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Regulatory Competition between Company Laws in the European Union: the Überseering Case

The strengthening of choice of law in the field of company law by the recent decision of the European Court of Justice in the Überseering case may lead in the near future to the mutual recognition of national business forms by the EU Member States. This will mean an increase in regulatory competition between company laws. But will this competition necessarily lead to an improvement in the quality of company laws, or could the opposite be the case? What would be the appropriate features of a regulatory framework that would guide a competitive race of company laws to the top and not to the bottom?

In a recent landmark decision (Überseering BV v Nordic Construction Company Baumanagement GmbH, C-208/00) of November 2002, the European Court of Justice (ECJ) clarified some long pending questions concerning the freedom of establishment of companies in the EU (Articles 43 and 48 EC in connection with Article 293 EC). The Überseering decision follows the famous Centros decision (C-212/97) of 1999, in which the ECJ strengthened the freedom of establishment of companies in the EU, but left open some considerable questions to the Member States.[1] The Überseering decision takes up these questions and comes by and large to the conclusion that Member States are not entitled to hinder companies, with the help of conflict of law rules, from transferring their seat to the desired Member State, if the companies are incorporated in accordance with the law of another Member State. In other words, a Dutch "Besloten Vennootschap" (BV) may transfer its seat (centre of administration or headquarters) to Germany without the necessity of liquidating the BV and being incorporated in Germany as an Aktiengesellschaft (AG) or a Gesellschaft mit beschränkter Haftung (GmbH). Until now such a move was blocked by the conflict of law rules in Germany and other Member States such as France, Italy and Spain.

The Überseering decision and the Centros decision will have the same impact on the future of freedom of establishment as the Dassonville decision and Cassis de Dijon decision did twenty-five years ago on the freedom of movement of goods. In other words, similarly to the existing regulatory competition via the mutual recognition of product standards, the regulatory competition of business forms is now at the gates of the EU. It is obvious that the growing regulatory competition of company laws in the EU may lead to seismic shifts in the traditional corporate governance systems of the Member States. For example, what role will legal capital play in the future? What will happen to German co-determination? Will the one or two tier system of corporate control survive in Europe? Will there still be a place for the French President Directeur Generale (PDG)?

In this article we shall first present a brief description of the Überseering case and its legal background, followed by a general report of the pros and cons of regulatory competition between company laws. We shall then focus on the properties of a competitive order for a viable regulatory competition of company laws in the EU and make clear that by introducing competition between company laws a bulk of related questions for the ECJ and for EU legislation may arise.

The Überseering Case

Although freedom of establishment is guaranteed by the EC Treaty there is a long-standing debate about what the exact meaning of freedom of establishment is, and there is a fierce debate about what conflict of laws doctrine may follow from Articles 43 and 48 EC.[2] Interpretations by legal scholars vary. Some are of the opinion that a company that has been legally formed

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[1] For a review of the Centros-decision see: H. Halbhuber: National Doctrinal Structures and European Corporate Law, in: Common Market Law Review, Vol. 38, 2001, pp. 1385-1420; K. Heine, W. Kerber: European Corporate Laws, Regulatory Competition and Path Dependence, in: European Journal of Law and Economics, Vol. 13, 2002, pp. 47-71.

in one Member State has to be accepted by the other Member States, e.g. a Dutch BV can relocate its headquarters to Germany and undertake its operations as a BV in Germany. Other scholars deny this. They claim that the EC Treaty is not explicit enough on the question of which conflict of law rule has to be applied by the Member States. As a result the Member States are free to decide on the appropriate conflict of law rule, e.g. Germany may refuse the recognition of a Dutch BV and force the BV to conform to German business forms. From the viewpoint of conflict of law rules the first position claims that the so-called "incorporation theory" (Gründungstheorie) holds, while the latter position advocates the so-called "real seat theory" (Sitztheorie) which forces companies to adopt one of the business forms of the host country. Over the last few decades the status quo of legal uncertainty favoured the supporters of the restrictive "real seat theory", but in 1999 the Centros judgement broke with the status quo by turning to the "incorporation theory". The ECJ ruled that a company that has been formed in accordance with the law of one Member State can register a branch in any other Member State, although the branch is the real centre of administration and the principal place of doing business, and the initial incorporation was only intended to circumvent the paying-up of a minimum share capital. However the Centros judgement left open the ultimate question, whether the "incorporation theory" was to be the leading conflict of law rule in company law in the EU. On 30 March 2000 the German Bundesgerichtshof (Federal Court of Justice) brought the Überseering case to the ECJ with the purpose of clarifying the long pending question of the appropriate conflict of law rule in the field of European company law.

