Member States.\textsuperscript{176}

Irrespective of whether codetermination is economically beneficial or detrimental, up to now, firms have been committed to the current regime by impediments and costs of reincorporation. If codetermination actually induces beneficial firm-specific human capital investments by employees, the possibility or the threat to reincorporate allows shareholders to expropriate employees’ quasi-rents without being able to commit to a specific national law. If such investments are beneficial, this may make a good case for European harmonisation. However, this approach is obviously problematic for firms or industries where specific investments by employees are not present.

D. Federal and Supranational Influence

1. Europe and Roe’s Thesis of Vertical Competition

While EU company law measures of harmonisation were designed to create uniformity among Member States, the effect of the federal law on the regulatory competition process in the US has long received little attention in the academic debate.

Of course, the new European Company Statute\textsuperscript{177} is of some importance, as it offers, at least with respect to those issues not left to national law, a federal type of company that could, in theory, compete with national forms. However, for various reasons, the European Union itself is unlikely to actively engage the market for corporate law,\textsuperscript{178} and the national varieties of the European Company can only compete with each other for firms that are willing to actually transfer their “real seat” to the state of incorporation.\textsuperscript{179}

The more interesting question is how actual and potential federalisation affects the development on the national level. In a recent article, Mark Roe has suggested that Delaware’s actual competitors are not the other US states, but actors on the federal level. The incentive shaping Delaware corporate law is thus not potential reincorporation to other states, but the permanent threat of federalisation of the law of publicly traded corporations, for which Roe cites

\textsuperscript{176} Deakin, supra n 87, 207.


\textsuperscript{178} On the parallel case of Canada, where federal incorporation has been permitted as an alternative to incorporation in one of the provinces, see Romano, supra n 12, 118–28 (generally arguing that the federal government, other than a small state, does not have incentives to create good corporate law).

\textsuperscript{179} See supra n 134.
some actual historic examples, such as the 1933 and 1934 Acts and the Sarbanes-Oxley Act of 2002. Beside Congress, the SEC, the Second Circuit Court of Appeals (when interpreting securities laws) and the New York Stock Exchange are the most important actors. If Delaware oversteps its permissible bounds, federal decision makers could intervene, or threaten to do so. In some cases such intervention was averted only by policy changes in Delaware. Actual intervention is thus not required to influence state corporate law, but its permanent threat may push Delaware into the desired direction. Thus, in Roe’s theory, whether Delaware corporate law is good or bad is ultimately not a matter of a race to the top or bottom between states, but into what direction state law is pushed by federal actors.

2. Consequences for Europe

The obvious question for Europe, raised by Roe himself, is what influence European law will have on state competition in the future, and whether the threat of or actual Europeanisation of corporate and securities law will pull the Member State’s company into one direction or the other.

However, there are some fundamental differences: first, under the EU political system, the Council, Commission and Parliament act considerably more slowly as legislators than do the US Congress concerning issues of corporate law. In the US, federal legislation in corporate law has usually been the result of issues discussed on the federal level; for example, the 1933 and 1934 Acts resulted from the depression and perceived problems of capital markets that had contributed to it; the Williams Act of 1968 was the answer to an increase in dubious takeover attempts during the 1960s; most recently, the Sarbanes-Oxley Act was the result of Enron and other corporate governance scandals. Admittedly, the EU Commission has become much more active than it

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1. Roe, supra n 25, 592; cf Kahan and Kamar, supra n 22, 679, 741 (arguing that there was no actual state competition, but that it was possible in theory); Bebchuk and Hamdani, supra n 29, 580-83; see also Bebchuk, supra n 13, 1434 (arguing that the threat of federal legislative intervention might prevent decisionmakers in Delaware from introducing value-decreasing statutes); MJ Roe, “Delaware’s Politics” (2005) available at http://ssrn.com/abstract=601962 (analysing the interplay of Delaware and federal law from a public choice perspective). On the Sarbanes-Oxley provisions on audit committee see, eg LE Mitchell, “The Sarbanes Oxley Act and the Reinvention of Corporate Governance” (2003) 48 Villanova Law Review 1189, 1198 (speaking of a “federalization of corporate governance”).

