Balancing entrepreneurial freedom and creditor protection in company and insolvency law: German and European Union perspectives

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This article will examine attempts to reform the law of private limited companies in Germany through the introduction in November 2008 of the Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (Law for the Modernisation of the Private Limited Companies Act and to Combat its Abuse). The law will be measured against the German Parliament’s stated aims of enhancing corporate flexibility and maintaining sufficient creditor protection. It will also be viewed within the wider context of European Union market integration, analysing the impact of the freedom of establishment on domestic legal regimes, as well as important questions about the nature of company law regulation in a transnational context.

1 Introduction

The German Law for the Modernisation of the Private Limited Companies Act and to Combat its Abuse1 illustrates the difficult balancing act between promoting entrepreneurship and creditor protection in private limited companies. The MoMiG can be seen as a direct response to recent European Court of Justice (ECJ) decisions, the growing use of English corporate forms in Germany and concerns about the perceived direct and indirect costs of German company law. Significant changes have occurred in the areas of ease of incorporation, minimum capital requirements and the responsibilities of directors and shareholders. Measured against stated policy goals, the flexibility and speed of incorporation in Germany has been enhanced and creditor protection gaps filled, although several challenges remain.

The tension between securing ease of establishment and sufficient creditor protection also arises at the European Union (EU) level. Recent decisions and legislative changes have sought to reconcile the freedom of establishment, guaranteed in Arts 49 and 54,2 with the prevention of internal market manipulation. These decisions have improved clarity in relation to conflict of laws issues, though left open areas of legal uncertainty in company and insolvency law. The freedom of establishment is emerging as a dynamic

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1 Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen [Law for the Modernisation of the Private Limited Companies Act and to Combat its Abuse] (Germany) 1 November 2008, BGBI I, 2026 (MoMiG).

principle of EU law, yet national and EU legislators have responded to its consequences with differing mechanisms and underlying regulatory goals. The greatest challenge lies in harnessing the benefits of corporate mobility, while developing complementary national and EU legal regimes to deal with the increasing cross-border interactions, accelerated business transactions and creditor protection concerns of the twenty-first century.

II The freedom of establishment: A catalyst for regulatory competition

Although the EU does not yet live up to Sir Winston Churchill’s dream of a ‘United States of Europe’, parallels have been drawn between the US competitive federalism model and the nature of regulatory competition in the EU. This model provides insights into the relationship between regulation at a local and transnational level, suggesting that in a free market, incorporators have an incentive to establish in a jurisdiction with favourable company law provisions. Owing to the lucrative nature of incorporations, in terms of employment creation, revenue and use of business services, states are pushed to redesign their company law systems in order to attract incorporations. The ultimate result, according to this model, is convergence around the most competitive corporate law standards.

It is arguable that the preconditions for regulatory competition have been met in the EU, in the form of companies’ guaranteed freedom of

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7 Barnard and Deakin, above n 6, p 218.
establishment. The ECJ has played a pivotal role in resolving conflict of law issues around the incorporation and legal capacity of EU companies. In recent jurisprudence, it has expressed preference for the ‘incorporation theory’ over the ‘real seat theory’, holding that a company’s establishment and functioning will be determined by the member state of incorporation, rather than the state in which it has substantial operations. As such, member states are precluded from imposing additional requirements on the incorporation or functioning of foreign companies. They cannot ignore a foreign company’s legal capacity or refuse to register a branch, even if a company was formed solely for the purpose of avoiding stricter requirements in another jurisdiction. These judgments have made it easier for companies to move within the EU and choose an incorporation regime attractive for their business purpose and activities.

In turn, increased corporate mobility has heightened pressure on member states to adjust national company law standards. Faced with true freedom in the selection of a corporate form, many entrepreneurs have sought to escape the strictures of national incorporation requirements, through establishing in another member state, such as through the incorporation of a private limited company in England in Wales. In 2008, the English limited company was

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9 FEU, above n 2, Arts 49, 54.
10 Centros Ltd v Erhvervs-og Selskabstyrelsen (C-212/97) [1999] ECR I-1484 at [17], [27] (Centros); Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd (C-16701) (2003) ECR I-10155 at [3], [95], [105], [122] (Inspire Art); Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) (C-208/00) [2002] ECR I-09919 at [56], [59], [81]–[2] (Überseering).
11 Ibid.
12 Überseering (C-208/00) [2002] ECR I-09919.
14 Centros (C-212/97) [1999] ECR I-1484 at [17], [27]; Inspire Art (C-16701) [2003] ECR I-10155 at [91], [95]–[96], [98], [120], [139].
15 Chalmers, Davies and Monti, above n 5, pp 702–3; Dashwood et al, above n 6, p 650; Johnston and Sypris, above n 8, at 395; Siems, above n 8, at 54; Teichmann, above n 8, pp 158, 168.
one of the highest and most consistently growing corporate forms in Germany, with an average increase of 15.4% per year. By 2009, there were 17,524 English limited companies registered in the German commercial register. In response to these pressures, company law reforms have taken place in many member states to enhance the flexibility of arrangements and strengthen corporate governance in small and medium enterprises.

The increased mobility of EU companies invites debate about the consequences of regulatory competition. Heralded, on the one hand, as an impetus for experimentation and innovation, regulatory competition is credited with enhancing the quality and efficiency of company law regimes. Corporate exits, under this logic, function as useful early indicators. They serve inter alia to highlight inefficient or problematic aspects of a state’s company law system and produce domestic discussion on the ideal distribution of costs and risks between shareholders, directors and creditors. Nonetheless, regulatory competition is not without its detractors. Chief among concerns is that it can precipitate a reduction in standards, resulting in a legislative regime skewed in favour of those able to successfully manipulate the threat of exit, at the expense of less mobile economic actors.

Overall, the model of regulatory competition provides an explanation of recent EU trends in market access and harmonisation. However, important questions also emerge. Has competitive pressure led to the privileging of entrepreneurial interests, at the expense of creditors, in national and transnational settings? How can the benefits of regulatory diversity be maintained within a common EU company and insolvency law framework? These questions, influenced by their wider political, economic and social context, will be dealt with first at a national level and subsequently, in cross-border relations.