The facts of the Überseering case are as follows: Überseering, a properly registered Dutch BV, owned a piece of land in Düsseldorf (Germany). In 1992 Überseering signed a project-management contract with the Nordic Construction Company Baumanagement GmbH (NCC) to refurbish a garage and a motel on the site. Überseering later claimed that the paintwork was defective. While Überseering unsuccessfully sought compensation from NCC, in 1994 two German nationals acquired all the shares in Überseering. Finally, in 1996 Überseering brought an action before the Landgericht (Regional Court). The Landgericht dismissed the action and the Oberlandesgericht (Higher Regional Court) also upheld this dismissal. The Oberlandesgericht was of the opinion that Überseering had transferred its actual centre of administration to Germany, since all its shares had been acquired by German nationals. Thus, Überseering did not have the proper business form to sue, because German company law requires the identity of the centre of administration and the place of incorporation. In other words, Überseering had no legal capacity in Germany because it was considered to be legally non-existent. Überseering appealed against this decision to the Bundesgerichtshof, which subsequently asked the ECJ whether it is possible to deny Überseering's legal existence in Germany by the logic of the "real seat theory", and if this is not the case should the corporation's legal capacity be determined according to the company's place of incorporation? Or in other words, does the EC Treaty demand that Member States have to mutually recognise EU business forms?

Because this paper is not concerned with the legal details of the Überseering case it seems sufficient to say that the ECJ rejected the German claim that the "real seat theory" applied. In other words, Überseering had legal capacity in Germany, despite having been registered in the Netherlands and with its only shareholders living in Germany. The decision may be interpreted as the application of the country-of-origin principle in the field of European company law in order to guarantee the freedom of establishment for companies. Similar to the regulatory competition of product standards on the European product markets, a regulatory competition of business forms may emerge in the future, because firms become entitled to switch to the company law that best fits their legal preferences.[3] Having said this, we shall turn now to the economic analysis and raise some questions that may turn up in the future of a liberalised European company law.

The Pros and Cons of Regulatory Competition

If choice of law is introduced into the field of European company law and firms can more or less freely choose between the business forms offered by the Member States, we have to ask what consequences this will have. Is regulatory competition between company laws welfare-enhancing, or not? Needless to say, there are two camps which support the one or the other position.

[2] See, for example: R. M. Buxbaum: "Back to the Future?" From "Centros" to the Überlagerungstheorie, in: P.B. Berger et al. (eds.): Festschrift für Otto Sandrock, Heidelberg 2000, pp. 149-163; W.F. Ebke: Centros – Some Realities and some Mysteries, in: American Journal of Comparative Law, Vol. 48, 2000, pp. 623-660; D. Zimmer: Mysterium "Centros", in: Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, Vol. 164, 2000, pp. 23-42.

[3] Surely, there will be fierce rearguard actions by the supporters of the "real seat theory" but it seems pretty clear that a fundamental liberalisation of corporate law is at the gates of the EU.