2. The Second Circuit includes the states of New York, Connecticut and Vermont (28 USC s 41), and thus adjudicates in many cases involving securities law.

3. Roe, supra n 25, 592.

4. In the course of the twentieth century, the issue of federalisation of corporate law was discussed several times. See ibid, 602–7. One important example is the Delaware case law on hostile takeovers.

5. Ibid, 643–44.

had previously been in company and securities law,\textsuperscript{186} and the EU may be attempting to streamline its legislative and regulative processes,\textsuperscript{187} but in comparison with the maybe sometimes hasty US legislation, it is still rather a cumbersome giant, under whose auspices projects that were discussed for many years, such as the Takeover Directive,\textsuperscript{188} can sometimes be delayed by particular, sometimes unrelated national interests.\textsuperscript{189} So far, spectacular insolvencies in Europe have had immediate effects only on the level of the respective Member State, in which most of the media attention to corporate governance scandals occurs. As a consequence, reforms are usually called for on the Member State level. Just two of many examples are the German KonTraG of 1998\textsuperscript{190} and the auditing reforms in Austria in 2001—which ultimately were the result of two bank insolencies.\textsuperscript{191} If a similar pattern prevailed in the US, Enron would have resulted in a reform of the corporate law of the state of Oregon;\textsuperscript{192} however, there was a rather speedy reaction in the form of a federal law. A major factor shaping the decisions of legislators and others is the public discussion in the media, in which, in Europe, political discussions are waged rather on the national than the European level. As long as there is no European public sphere, one can safely expect that in Europe, a crisis will normally result in national rather than supranational intervention. European regulation tends to deal with more fundamental issues and is sometimes discussed for decades before enactment.

Differences in the court system are probably even more significant: the ECJ, as far as it is asked to deal with issues of company and securities law at all, can hardly be compared to the Federal Appellate Court for the 2nd Circuit and the US Supreme Court, whose adjudicative activity regularly goes back to claims to


\textsuperscript{187} Cf E Ferran, Building an EU Securities Market (Cambridge University Press, 2004), 61–126 (discussing the Lamfalussy process).


\textsuperscript{189} See, eg Ferran, supra n 187, 116–17 (discussing the impact of the dispute about the status of Gibraltar on the takeover directive).

\textsuperscript{190} KonTraG: Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (law on control and transparency in business), 27 April 1998, (German) BGBI I 1998 I, 786; see, eg, D Dörner, “Ändert das KonTraG die Anforderungen an den Abschlußprüfer?” (1998) 42 Der Betrieb 1, 1 (stating that the legislation was the result of corporate governance scandals).


\textsuperscript{192} Enron was incorporated in Oregon. See, eg, M Cole, “‘Delaware Is Not a State’: Are We Witnessing Jurisdictional Competition in Bankruptcy?” (2002) 53 Vandulouv Law Review 1815, 1874.
damages resulting from the violation of protective norms of securities law. In Europe, these issues are normally dealt with by national courts, and the rare cases in which the ECJ has been asked for a preliminary opinion (on the interpretation of EU directives) have led to few meaningful substantive solutions.

But most importantly, Europe lacks a capital markets regulator comparable to the SEC, which is specialised in its field and can relatively quickly issue regulations binding on public corporations; thus, the SEC frequently interferes with companies’ corporate governance structures. Good examples are proxy rules, which affect the stockholders’ ability to vote and thus a core field of the inner affairs of the corporation, or the SEC’s recent proposal aiming at giving minority shareholders the opportunity to propose a competing short slate of candidates for the board of directors. Europe also lacks a pan-European stock exchange comparable to the NYSE, whose listing requirements (under sometimes considerable influence of the SEC) also affects corporate governance. But even if a European SEC or NYSE existed, as long as European competition focuses on closely held corporations, the influence of capital market institutions is irrelevant anyway.