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18 Ibid.

19 See generally Dashwood et al. above n 6, at 718; Johnston and Sypris, above n 8, at 396; Schall, above n 8, at 1535; Siems, above n 8, at 56; Witt, above n 8, at 876–7, 886, 903, 905–6, 920, 925–9.

20 See generally Bebchuk, above n 6, at 1445, 1457; Chalmers, Davies and Monti, above n 5, at 707; Deakin, above n 6, pp 441–3; Johnston and Sypris, above n 8, at 391.

21 See generally Barnard and Deakin, above n 6, p 4, 35; Bebchuk, above n 6, at 1457; Deakin, above n 6, pp 441–3; Johnston and Sypris, above n 8, at 392, 394.


23 Chalmers, Davies and Monti, above n 5, pp 683–4, 700.
III The rise of the mini-GmbH

Ripples of legislative change in Europe, which followed the ECJ’s influential recent decisions on the freedom of establishment, extended to Germany in 2008 with the creation of the *Unternehmergesellschaft (haftungsbeschränkt)* (UG, mini-GmbH). Competitive pressure and the perceived costs of German company law were a major impetus for modernisation, as well as the desire to protect third parties against corporate abuse.24 The Federal Government placed emphasis on maintaining existing comparative advantages, such as the legal capital system,25 while simultaneously consolidating many areas of company law to make incorporation easier, faster and cheaper.26 As it noted, the reform has both legal and political significance:27

[Mit der Reform] wird ein rechtspolitisches Signal gesetzt, dass die Gründung einer GmbH sehr kostengünstig, unbürokratisch und schnell erfolgen kann.28

Parliament emphasised the necessity of protective safeguards for creditors, to reduce information asymmetries, divergent interests and imprudent risk-taking.29 The *MoMiG* thus has two major regulatory goals at its crux: facilitating new commercial enterprises and preventing corporate abuse.30

A Scope of reform

In light of the German Parliament’s dual policy aims, three components of the *MoMiG* deserve specific attention, namely the ease of incorporation, minimum capital requirements and responsibilities of directors and shareholders.

26 Beurskens and Noack, above n 16, at 1070; Explanatory Memorandum, *MoMiG*, above n 24, pp 1, 58, 63.
28 The reform is designed to send a political and legal signal that the establishment of a GmbH can be carried out very cheaply and quickly, without excessive bureaucratic requirements’ [author’s trans].
Incorporation requirements

The previous German incorporation regime, notorious for its perceived lengthy, strict and expensive requirements, led many entrepreneurs to opt for the faster and simpler process in England. In response, changes to public licences, notary involvement and electronic registers have been pursued.

(a) Public licences

Previously, incorporators were required to obtain a public licence prior to registration, if a licence was required for the company’s future business activities. Licensing bodies often required proof of a company’s incorporation, yet incorporation was only possible after licences had been issued. A common practice was to narrowly define a company’s business activities at incorporation and then seek amendment of these purposes and the necessary public licences thereafter. The MoMiG has delinked both conditions, eliminating the need for public licences as a precondition for registration.

(b) Notary involvement

Similarly, the involvement of notaries in the incorporation process has been streamlined. A notary is still responsible for reading out articles of association, verifying the identity of parties and registering the incorporation documents. However, a standard form of notarisation has been introduced to reduce costs and speed up the process in uncomplicated incorporation cases. Notaries still retain an advisory role, but bear the onus of convincing clients that they require advice surpassing the standard form.

(c) Use of electronic processes

The use of electronic processes is also designed to speed up the incorporation process. The filing of incorporation documents can now take place through electronic communication between a notary and the commercial register and details of companies’ registered offices will be available publicly on the electronic company register.

(d) Evaluation

The MoMiG legislative package represents a considerable effort to liberalise the process of incorporation. Demonstrated by the huge take up of the

References:

31 Beurskens and Noack, above n 16, at 1070; Eidenmüller, above n 5, at 717; Explanatory Memorandum, MoMiG, above n 24, p 56; Teichmann, above n 24, at 20–1. See generally Eidenmüller, above n 5, at 714.
33 Ibid.
34 Ibid.
36 Beurskens and Noack, above n 16, at 1073; Explanatory Memorandum, MoMiG, above n 24, p 65; Teichmann, above n 24, at 21.
37 ‘Musterprotokoll’.
38 Explanatory Memorandum, MoMiG, above n 24, p 2; MoMiG § 1(2); Teichmann, above n 24, at 21.
39 Beurskens and Noack, above n 16, at 1074; Teichmann, above n 24, at 21.
40 Teichmann, above n 24, at 21.
mini-GmbH in recent years, the reform appears to have delivered on its promise of making German corporate forms more attractive and competitive.\textsuperscript{42} In 2010, the number of UGs registered in Germany officially surpassed English limited companies for the first time.\textsuperscript{43} Especially as the \textit{MoMiG} only entered into force on 1 November 2008, the huge growth in UG registrations is astounding, rising from 1200 in 2009 to 23,369 in 2010.\textsuperscript{44} The increased flexibility appears to have played a large role in this development. Referring to the 1,874.4\% growth rate in UG registrations between 2009 and 2010, Kornblum declares that the \textit{MoMiG} concept has proven its worth.\textsuperscript{45} In addition to its popularity, legal commentators predict that the process of incorporation will be substantially faster, owing to the phasing in of electronic processes and delinking of public licence requirements from registration.\textsuperscript{46} It should now be possible to establish a GmbH or UG in the space of a few days, or within 24 hours in the case of off-the-shelf acquisitions.\textsuperscript{47}

Nonetheless, the failure to introduce model articles of association has been looked upon by business representatives as a missed opportunity.\textsuperscript{48} Such a proposal would have removed the need for notary involvement in straightforward cases.\textsuperscript{49} Despite the introduction of a standard form, concerns remain about the time-consuming nature of notary involvement and suggest that it could be simply ‘leere Förmelei’ (an empty formality) in many cases.\textsuperscript{50}

Responding to this critique, the retention of notary involvement has been justified as a means of providing comparably cheap legal advice and preventing mistakes, omissions and fraud in the filing of registration documents.\textsuperscript{51} In its response to the \textit{MoMiG} Bill, the \textit{Bundesrat} (Federal Council of Germany) described notary involvement as an opportunity for small and medium-sized businesses to raise important questions and clarify uncertainties on the content, effect or interpretation of articles of association.\textsuperscript{52} Notaries’ expertise in this area is considered particularly attuned to the tasks of fraud prevention and verifying directors’ identities, rather than shifting these responsibilities to public register officials.\textsuperscript{53}

The \textit{MoMiG} is expected to lower bureaucratic hurdles and speed up incorporation, whilst simultaneously maintaining the integrity of the process through continuing notary involvement.