The proponents of a welfare-enhancing regulatory competition in the field of company law claim that competition between company laws drives company laws towards efficiency.[4] To derive this conclusion they consider company laws as products which compete for their adoption by firms like car manufacturers compete for the adoption of the cars they produce by car drivers.[5] The "law as a product" analogy seems to be appropriate – or, less emphatically, acceptable – if we make the realistic assumption that producing, e.g. a car, not only requires the combination of capital and labour but also a legal framework that organises the various production processes. From this viewpoint it is also no surprise that legal products should be priced. A high-quality company law may have a higher price than a low-quality company law.

If we accept the "law as a product" analogy, it appears that competition between legal products may have the same positive effects that competition has on ordinary markets. We can briefly summarise the advantages of regulatory competition in the field of company law.

- Because regulatory competition implies that there are various company laws with different qualities and prices, a firm may choose the company law that best fits its legal needs. The right to choose and the availability of different company laws helps to satisfy the diverse legal preferences of firms.
- Jurisdictions are eager to convince firms to adopt their specific company law because firms will pay for its use. The ensuing financial pressure will have the effect that jurisdictions will be prepared to adapt company law constantly to the users' preferences and to introduce legal innovations. The permanent flow of legal innovations will help company law to improve constantly.
- From a politico-economic point of view regulatory competition will set politicians under pressure to price the offered company law fairly. There will be no regulatory slack for a monopoly pricing of company laws, since firms can choose another company law with the same or similar legal features but with a lower price.

To sum up, the proponents of competition between company laws assume that there is a "race to the top" in the legal quality of company laws. Hence, their political advice is that the more regulatory competition there is, the better the legal results will be.

On the other hand there are legal scholars who assume that there will be no "race to the top" but a "race to the bottom" (Delaware effect) of legal standards. The story of these scholars[6] runs in the opposite direction to the aforementioned story. Furthermore, these scholars believe in the "law as a product" analogy and they also assume that competition between company laws may exist. However, in their opinion regulatory competition does not work because several market failures exist.

- First, there is the problem of negative externalities. A jurisdiction may try to sell its company law by granting its companies risk transfers to other jurisdictions, e.g. restricting the directors' liability to the territory in which the firm is incorporated although the centre of administration and the usual place of business is located elsewhere. Or a jurisdiction may offer a company law that allows substantial risk shifts to minority shareholders or creditors. Such risk shifts may be welcomed by blockholders and directors who are entitled to make the incorporation decision. The logic behind the argument of negative externality is that managers and politicians are seen as agents who can be checked only insufficiently by their principals. The lack of control gives politicians and managers discretionary power to exploit their principals and third parties.
- Besides the problem of negative externalities there is also a problem of positive externalities. Since legal products have the characteristics of a public good, one jurisdiction can copy another jurisdiction's company law without bearing the costs. It follows from the public good problem that if there is no possibility of excluding copying, a jurisdiction will have no incentive to improve its company law.
- Because firms are price-sensitive they will adopt the company law with the best ratio of cost and quality. But if regulatory competition or the public good problem drives company laws to a greater similarity the cost component will become more and more important. In the end a marginal price reduction may be sufficient to attract all incorporations. Since all jurisdictions will anticipate the pricing strategy of the other jurisdictions all jurisdictions will lower

[4] R.K. Winter: State Law, Shareholder Protection, and the Theory of the Corporation, in: Journal of Legal Studies, Vol. 6, 1977, pp. 251-292; F.H. Easterbrook, D.R. Fischel: The Economic Structure of Corporate Law, Cambridge (Mass.) 1996.

[5] R. Romano: Law as a Product: Some Pieces of the Incorporation Puzzle, in: Journal of Law, Economics and Organization, Vol. 1, 1985, pp. 225-283.; W.J. Carney: The Production of Corporate Law, in: Southern California Law Review, Vol. 71, 1998, pp. 715-780.

[6] W.L. Cary: Federalism and Corporate Law: Reflections upon Delaware, in: Yale Law Journal, Vol. 83, pp. 663-705; L.A. Bebchuk: The Debate on Contractual Freedom in Corporate Law, in: Columbia Law Review, Vol. 89, 1989, pp. 1395-1415.

their prices for company law. Finally, company law will have a price near zero and the legal production costs will not be covered by the returns. However, without returns there is no incentive for the supply of a high-quality company law.