All this leads to the conclusion—in spite of EU attempts at harmonisation in corporate and securities law—that the gravitational pull of the EU level of legislation and regulation is likely to be significantly weaker than that of the US federal level. No potential supplier in the market for European corporate law would have much to fear from the threat of the EU taking away its powers (as US federal law does). The latitude of discretion assigned to competitors will thus remain considerably larger than in the US, even though the difference is one of degree, rather than absolute.

Furthermore, the pressure of economic incentives by which potential Europeanisation would force EU Member States to pursue a “supranational” course in its policy measures will be reduced. For Delaware, federalisation is a considerable threat: the more its own discretion is reduced by federal authorities, the more it loses of its special competitive advantage and its exceptional position among US states, which yields a considerable proportion of state income. Delaware will avoid putting that at risk. However, as long as no state is in a similar position—that is, of near-complete dependency on corporate law—in

193 Good examples are suits for damages due to insider trading. See Allen and Kraakman, supra n 19, 590–91. The prohibition of insider trading largely developed from Securities Exchange Act s 10(b) and the SEC rule 10b-5, which were originally directed at fraudulent practices in sales of securities. See Kardos v National Gypsum Co, 69 F Supp 512 (ED Pa 1946); SEC v Texas Gulf Sulphur Co, 401 F 2d 833 (2d Cir 1968), cert denied 394 US 976 (1969); Chiarella v United States, 445 US 222 (1980); Dirks v SEC, 463 US 646 (1983); see Clark, supra n 19, 309–56.

194 Securities Exchange Act, s 14, 15 USC § 78m; SEC Regulation 14A, 17 CFR s 240.14A.

195 See also Roe, supra n 25, 612–14.


197 Roe, supra n 25, 599–600.
Europe, the threat of supranationalisation is much less drastic for any participant in the market. The weak incentives to compete for Member States are counterbalanced by a weak supranational gravitational pull.

3. Approaches Similar to Harmonisation in Creditor Protection

It is sometimes speculated that whether the German GmbH and other continental types of corporations will be the “victims” of regulatory competition, which the UK private limited company seems to be winning. This has already encouraged some countries to eliminate or reduce minimum capital requirements.196 Conspicuously, capital adequacy and maintenance requirements are virtually non-existent in the US. Usually other measures are considered to be important for creditor protection, which are regulated either by federal law or by uniform laws.197 The Uniform Fraudulent Transfer Act and the older Uniform Fraudulent Conveyance Act have been implemented, in some form, in all the US states.198 Those laws not only address transfers with the actual intention to defraud creditors. A transaction will be considered a fraudulent transfer in two cases: in the first case, the debtor either “was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction”;201 in the second case, he or she must have (2) “intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due”.202 The provision also covers dividend payments,203 one of the main targets of the Second EU Directive.204 Foreseeability by the beneficiary is not necessary for the application of the statute.

In the US, insolvency law (referred to as bankruptcy law) is federal law;205 and it also includes a provision mirroring fraudulent conveyances.206 Federal courts developed the doctrine of equitable subordination,207 which allows for a subordination of certain types of problematic claims to the benefit of other

196 See supra n 96.
197 See also Tröger, supra n 31, 54 n 225.
198 Ultimately, those statutes go back to an English statute of 1571. See Allen and Kraakman, supra n 19, 140; Tyrell’s Case (1601) 3 Coke 80b, 76 ER 809; see also Clark, supra n 19, 44-45 n11.
199 Uniform Fraudulent Transfer Act, s 4(a)(2)(a).
200 Uniform Fraudulent Transfer Act, s 4(a)(2)(b).
203 US Constitution, Art 1 s 8.
204 11 USC, s 548.
205 See Clark, supra n 19, 52-71; Allen and Kraakman, supra n 19, 141-56.
debtor. Thus, the only important doctrine aimed at creditor protection under state law is veil-piercing.208

This adds up to the picture that creditor protection mostly remains outside the scope of regulatory competition in the US. Admittedly, there is an incipient discussion on regulatory competition in bankruptcy law, as debtors appear to have considerable discretion as to where to file for bankruptcy protection.209 However, this is limited by the fact that all bankruptcy courts are bound by the Bankruptcy Code and decisions of higher courts and ultimately the US Supreme Court.

