

# Discussion Report: Cost-based and Rule-based Markets for Rules in Corporate Law

by

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In the beginning of the discussion Dr. *Arkadiusz Radwan* doubted the conclusions of Prof. *Marco Ventoruzzo* concerning the European market for corporate charters. He pointed out that the distinction between cost-based and rule-based markets was non dichotomous, as rules are a cost factor too. Moreover *Radwan* challenged the argument of *Ventoruzzo* that there was already a responsive competition in the European Union. For that conclusion too many variables would be still unknown. *Radwan* referred to the actual exporting member states that were not active so far. These states were even confronted with additional problems because of foreign incorporators. Especially the German companies would not apply the accounting rules in a proper way. Also other would-be exporting states as Austria, Luxembourg, Estonia or Malta do not prove committed to entering the race. Moreover *Radwan* referred to the East European member states that were supposed to classic importing states. In these states the incorporation of a business would still be a long and complex process, particularly in Poland and Hungary. Nevertheless the number of foreign corporations would be rather small. Additionally *Radwan* observed that the distinction between rule based and cost based competition can be somehow blurred, as rules also represent possible costs and possible benefits. Dr. *André Westhoff* added that the majority of the English companies in Germany does not comply with the applicable English accounting provisions. As the consequence many of these corporations will face serious sanctions by the Companies House as the responsible English authority in this regard. Dr. *Matthias Schüppen* referred to the further prospects of the Societas Europaea as more theoretical option in this discussion. Moreover *Schüppen* explained the difference between the cost based approach as short term development. In the long run these differences between the member States would disappear and also the European market for corporate charters would become a rule based market. Prof. Dr. *Holger Fleischer* added to the discussion that the main difference between the U.S. and the

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European market were the structure and the focus of both markets. While the U.S. market was dominated by listed corporations with a certain amount of capitalization the European market knew only unsophisticated players in the form of mainly small businesses that hardly knew to use the advantages of other legal regimes. Prof. Dr. *Heribert Hirte* agreed with the approach of *Ventoruzzo*. The European market for corporate charters would exist and develop in considerable way. *Hirte* referred especially to the recent activities of the Companies House that would publish its information also in German to reach especially the German incorporators. Moreover the British government would welcome this development as an export strategy of the English legal system in Europe. Nevertheless there would be some fear in the United Kingdom of a harmonization of the law of limited liability companies by the European legislator. Concerning the magnitude of the market *Hirte* doubted that the European market would be as strong as in the U.S. *Radwan* replied that the mere fact of publishing information in German by the Companies House would not mean that the British government is supporting this development. It could also simply be an approach of limiting the negative effects if this development.

Prof. Dr. *Hans-Friedrich Müller* doubted the significance of the still existing barriers in some member states concerning the freedom of movement of the registered office to another member states which was not addressed in the recent judgments of the European Court of Justice so far. The implementation of the cross-border mergers directive (directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies) would offer an alternative option for these cases. Mr. *Christopher King* and also Prof. *Federico Mucciarelli* added that for practical reasons the difference of these cases would hardly exist.

In his final remarks *Ventoruzzo* underlined that, as explained in his paper, the expressions cost based and rule based markets for rules are labels used to evoke with a catch-phrase the fact that in some systems regulatory competition revolves primarily around the short-term, costs of the incorporation process, including minimum legal capital; while in other systems regulatory competition is affected primarily by regulatory differences concerning the internal affairs of the corporation. In this respect, it is obvious that also (some) rules might be examined in terms of costs and benefits, the distinction drawn should not be taken literally but rather as describing two models of charter competition in corporate law. As to the actual reactions of the member states as the participants of the supply side of the market he referred to the actual developments in the Spanish and French Corporate Law. Both member states had adopted a new legislation reducing the costs of the process of incorporation in a significant way. In addition, he reminded that in the

U.K., the Department of Trade and Industry has formally and explicitly indicated the ability to attract incorporating corporations as a goal of corporate law. Also in the recent reform of Italian corporate law the legislature expressly pursued the competitiveness of the corporate legal system and the ability to attract foreign corporations. If those elements are not enough, the recent increase of the number of corporations operating in one State but incorporated abroad after the ECJ decision, suggests that this phenomenon can no longer be ignored.