\textsuperscript{42} Explanatory Memorandum, \textit{MoMiG}, above n 24, p 76; Teichmann, above n 24, at 22, 24.
\textsuperscript{43} Kornblum, above n 17, at 746; Udo Kornblum, ‘Unternehmensrecht: Die UG hat die Ltd überholt’ [Company Law: the UG has surpassed the Ltd] (2010) 4 \textit{GmbH-Report: Recht und Wirtschaft für die GmbH} 53 at 53.
\textsuperscript{44} Kornblum, above n 43, at 746.
\textsuperscript{45} Kornblum, above n 17, at 746.
\textsuperscript{46} Alio, above n 24, at 59; Beurskens and Noack, above n 16, at 1074–5.
\textsuperscript{47} Teichmann, above n 24, at 21.
\textsuperscript{48} Explanatory Memorandum, \textit{MoMiG}, above n 24, pp 176, 178.
\textsuperscript{49} Ibid, p 65.
\textsuperscript{50} Explanatory Memorandum, \textit{MoMiG}, above n 24, p 60.
\textsuperscript{51} Ibid, p 148; Teichmann, above n 24, at 21.
\textsuperscript{52} Explanatory Memorandum, \textit{MoMiG}, above n 24, pp 147–8.
\textsuperscript{53} Ibid, pp 64, 149–50.
2 Minimum capital requirements

The original minimum capital requirement of €25,000 was a lynchpin of creditor protection in the GmbHG. However, this requirement has come under increased scrutiny, due to the influence of foreign €1 companies and the ECJ’s refusal to recognise this as a legitimate restriction on the freedom of establishment.

(a) Legislative changes

The creation of the UG, a variant of the regular GmbH, could well be the most significant aspect of the MoMiG legislative reform, or at least the most controversial. Under the new system, incorporators can choose to establish a regular GmbH, which retains the previous €25,000 capital requirement; or to establish an UG, for which minimum capital requirements have been removed. All share contributions must be paid up in full prior to the registration of an UG, and the company must place one-quarter of its annual profits into a reserve fund. If a mini-GmbH increases its initial capital to above the €25,000 minimum, it may elect to transform into a regular GmbH, but this is not automatic.

(b) Evaluation

The decision to retain minimum capital requirements for regular GmbHs has provoked considerable debate. Commentators assert that the legal capital system may be prohibitive for small enterprises, especially in light of Germany’s changing commercial scene towards service industries. According to critics, minimum capital requirements should be reduced or removed and creditor protection pursued through other means.

Nonetheless, entrenched opposition in many corners of the business, political and legal worlds made removal of the €25,000 minimum impossible. The requirement has been rigorously defended on the grounds of creditor protection and fraud prevention.

54 Schall, above n 8, at 1543.
57 Ibid, § 5a (1).
58 Ibid, § 5a (2).
59 Ibid, § 5a (3).
60 Ibid, § 5a (5); See also Alio, above n 24, at 59; Veil, above n 55, at 625-6.
61 Explanatory Memorandum, MoMiG, above n 24, p 69; Teichmann, above n 24, at 22.
63 Ibid, p 70.
65 See Beurskens and Noack, above n 16, at 1091; Explanatory Memorandum, MoMiG, above n 24, p 76; Teichmann, above n 24, at 22; Veil, above n 55, at 626.
66 Explanatory Memorandum, MoMiG, above n 24, p 76; Inspire Art (C-167/01) [2003] ECR I-10155 at [110] (Chamber of Commerce, Netherlands, German and Austrian Governments) (during argument).
initial hurdle that ensures adequate financing and a level of seriousness amongst incorporators. Many business representatives expressed concern that a reduction or removal would undermine the GmbH’s reputation as a reliable and trustworthy corporate form.

The creation of the UG was an attempt to placate both camps, without the need for excessive regulation, and represents a significant development in the German company law landscape. Improving the transitional arrangements between UG and GmbH companies would maximise their comparative advantages and grant entrepreneurs the flexibility to choose a form that best suits their initial capital, commercial purposes and expansion of activities over time.

3 Responsibilities of directors and shareholders
While the traditional thrust of German company law has been to rely on a combination of capital maintenance requirements and director and shareholder responsibility, the MoMiG has introduced additional liability for management and members, especially in situations of crisis and insolvency.

(a) Directors’ duties
Many directors’ duties have been relocated from company to insolvency law, such as the duty to file for insolvency within a maximum period of three weeks after a company’s illiquidity or over-indebtedness. Further responsibilities include the obligation to call a general meeting in the event of...

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67 See, eg, Explanatory Memorandum, MoMiG, above n 24, pp 69, 74, 76; High Level Group of Company Law Experts, above n 64, pp 23, 25; Inspire Art (C-167/01) [2003] ECR I-10155 at [110] (Chamber of Commerce, Netherlands, German and Austrian Governments) (during argument); Steffek, above n 29, pp 310–1, 321; Teichmann, above n 24, at 22; Überseeing C-208/00) [2002] ECR I-09919 at [16], [87] (German Federal Supreme Court) (during argument); Veil, above n 55, at 627–8.