By contrast, issues of creditor protection are in part an issue of company law in Europe (and also an important aim of the EC Company Law Directives). With the ECJ apparently setting tight limits to the application of mechanisms of corporate law to foreign companies in *Inspire Art*, effects of competition on creditor interests are likely to depend on the applicability of instruments of insolvency law to companies incorporated in other EU and EEA Member States, and on the courts of which state will be in charge of insolvency proceedings.

According to Article 3(1) of the Council Regulation on Insolvency Proceedings,210 “The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings”. Article 3(2) sets out a presumption that the main interests are at the place of the registered office, and other states may only open proceedings if there is an establishment in the particular state, and the proceedings have to be restricted to the assets there in that case. However, the presumption can be rebutted, and some national courts have vigorously asserted their jurisdiction. For example, a German court, the *Amtgericht Hamburg*, found that it could open proceedings over an English letterbox company, and it even stated that its shareholders could not rely on limited liability as it was grossly undercapitalised.211 Likewise, the English High Court found that insolvency proceedings could be opened in England over a German holding company which, in the eyes of the court, had the centre of its business activities in Bradford.212 In the *Eurofoods* case, concerning an Irish subsidiary of Parmalat

208 There may be some regulatory competition on veil piercing. For example, Nevada has promoted its corporate law with the argument that veil piercing is more difficult than in all other states. Cf. Kahan and Kamar, supra n 22, 717.
209 See eg Cole, supra n 192, 1845.
over which both Italian and Irish courts had claimed jurisdiction, the Supreme Court of the Republic of Ireland has referred a number of questions concerning the interpretation of the Regulation to the ECJ.\(^{213}\)

The effects of regulatory competition on creditor interests will partly depend on how national courts and the ECJ will deal with the Regulation. If insolvency proceedings will usually be initiated in the state of incorporation, the effects described in Section C.4 are likely to pertain also to insolvency law. Furthermore, even when the issue of jurisdiction is clear, national courts have to grapple with the question of whether the application of national doctrines of insolvency law (as well as corporate law) is compatible with the freedom of establishment under the criteria set out by the ECJ.\(^{214}\) If the bounds set by the ECJ are narrow, the effects of regulatory competition will be stronger.

E. Summary

The analysis in this article has shown that the structural conditions of European market for corporate law differ from the US in several respects.

On the supply side, a European Delaware is virtually impossible. Delaware owes its unique position to unusual historical circumstances, which cannot be expected to be reproduced in twenty-first-century Europe. Even without the current prohibition of franchise tax, small European states are badly positioned to offer advantages which could allow them to become quasi-monopolists, which is, in turn, a precondition for a credible commitment to the kind of corporate law favoured by the market.

On the demand side, legal, administrative and cultural factors are likely to reduce market demand as such, and thus slow down the race either to the top or bottom. The focus of regulatory competition on newly founded corporations, and even European financial structures among publicly traded firms are likely to reinforce fragmentation in the market. With less developed capital markets on the continent, and continental large shareholders being able to control reincorporation without having to bargain with the minority, a movement “to the bottom” cannot be ruled out. Large institutional creditors may also be able to influence the development in their favour, which may be detrimental to other groups of nonshareholder constituencies and even shareholders.


\(^{214}\) In Inspire Art, supra n 8, para 133, the ECJ refers to the criteria set out in Case C 55/94 Reinhard Gehbard v Consiglio dell’Ordine degli Avvocati e Procurandi di Milano [1995] ECR 4165. National measures hindering or making less attractive the exercise of the freedoms “must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it”.

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The European level of legislation and regulation is less likely to influence the conduct of national actors in the market than the federal level in the US, because Europe lacks an influential common public sphere, the legislative process is slow, and there is no court system or European securities authority with substantive influence on corporate law in place.

However, while the danger of a race to the bottom as such seems to be larger in Europe than in the US, and while federal influence (in whatever direction) seems weaker, both the reduced incentives for states on the supply side and certain impediments on the demand side are likely to slow down the competitive development of corporate law considerably, in whatever direction it may be going.