To sum up, the opponents of regulatory competition see a lot of deficiencies in the workability of competition between company laws. As a result their political advice is that regulatory competition is not a probate device to enhance the quality of company laws.

Although the two camps in the debate on the workability of competition between company law come to two different conclusions, both assume that there is regulatory competition and that there is a tendency to an equilibrium on the market for company laws. But there may also be the possibility of no regulatory competition or only a very clumsy one. If that were the truth there would be neither a "race to the top" nor a "race to the bottom". The third (and clearly the smallest) camp investigates factors reducing regulatory competition. These scholars are mainly concerned with legal path dependencies and legal lock-ins.[7]

All the different economic factors that may work against the formation of a market for company laws cannot be described.[8] In short, these factors put forward the empirical existence of economies of scale and scope in the production and adoption of company law, which leads to the situation of natural monopolies in the supply of company law. In the case of natural legal monopolies the introduction of regulatory competition can lead to two stable solutions.

The first is that despite the possibility of choice of law, firms will stick to their initial choice. Because the right to choose also implies the right not to choose, regulatory competition may simply not take place and the initially given structure and qualities of company laws will remain in place. In the second case regulatory competition takes place but it leads to a hegemonic company law. That means the company law with the initially largest economies of scale and scope will outperform the other company laws, no matter whether the legal designs of the abandoned company laws are better. The crucial point of path dependence is that in both cases it cannot be assumed that regulatory competition will select welfare increasing company laws, and strictly speaking it is impossible to make any statement about the economic efficiency of law.[9]

So far we have said nothing about the legal framework in which competition between company laws has to be embedded. We have only given a rough outline of the "pure" theory of regulatory competition between company laws without reference to the competitive order at the institutional meta-level. Also, we gave no empirical account of the most realistic scenario. But it seems that all three scenarios might happen in reality.

In the following, our main concern is the question of the elements to which a competitive order should draw special attention in order to introduce workable regulatory competition between European company laws. The aim is to identify the institutional categories that have to be adjusted to start a regulatory "race to the top" and – vice versa – to avoid a "race to the bottom" in the aftermath of the Überseering decision.

Properties of a Legal Meta-frame

To start with, it is useful to remember what the meaning of company law in general is. From a contractual point of view company law is a standard form contract. One simple explanation why company law is a standard form contract is that it saves transaction costs. Parties that want to set up a business do not need to enter into long and expensive negotiations to write down a company contract, they can use the standard form that has been approved for running businesses.

However, even a highly elaborated company law is always incomplete, which means that there are always future contingencies with which the default rules of company law cannot deal. In order to complete the company contract the help of a third party is needed who is able to balance company conflicts. So we can say that (a complete) company law has a contractual *ex ante* component and a contractual *ex post* component. While the *ex ante* component consists of the parties' contractual will, the *ex post* component refers to a third party to resolve conflicts that were not foreseen when the company was set up. From this, a competitive order or meta-frame follows that guides the competition between company laws, which has to take into account both the *ex ante* and the *ex post* components of company law. We shall start with a discussion of the *ex ante* component, but then we shall open the perspective to the *ex post* component of company law,

[7] M.J. Roe: Chaos and Evolution in Law and Economics, in: Harvard Law Review, Vol. 109, pp. 641-668; M. Klausner: Corporations, Corporate Law, and Networks of Contracts, in: Virginia Law Review, Vol. 81, 1995, pp. 757-852.

[8] For more details see: K. Heine, W. Kerber: European Corporate Laws, Regulatory Competition and Path Dependence, in: European Journal of Law and Economics, Vol. 13, 2002, pp. 47-71.

[9] O.A. Hathaway: Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, in: Iowa Law Review, Vol. 86, 2001, pp. 601-665.

which might also be of interest in the aftermath of the Überseering decision.