68 Explanatory Memorandum, MoMiG, above n 24, pp 74, 76; Teichmann, above n 24, at 22.


70 Alio, above n 24, at 59; Beurskens and Noack, above n 16, at 1092.

71 Explanatory Memorandum, MoMiG, above n 24, pp 77, 152; Veil, above n 55, at 624, 627.


74 Teichmann, above n 8, p 176; Veil, above n 55, at 636.

75 Bürgerliches Gesetzbuch [Civil Code] (Germany) § 823(2) (BGB); GmbHG § 64(1); Insolvenzordnung [Insolvency Statute] (Germany) 5 October 1994, BGBl I, 1885, §§ 15a(1), 4, 18(2) (InsO); Strafgesetzbuch [German Criminal Code] (Germany) § 283 (StGB).
an UG’s imminent illiquidity, and the prohibition on payments made after a company’s illiquidity or over-indebtedness.

(b) Shareholder responsibilities

Shareholder responsibility has also been sharpened in corporate abuse situations. Where there is no management available, shareholders have a duty to file for insolvency within three weeks. This responsibility can only be avoided if a member lacked positive knowledge of the absence of management and of the company’s illiquidity or over-indebtedness. Shareholders may also be liable under Existenzvernichtungshaftung, where they intentionally interfere in a company’s activities and thereby destroy its economic base, through actions such as transferring assets to a separate legal person, materially undercapitalising the company, or knowledgeably allowing a director to frustrate creditor interests.

(c) Evaluation

At the same time as incorporation requirements have been liberalised, the MoMiG introduces greater compensatory and liability measures in insolvency law. Mirroring the approach taken by adherents of the incorporation theory, such as England, the MoMiG strengthens directors’ responsibilities in crisis situations, in order to prevent behaviour that might jeopardise the interests of the company, shareholders and creditors. These duties provide directors with an impetus to remain abreast of financial developments, provide shareholders and creditors with sufficient information and maintain assets in an insolvency context.

Nonetheless, shareholders’ heightened responsibility in Germany differs markedly from the traditional English approach. Under the common law, shareholder liability is exceptional and established on a case-by-case basis, mainly in the context of small limited companies, where the corporate structure is used to perpetrate fraud, for the sole or dominant purpose of

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76 GmbH § 5a(4).
77 Ibid, § 64 (3); Beurskens and Noack, above n 16, at 1082.
78 F Steffek, ‘Der subjektive Tatbestand der Gesellschafterhaftung im Recht der GmbH zugleich ein Beitrag zum Haftungsdurchgriff’ [The Subjective Elements of Shareholder Liability in GmbH Law — at the same time, a Contribution to Piercing the Corporate Veil] (2009) 64(2) Juristen Zeitung 77 at 80.
79 InsO § 15a(1), (3).
80 Ibid.
81 BGB § 826; See also Beurskens and Noack, above n 16, at 1082; F Steffek, Glaubigerschutz in der Kapitalgesellschaft: Krise und Insolvenz im englischen und deutschen Gesellschafts- und Insolvenzrecht [Creditor Protection and the Corporation: Financial Crises and Insolvency under English and German Company and Insolvency Law], Mohr Siebeck, Tübingen, 2011, pp 832–3, 839–40.
82 Explanatory Memorandum, MoMiG, above n 24, pp 113; Steffek, above n 29, p 315.
83 Eidenmüller, above n 8, at 476; Steffek, above n 29, p 310.
84 Steffek, above n 72, p 1277; Teichmann, above n 8, p 155; Teichmann, above n 24, at 22.
85 Casper, above n 72, at 1137; Schneider, above n 73, at 61; Steffek, above n 29, p 294; Veil, above n 55, at 628.
86 See, eg, Casper, above n 72, at 1127, 1136; Explanatory Memorandum, MoMiG, above n 24, pp 113; Schneider, above n 73, at 59; above n 73, at 296–7; Steffek, above n 29, pp 310–1; Veil, above n 55, at 628, 636, 638.
87 Re Darby; Ex parte Brougham [1911] 1 KB 95; Cf Adams v Cape Industries Plc [1990] Ch
avoiding existing legal obligations or a company is merely an agent for its controllers. Common law jurisdictions have tended to focus on the liability of directors, who, in small companies are likely to be shareholders, rather than on the liability of shareholders per se, through liability for fraudulent trading and wrongful trading. English courts are much less willing to engage in attribution or liability piercing for the benefit of creditors and there is greater reliance on personal guarantees. By comparison, the German statutory scheme is designed to combat abuse in crisis situations, recognising that in the absence of management, a company might otherwise renge on its legal obligations and delay insolvency proceedings, harming the company’s assets and creditor satisfaction claims.

Increased shareholder responsibility could raise concerns about undermining the separate legal entity rationale, through disregarding the distinction between professional management and financing. This could reduce the attractiveness of share capital investment and lead to legal uncertainty about the precise contours of director and shareholder responsibility. However, the line between management and financing of a company is not always clear-cut, especially in small and medium-sized companies. Furthermore, the required elements of subjective intent or positive knowledge would seem to limit shareholder duties to exceptional situations and spare small shareholders from responsibility in most cases. Liability does not extend to gross negligence, creates no duty to inquire and does not produce a standard of care analogous with that of directors. Nevertheless, it is suggested that clear legal criteria should be developed to determine when shareholders’ responsibilities will arise and how these can be discharged, to prevent unreasonable commencement of insolvency proceedings by shareholders.

B The mini-GmbH: A pawn of regulatory competition or a unique regulatory response?

The introduction of the MoMiG in Germany demonstrates the impact of regulatory competition on domestic law. Framed as an explicit attempt to modernise aspects of German company law, it has produced liberalisation of certain requirements and a shift in creditor protection provisions towards insolvency law.99

However, the aim of enhancing the attractiveness of German companies has not necessarily led to a reduction in creditor protection standards.100 An overarching theme of the MoMiG is the desire to improve the competitiveness and efficiency of the company law system as a whole, taking into account the need to prevent corporate abuse and provide predictable and secure conditions for external finance.101 Although the pendulum between entrepreneurial freedom and creditor protection appears to have swung closer in the direction of deregulation,102 German law has not lost its focus on ‘ethical soundness’.103 As the example of England indicates, creditor satisfaction rates are not necessarily undermined in more liberal company law frameworks, owing to the existence of self-protection mechanisms, such as floating charges, shareholder securities and rights to initiate insolvency proceedings.104 The interests of unsecured creditors with low bargaining power are preserved in German law through statutory and individual protection measures.105 Overall, despite closer convergence with the English model,106 the level of compulsory creditor protection in Germany remains higher and self-protection and information mechanisms continue to be available.107

This illustrates the fundamental differences between German and English business law traditions. In England, emphasis is primarily placed on flexibility in the establishment of a company and individual responsibility in the case of creditors.108 The various interests of directors, shareholders and creditors are brought into alignment through comprehensive principles on directors’ duties, disclosure, securities and voidable transactions.109 By comparison, the German system has traditionally devoted greater attention to regulatory safeguards.110 As Bachmann observes:

99 Bachmann, above n 16, at 1063.
100 Steffek, above n 29, p 300.
101 Explanatory Memorandum, MoMiG, above n 24, pp 1.
102 Steffek, above n 29, p 316.
103 Bachmann, above n 16, at 1067.
104 Belchuk, above n 6, at 1489; Steffek, above n 29, pp 298–300.
105 Steffek, above n 29, p 316.
107 Schall, above n 8, at 1540–1; Steffek, above n 29, pp 315–16, 320; Steffek, above n 81, pp 825, 880, 884; Steffek, above n 106, at 595.
108 See generally Steffek, above n 81, pp 787, 878–9.
109 See generally Steffek, above n 29, pp 306–7; Steffek, above n 72, p 1279; Steffek, above n 106, at 595.
Faced with the regulatory choice of either spurring entrepreneurial spirit or protecting the interests of potential creditors, continental legal systems prefer the second option . . . From an economist’s point of view this may turn out to be less efficient than a more liberal regime. But the utilitarian standpoint never was part of the continental legal tradition.\textsuperscript{111}

These underlying differences help to explain why regulatory competition has not produced greater convergence in statutory protection standards, despite general trends towards flexibility in the incorporation process.\textsuperscript{112}

Indeed, the MoMiG can be seen as an attempt to combine the advantages of the English deregulatory flair with traditional regulatory safeguards. It aims to get the best of both worlds through the concurrent easing of some restrictions and introduction of others. The ultimate challenge lies in reconciling the two competing strains. Hailed as ‘the single most important reform of the most commonly used German corporate form’,\textsuperscript{113} the MoMiG clearly demonstrates the tension involved in developing an economically efficient company law scheme, vacillating between private autonomy on the one hand and sufficient state regulation on the other.\textsuperscript{114}

\section*{IV Corporate mobility and creditor protection in the EU}

The dual aims of creditor protection and entrepreneurial freedom become especially murky when applied in a cross-border setting, because of the range of interests, actors and legislative systems at play. Company decisions in incorporation and insolvency have significance not only in a local context, but throughout the highly porous markets of other member states.\textsuperscript{115} Courts are increasingly called upon to consider the legal principles of neighbouring states and to decide on matters involving foreign parties and assets.\textsuperscript{116} Enhanced corporate mobility, concerns about cross-border fraud and the influence of

\textsuperscript{111} Bachmann, above n 16, at 1067.
\textsuperscript{112} See generally Barnard and Deakin, above n 6, p 34; Deakin, above n 6, p 447; Kirchner, Painter and Kaal, above n 8, 175; Witt, above n 8, at 903, 930.
\textsuperscript{113} Bachmann, above n 16, at 1064; Steffek, above n 29, p 291.
\textsuperscript{114} Steffek, above n 29, p 291.
foreign legal principles have pushed entrepreneurial freedom and corporate governance to the forefront of EU company and insolvency law reform.\textsuperscript{117}

A EU regulatory goals

Underlying EU initiatives in company and insolvency law is the desire to promote closer economic integration, strengthen the competitiveness of EU businesses, establish legal certainty and target market distortions. The ECJ has taken primary responsibility for striking down national discriminatory measures against foreign companies and removing other impediments to the free movement of companies.\textsuperscript{118} This is guided by the legislative aim of enhancing economic integration and securing market access.\textsuperscript{119} Strengthening the overall international competitiveness of the European market is also a major priority\textsuperscript{120} and is seen as fundamental for the creation of a 'modern, dynamic, interconnected industrial society'.\textsuperscript{121} As the European Commission Proposal on Insolvency Proceedings reveals, the goals of sustainable growth and prosperity have become a 'high political priority' in light of the current economic crisis.\textsuperscript{122} In particular, the European Commission has emphasised the importance of an efficient insolvency law system to help businesses withstand financial difficulties, reorganise their affairs and provide entrepreneurs with a second chance.\textsuperscript{123}

Legal certainty is viewed as the bedrock of this modernised system.\textsuperscript{124} Due to the impact that diverse national laws can have on cross-border operations, clear structures are needed to resolve conflict of laws issues.\textsuperscript{125} As Judge Brosman observes, '[I]urking in all transnational bankruptcies is the potential

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\textsuperscript{117} L C Ho, ‘Cross-border fraud and cross-border insolvency: Proving COMI and seeking recognition under the UK Model Law’ (2009) 24(9) Jnl of International Banking and Financial Law 537 at 537; Maresceau and Tison, above n 8, at 86; Ringe, above n 30, at 10; Steffek, above n 73, at 295; Steffek, ‘Unternehmenssanierung und Unternehmensinsolvenz’, above n 115, p 303; Teichmann, above n 24, at 22.
\textsuperscript{118} Chalmers, Davies and Monti, above n 5, p 677; Johnston and Sypris, above n 8, at 378.
\textsuperscript{119} See generally Barnard and Deakin, above n 6, p 3; Chalmers, Davies and Monti, above n 5, p 674; European Insolvency Regulation, Recitals [2]; Maresceau and Tison, above n 8, at 84; Siems, above n 8, at 47; Teichmann, above n 8, p 146.
\textsuperscript{121} Commission of the European Union, above n 120, p 3; Dashwood et al, above n 6, p 677; High Level Group of Company Law Experts, above n 64, p 4.
\textsuperscript{123} Ibid.
\textsuperscript{124} Commission of the European Union, above n 120, p 6, 9; Ho, above n 117, at 543.
\textsuperscript{125} Commission of the European Union, above n 120, p 11; Kirchner, Painter and Kaal, above n 8, p 184; Maresceau and Tison, above n 8, at 86; Schall, above n 8, at 1536; Teichmann, above n 8, p 176.
\end{footnotesize}
for chaos if the court involved ignores the importance of comity. Mutual recognition principles in company and insolvency law are therefore designed to establish stable conditions for cross-border movement, financing and fraud prevention.