Choice of Law – the *ex ante* Perspective

As mentioned above, in the field of company law it is possible to employ the so-called "real seat theory" or the "incorporation theory" as the governing conflict of law rule. If the "incorporation theory" is in place a firm's option to exit one company law and to enter into another one are increased enormously. On the other hand, if the "real seat theory" becomes the governing conflict of law rule then firms have fewer opportunities to switch from one company law to another. So we may conclude that the "real seat theory" and the "incorporation theory" are meta-rules which adjust the level of regulatory competition in the market for company laws.

The appropriate amount of exit options in the market for company laws depends on whether or not competition between company laws works. Those who believe that it works will advocate the "incorporation theory", while those who do not believe that it works will argue in favour of the "real seat theory". But the long-standing controversy regarding competition between company laws shows that we can neither simply assume nor deny the workability of regulatory competition. The point is that we can imagine more complex regimes of meta-rules that may facilitate a workable competition of company laws. For example, it may be considered implementing the "incorporation theory" in the EU but excluding all company law rules concerning take-overs from regulatory competition and harmonising them at the EU level. Or there may be some fields of company law that are completely deregulated and left to the will of the parties, without any intervention from the EU or the Member States. If this is the case we shall also have regulatory competition between privately construed institutions that belong close to the domain of company law. From a theoretical viewpoint co-determination might be a candidate for deregulation and institutional competition; if co-determination is productive then firms may introduce it voluntarily.[10]

To sum up, choice of law rules can be used to design the meta-order at the EU level that determines how powerful regulatory competition between company laws will be. But in our opinion it makes sense neither to argue in favour of a ruthless regulatory competition nor to condemn regulatory competition. We are of the opinion that there is a need for more complex meta-rules which can deal carefully with the "race to the bottom" problem and legal path dependencies in a European context.

However, appropriate choice of law rules alone will not be sufficient to initiate regulatory competition in the field of company law because – a fact which is often not recognised – choice of law rules are a means to introduce regulatory competition only on the *ex ante* component of company law. Therefore, choice of law rules, which are only a part of the incorporation puzzle, have to be complemented by choice of forum rules. This will be explained below.

Choice of Forum – *the ex post* Perspective

From the perspective of a "complete" company law contract it seems reasonable to extend our discussion to the contractual *ex post* component. The "choice of forum" question is of great importance here. What is meant by the term "choice of forum" is that parties have a choice between different courts or arbitration agencies to resolve corporate conflicts. For example, a Dutch BV may choose an English court because the parties are of the opinion that English courts have the best expertise for resolving a conflict.

Needless to say, if choice of forum is allowed there will be competition between forums. Competition between courts and court systems leads to some interesting consequences that we shall briefly discuss. A first consequence is the introduction of incentives to the court system. Because lawsuits bring money to a jurisdiction's court system and to the law industry, i.e. lawyers and law firms, it is profitable to supply attractive court systems and legal procedures.

Besides the competitive stimulus to court systems, choice of forum allows jurisdictions to specialise in a subgroup of questions concerning the interpretation of company law, e.g. one jurisdiction may be a specialist for directors' liability, another may be a specialist for mergers and so on. We may interpret this as a legal division of labour that enhances the productivity of the entire legal system. Another implication of choice of forum is that a jurisdiction that is able to attract legal disputes may have the advantage of being the first jurisdiction to spot new company law problems, e.g. special problems that occur mainly in the growing IT business. This knowledge can be used to improve the *ex ante* component of company law and to increase the number of future incorporations.

From the perspective of European company law an interesting feature of choice of forum is its capability to

[10] E.G. Furubotn: Codetermination and the Efficient Partitioning of Ownership Rights in the Firm, in: Journal of Institutional and Theoretical Economics, Vol. 137, 1981, pp. 702-709.

act as a substitute (to a certain degree) for a restrained choice of law. There may be a restriction on choice of law if for instance a jurisdiction enforces parts of its company law on its territory or if jurisdictions have harmonised parts of their company law.[11] Such an absence of choice of law and regulatory competition can lead to the negative consequence that the *ex ante* component of the offered company is weakened. But if it is possible to choose between courts, a weak *ex ante* component of company law may be substituted for in part by a strong *ex post* component. Furthermore, it is highly probable that the Überseering decision will trigger a discussion about the possibilities in the EU of choosing between different forums. It would be reasonable if law and economics scholars undertook deeper investigations into the connection between choice of law and choice of forum.

The Freedom of Pricing Company Law

Up to this point we have dealt with problems that have to do with the EU's prospective transition to the "incorporation theory" as the dominant conflict of law rule. Now we shall turn our attention to a fiscal matter that is a decisive factor in initiating regulatory competition between European company laws.

The incentive to create new legal solutions or to adapt company law to the legal preferences of its customers is strengthened if jurisdictions can price their legal products. An example of pricing legal products is the pricing of company laws in the United States. In the United States the states can freely decide how much they want to take from firms for incorporation in the form of franchise taxes and incorporation fees. And in some states we find highly sophisticated and effective systems of pricing company law.[12] Since it would take too long to explain the pricing schemes in detail here we shall refer only to the basic problems of pricing legal products.

As on ordinary markets a precondition for the workability of the price mechanism on company law markets is that there is a sufficient number of competitors who independently adjust prices, or that there are at least no barriers to entry for potential competitors (potential competition). Whether these preconditions are given on the market for company law is a fiercely disputed topic in the company law literature.[13] But although market failures on the market for legal products sometimes lead to the pricing of legal products above marginal costs, this situation has to be compared with a situation in which there is no choice of law and jurisdictions claim a regulatory monopoly. So we have to compare the costs of a regulatory monopoly when competition is absent by coercion and the costs of a regulatory monopoly that may grow out of a competitive process. In the latter case potential competition may serve as a safeguard that the price of the offered legal product will not exceed a certain level and that the quality of the offered legal product is constantly adapted to the customers' preferences. Certainly, if the "real seat theory" is in place, the pricing of company law is unnecessary. However, the denial of choice of law and non-adjustment of legal products may lead to additional costs if poorly designed company law has to be substituted for with the help of private governance mechanisms or private ordering.[14]

Although we could imagine a jurisdiction that gains a position as a "legal monopolist" and that raises its price for company law severely, there is up to now no empirical evidence that this scenario has ever happened in regulatory competition.[15] On the contrary, when regulatory competition is absent the customers of a legal system often face the problem of inferior legal rules. It seems reasonable to empower EU Member States to price their legal products in the area of company law. Nevertheless, it might be a good idea to have a legal procedure and a committee to watch over the pricing of legal products. Perhaps it would also be possible to extend antitrust law to the area of interjurisdictional competition.

"Product Markets" and "Factor Markets"

Since we have pointed out that company law has a contractual *ex ante* and a contractual *ex post* component, and that legal products should have a price, we shall direct our attention to a final aspect that may arise in the aftermath of the Überseering decision. This concerns the vertical relation between legal product markets and legal factor markets. In terms of economics, the production of legal products needs some input that becomes transformed into legal output. What are these inputs? And what role do they play in the crea-

[11] For instance, in the United States considerable parts of insolvency law are harmonised but parties can choose between the states for legal conflict resolution. In this case the states compete with the aid of attractive legal procedures.

[12] M. Kahan, E. Kamar: Price Discrimination in the Market for Corporate Law, in: Cornell Law Review, Vol. 86, 2001, pp. 1206-1256.

[13] For an overview see: R. Romano: The Genius of American Corporate Law, Washington 1993.

[14] For the need for "legal substitution" in general see: R. La Porta, F. Lopez-de-Silanes, A. Shleifer, R.W. Vishny: Law and Finance, in: Journal of Political Economy, Vol. 106, 1998, pp. 1113-1155.