B Scope of harmonisation

Recent EU initiatives have sought to promote corporate mobility and creditor protection through removing barriers, establishing legal principles and creating new corporate forms.

4 Ease of establishing cross-border commercial activities

The ease of cross-border establishment varies according to the nature and permanency of activities pursued: direct, secondary operations; the transfer of a company’s centre of administration; and the proposed European Private Company or Societas Privata Europaea (SPE).

(a) Secondary establishment

Secondary establishment has been substantially eased in the EU. The ECJ has taken a proactive approach to conflict of laws resolution, holding that a company’s operations will be governed by its home state and not the state in which it carries out substantial commercial activities. This has enhanced certainty in relation to applicable company law and provides entrepreneurs with a large degree of flexibility in establishing branches, subsidiaries or agencies in other states.

(b) Primary establishment

Nonetheless, there remains a large disparity between the freedom of establishment guaranteed in the context of secondary establishment and the principles applicable where a company wishes to move its real seat and company law regime to another state. In the absence of a harmonised framework, member states have the primary responsibility for determining connecting factors that must be retained by companies, if they wish to enjoy the status as a company governed by national law. In many member states,

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126 Re Brierley 145 BR 151 (Bankr SDNY, 1992).
128 Maresceau and Tison, above n 8, at 85; Wymeersch, above n 22, at 695.
129 Explanatory Memorandum, MoMiG, above n 24, pp 70; Siems, above n 8, at 48; Wymeersch, above n 22, at 667, 681.
131 Cartesio Oktató és Szolgáltató bt (C-210/06) [2008] ECR I-09641 at 110 (Cartesio);
this means that a company must wind up its operations in its state of incorporation before reincorporating elsewhere.132

The proposal for a *Fourteenth Directive* would have supported the EU’s goals of freedom of establishment, modernisation and legal certainty.133 Under the proposed draft, if a company meets the incorporation requirements of a host state, it would be able to transfer its registered office without losing legal personality.134 This would reduce the substantial costs involved in winding-up and reincorporation135 and enhance the productivity of EU companies.136

Third parties, such as employees, public authorities and creditors, would be explicitly protected through publicity, disclosure and settlement of debt requirements.137

However, disagreements about the impact of a one-stage conversion process on home state stakeholders have stalled legislative reform.138 There are residual concerns about the adequacy of protection mechanisms for creditors, employees and taxation officials, designed to prevent companies escaping existing obligations.139 Some legal commentators suggest that it could open up a market for re-incorporations and provide additional impetus for forum shopping.140

As the ECJ has emphasised, an international convention is sorely needed to resolve remaining legal gaps and uncertainties.141 Negotiations will provide a forum for discussing adequate levels of third party protection, as well as the shape of future cross-border mobility and regulatory competition in the EU.

**(c) Societas Privata Europaea**

The proposed introduction of an SPE has been canvassed as a future alternative. Recognising that approximately ninety per cent of European

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132 See, eg, Commission of the European Union, above n 130; Dashwood et al, above n 6, p 655; Roth, above n 110, at 207.
133 Commission of the European Union, above n 130; Dashwood et al, above n 6, p 658; Johnston and Sypris, above n 8, at 398; Vaccaro, above n 8, at 1362.
134 Commission of the European Union, above n 130; Johnston and Sypris, above n 8, at 401; Kirchner, Painter and Kaal, above n 8, at 168.
135 Commission of the European Union, above n 130; Dashwood et al, above n 6, p 657.
136 Johnston and Sypris, above n 8, at 401–3; Vaccaro, above n 8, at 1362.
138 Ross, above n 110, at 207.
140 Daily Mail (C-81/87) [1988] ECR 548 at [23]; See also Commission of the European Union, above n 130; Dashwood et al, above n 6, p 657; Teichmann, above n 8, at 175; Wymeersch, above n 22, at 677.
businesses are small and medium enterprises, the reform would offer companies a secure framework for conducting corporate activities in cross-border settings.

On the one hand, this could help to overcome existing obstacles. Rather than relying on mergers, subsidiaries or joint-ventures, enterprises could retain control over the expansion of their activities overseas and would face fewer bureaucratic burdens and time-consuming processes. Requirements would be tailored to the needs and resources of small and medium businesses, meaning for example, that companies could utilise the services of local solicitors, rather than seeking costly legal advice on foreign company law. A uniform corporate form would reduce familiarity, language and knowledge gaps, shore up trust amongst creditors and ease burdens on national courts.

Nonetheless, many details of the SPE require further development. The SPE would still rely on provisions of member states’ company law, especially in relation to directors’ liability, tax requirements and workers’ participation. This creates potential uncertainty, given states’ divergent understandings of limited liability, minimum capital requirements and opportunities for creditor self-protection. Current proposals for a €8,000 minimum capital or mandatory solvency test have been mired in fierce debates about the adequacy of start-up funds and attractiveness vis-à-vis the English limited company. This leads to the most powerful critique: is a new European corporate form even necessary, or would it be preferable to focus on modernising national legal systems and enhancing corporate mobility through other means?

Overall, the success of the SPE will depend on member states bridging differences in company law standards and its ultimate take-up by ‘customers’ in the field. The proposal would not attempt to replace national requirements in any meaningful way, but might in time become a model framework for private limited companies in Europe.

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142 Herzog, Siems and Rosenhäuser, above n 130, at 248–9.
144 Herzog, Siems and Rosenhäuser, above n 130, at 249.
145 Ibid, at 249, 255; Siems, above n 8, at 54–5; Teichmann, above n 8, p 179.
146 Herzog, Siems and Rosenhäuser, above n 130, at 252, 254–5; Kirchner, Painter and Kaal, above n 8, at 189–90, 194; Siems, above n 8, at 48; Teichmann, above n 8, pp 174, 179.
147 Ibid, at 249, 254; High Level Group of Company Law Experts, above n 64, 40; Teichmann, above n 8, p 178.
148 Commission of the European Union, above n 143, p 5.
149 Herzog, Siems and Rosenhäuser, above n 130, at 250–1.
150 Commission of the European Union, above n 143, p 5; High Level Group of Company Law Experts, above n 64, p 39.
151 Teichmann, above n 8, p 180.
152 High Level Group of Company Law Experts, above n 64, p 39.
5 Protection of creditor interests

As appears in ECJ jurisprudence, there is a noticeable resistance to host states imposing company law creditor protection provisions prior to insolvency. With the exception of disclosure requirements and transaction law, central pillars of creditor protection are therefore located in the company law of home states and the insolvency law of host states.

(a) Creditor protection in company law

The ECJ has taken a restrictive approach to host state provisions designed to regulate the activities of pseudo-foreign companies in the interests of creditors. It set the bar high in *Inspire Art*, *Centros* and *Überseering*, and held that restrictions on the freedom of establishment can only be justified in individual cases of fraud or where it is non-discriminatory and necessary, proportionate and appropriate to secure 'imperative requirements in the general interest.' The United Kingdom Government’s arguments in *Inspire Art* appear to have been persuasive. It emphasised that creditors must take a measure of self-responsibility and, if uncertain or dissatisfied with the protections offered in a company’s home state, are free to enter further agreements or take out additional security.

Nonetheless, EU harmonisation efforts, particularly the standardisation of disclosure requirements in the *Eleventh Directive*, have reduced information asymmetries in cross-border transactions. Applied in the German domestic context, branches of foreign companies are required to provide details of their constitution, corporate form, authorised representatives and, following the *MoMiG* reform, a registered local address in Germany. Such information requirements are regarded as a justified limitation on corporate mobility, owing to their significant protective function. Through enhancing legal certainty, transparency and accountability, creditors and other stakeholders are put on notice and have the opportunity to seek further contractual assurances. The public accessibility of this information is an integral part of the *MoMiG* reform, ensuring that creditors can escape long-winded and

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153 *Centros* (C-212/97) [1999] ECR I-1484 at [38]; *Inspire Art* (C-167/01) [2003] ECR I-10155 at [3]; *Überseering* (C-208/00) [2002] ECR I-09919 at [93].
154 Johnston and Sypris, above n 8, at 379; Steffek, above n 81, p 790; Vaccaro, above n 8, at 1355.
155 *Centros* (C-212/97) [1999] ECR I-1484 at [24]–[25], [34]; See also *Inspire Art* (C-167/01) [2003] ECR I-10155 at [95]–[96]; *Überseering* (C-208/00) [2002] ECR I-09919 at [92]; Siems, above n 8, at 52; Teichmann, above n 8, pp 157–8; Vaccaro, above n 8, at 1355.
156 *Inspire Art* (C-167/01) [2003] ECR I-10155 [125] (United Kingdom Government) (during argument).
157 High Level Group of Company Law Experts, above n 67, p 5.
158 *Eleventh Directive*, Recital [4]; See also Teichmann, above n 8, pp 140, 164.
159 *GmbHG* § 8(4)(1); *HGB* § 13g.
160 Steffek, above n 24, at 2083.
161 See, eg, Dashwood et al, above n 6, p 681; *Inspire Art* (C-167/01) [2003] ECR I-10155 at [125], [135] (United Kingdom Government and Inspire Art Ltd) (during argument);
difficult attempts to chase up company management. Further EU reform might be necessary to facilitate information sharing across jurisdictions.

(b) Applicable insolvency law

The European Insolvency Regulation aims to demarcate zones of member state competence and ensure that assets and creditor claims are efficiently dealt with in a company’s Centre of Main Interest (COMI) and secondary proceedings. According to Art 4(2)(1), the opening, conduct and closure of insolvency proceedings will be governed by the national jurisdiction in which a company has its COMI. Based on the principles of mutual trust and universality, all member states are required to respect a court’s opening of proceedings and can only challenge this decision on the basis of the state’s national insolvency law. These principles are intended to prevent any competing claims to jurisdiction and to set clear lines of responsibility and recognition. Making the COMI the main criterion for jurisdictional competence is reminiscent of the real seat theory. It ensures that creditors, courts and stakeholders are able to launch proceedings in a familiar jurisdictional environment and that states have competence over matters where local interests are most affected.

However, there is some imprecision involved in identifying a company’s COMI. Despite the rebuttable presumption that the COMI will coincide with the registered office, there may still be an element of artificiality and elasticity involved, especially in relation to corporate groups. As Bachner observes, ‘even the innocent word “presumption” may mean different things to lawyers in different legal systems’. Due to this imprecision, there is a danger that a ‘race to the courts’ may be launched, with provisional...
proceedings used in pre-emption and parties vying to initiate main proceedings in a state with the most favourable insolvency law regime.\textsuperscript{176} For some legal commentators, \textit{Eurofood}\textsuperscript{177} was a lost opportunity to extrapolate on the rebuttable presumption and the depth of inquiry needed to establish national jurisdiction.\textsuperscript{178} This does not mean that the COMI is simply a factual analysis with no teeth, to be determined on a case-by-case basis. Instead, as a question of law, the ECJ is likely to continue to play a role in giving this concept real bite into the future.\textsuperscript{179}

Owing to the large differences in national insolvency law systems, conflict of law resolution is naturally a central component of EU legislative action. The major task lies in clarifying definitional issues to ensure an efficient, coordinated system and predictability for third parties.\textsuperscript{180} This consideration has been taken up by the European Commission in its current proposal to amend the \textit{European Insolvency Regulation}.\textsuperscript{181} While the COMI principle would remain intact under this proposal, the European Commission recognises that there have been practical difficulties in applying the concept.\textsuperscript{182} The proposed amendment would clarify rules on jurisdiction in main and secondary insolvency proceedings and introduce requirements for the publication of information relating to cross-border insolvency proceedings.\textsuperscript{183}

\textbf{(c) Substantive creditor protection in insolvency law}

In relation to the commencement of proceedings, ranking of claims and directors’ liability, substantial national differences remain, with consequences for the level of creditor protection, business certainty and competitive advantages in cross-border situations.