[15] R. Romano: The Genius of American Corporate Law, Washington 1993.

tion of a meta-order for a regulatory competition of European company laws? The most important input factors in the production of company law are organisational capacities, such as courts, legal administration and legislation, and human capital, such as judges and lawyers. We shall concentrate our attention on the second category: human capital.

It is obvious that the quality of law depends crucially on the capabilities of judges and lawyers who are the intermediaries between the written legal codes of company law and the customers of company law. The power of a company law essentially depends on the intellectual input of judges and lawyers. From the perspective of law and economics we therefore have to ask which meta-rules will efficiently link the human capital of judges and lawyers to European company laws.

The answer is that interjurisdictional competition can also help solve this problem. If judges and lawyers can move freely between jurisdictions and offer their services the quality of legal products will be enhanced. The first reason why the freedom of establishment of judges and lawyers should be an essential part of a meta-order for competition between European company laws is that specialised human capital can match up with the company law or forum with which the "joint legal output" is maximised. The second reason is that jurisdictions can try to improve their legal products by attracting highly skilled judges, which also will attract highly skilled lawyers.[16]

Additionally, interjurisdictional competition for the attraction of "human legal capital" has a stimulating effect on judges and lawyers because they will be confronted with increasing competition on the labour market for judges and lawyers. Of course, such an increase in competition on the market for legal services may be not welcomed by incumbent judges and lawyers, who may try to restrict competition with the help of barriers to entry, such as the need for special qualifications that are difficult for foreign lawyers and judges to acquire. These forms of cartelisation of legal services may lead to a severe restriction of the workability of the market for legal products. Therefore, a meta-order will also have to fight against pressure groups which restrain competition on legal factor markets.[17]

Final Remarks

The task of this contribution has been to present an outline of some important questions that are related to the recent Überseering decision by the ECJ. In conclusion, the strengthening of choice of law in the field of company law by the Überseering decision may lead in the near future to the mutual recognition of national business forms by the European Member States. Certainly, there will be Member States, such as Germany, that will fight vigorously against the influx of foreign business forms, and there will be highly sophisticated judicial discussions, too. Another related question will be the impact of the creation of an EU business form like the Societas Europaea (SE).[18] Although up to now it is not possible to make an assessment as to the impact the SE will have in the future, it is clear that the SE is an attempt to prevent regulatory competition and to preserve national modes of corporate governance, as for example the German co-determination or the requirement of minimum standards of legal capital. On the other hand, as long as the SE is not mandatory, the different European company laws will face growing regulatory competition. But if this is true it becomes necessary to discuss the appropriate features of a regulatory framework that will guide the competitive race of company laws towards the top. In this regard we have identified four essential fields that have to be managed by a legal framework at an EU wide level.

- The guarantee of choice of law is the core feature to enable competition between company laws in the EU.
- The introduction of choice of forum is an important complementary feature to the guarantee of choice of law.
- The pricing (in the form of franchise taxes and fees) of company law by the Member States amplifies the jurisdictions' incentives to improve their company law.
- Legal product markets are vertically linked to legal factor markets. Therefore, interjurisdictional competition on legal factor markets may also be an important feature for enhancing competition between company laws.

In the aftermath of the Überseering decision these four fields will soon be on the agenda of European courts, and it seems to us that the "law and economics department" can contribute substantially to finding efficient legal solutions.

[16] An illustrative example for the case of Delaware is given by W.T. Allen: The Pride and the Hope of Delaware Corporate Law, in: Delaware Journal of Corporate Law, Vol. 25, 2000, pp. 70-78.

[17] For an overview of the freedom of movement in the EU for workers and the urgent need to develop a regulatory framework (meta-order) to guarantee this freedom, see: J. Pelkmans: European Integration, second ed., Harlow 2001, pp. 165.

[18] C. Teichmann: Die Einführung der Europäischen Aktiengesellschaft, in: Zeitschrift für Unternehmens- und Gesellschaftsrecht, Vol. 31, 2002, pp. 383-464.