(i) Grounds of insolvency

The ease and speed of opening insolvency proceedings and actors entitled to lodge a petition vary between EU jurisdictions, especially with respect to recognised grounds of insolvency.\textsuperscript{184} Almost all states use the inability to pay debts as a basis for insolvency;\textsuperscript{185} however, national laws differ in relation to the degree, duration, imminence and future prognoses of illiquidity,\textsuperscript{186} and the presumptions that can be relied upon.\textsuperscript{187} Only half of EU states recognise over-indebtedness as an insolvency ground and there is little jurisprudence on

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\textsuperscript{176} See generally Bachner, above n 127, at 311, 318–19, 325–6; Eidenmüller, above n 8, at 477; Steffek, above n 132, p 720.
\textsuperscript{177} (C-341/04) [2006] I-3813.
\textsuperscript{178} Bachner, above n 127, at 323.
\textsuperscript{179} Ibid, at 315.
\textsuperscript{180} Commission of the European Union, above n 120, pp 8–9.
\textsuperscript{181} \textit{European Commission Proposal on Insolvency Proceedings}, above n 122.
\textsuperscript{182} Ibid, pp 2–4.
\textsuperscript{183} Ibid, pp 5–6.
\textsuperscript{184} Bachner, above n 127, at 318–19.
\textsuperscript{185} Steffek, ‘Insolvenzgründe in Europa’, above n 115, at 320–2, 352.
\textsuperscript{187} Steffek, ibid, p 901.
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this ground. No attempt to harmonise insolvency grounds has yet been attempted, which highlights the significance of these indicia in member states’ legal systems. Owing to their role in preserving a company’s assets and providing compensation or restitution, they mark the point at which creditor interests will rise to the forefront of corporate governance. In Germany, the existence of insolvency grounds creates a duty on management to file for insolvency, whereas in England, creditors are given much greater power to negotiate and initiate insolvency proceedings. The absence of EU harmonisation signifies the importance of insolvency grounds in domestic regimes and differing modes of creditor protection.

(ii) Security charges

Likewise, the treatment of security interests remains subject to national insolvency norms, which has diverse consequences for creditors’ interests. The floating charge, which is an extremely popular form of security for English limited companies, has few counterparts in the EU. The flexible and often indeterminate nature of the floating charge, coupled with the German requirement that all interests in real property must first be entered into the land register, make it difficult to apply in German law. This has implications for English limited companies with their COMI in Germany and German companies operating abroad. The substantive differences between EU security instruments present challenges for their recognition in other states and the ability of creditors to assert these when a company is active overseas.

192 See generally Insolvency Act 1986 (UK) c 45 ss 122 (1)(f), 214(6), 238, 11(a) Sch B1; See also Eidenmüller, above n 5, at 724; Schall, above n 8, at 1547; Steffek, above n 132, pp 708, 731; Steffek, ‘Insolvenzgründe in Europa’, above n 115, at 350–1; Steffek, above n 191, p 732; Steffek, ‘Unternehmenssanierung und Unternehmensinsolvenz’, above n 115, p 331.
198 BGB § 873(1).
200 Büttner, above n 116, at 271, 284, 286, 291.
(iii) Directors’ duties

In the absence of a combined European approach to directors’ duties, many states have sought to extend the scope of directors’ liability to foreign companies, by moving provisions on directors’ liability from company to insolvency law.201 This throws light on the different approaches taken by member states towards compensation and restitutionary measures. Simultaneously, it reveals the imprecise distinction between company and insolvency law.202 At what point do substantive elements of a country’s insolvency law become unjustified restrictions on the freedom of establishment? A broad approach to insolvency law would seem to undermine the incorporation theory and re-introduce the real seat theory through a backdoor.203 The European Insolvency Regulation has helped to resolve key conflict of laws issues in the EU; however, as these examples reveal, several tensions remain.

(iv) Forum shopping

Finally, the spectre of forum shopping highlights the perverse incentives that could emerge as a result of differences in insolvency law regimes.204 Walters and Smith suggest that England and Wales are emerging as key destinations for insolvency tourism.205 Concerns about a ‘race to the bottom’206 in insolvency law standards may be exaggerated; yet forum shopping is clearly an externality that the EU is keen to avoid.207 Particularly problematic is the danger that linked provisions of a state’s company and insolvency law could be separated, resulting in legal gaps and the unravelling of protective norms.208 Opportunistic corporate migration would have severe impacts on creditors with low bargaining power, especially when faced with an unfamiliar insolvency law regime,209 and would place additional burdens on host state institutions, such as courts and official receivers.210 Likewise, if competition for the opening of main proceedings intensifies, it could lead to insolvency petitions being lodged in a pre-emptive manner.211 Uncertainties

201 See generally Beurskens and Noack, above n 16, at 1088; Casper, above n 72, p 1139; Explanatory Memorandum, MoMiG, above n 24, pp 193; Teichmann, above n 8, p 176; Teichmann, above n 24, at 20, 24.
202 See, eg, Micheler, above n 131, at 525–6, 529; Ringe, above n 30, at 23; Schall, above n 8, at 1537, 1552, 1554.
203 See generally Eidenmüller, above n 8, at 476; Kirchner, Painter and Kaal, above n 8, p 186; Micheler, above n 131, at 529; Schall, above n 8, at 1537; Teichmann, above n 24, at 24; Verse, above n 95, at 1123.
204 Eidenmüller, above n 8, at 476, 478; Ringe, above n 30, 17; Steffek, above n 132, p 705; Vaccaro, above n 8, at 1364.
206 Vaccaro, above n 8, at 1364.
207 See, eg, Eidenmüller, above n 8, at 469–70, 473; European Insolvency Regulation, Recitals [4]; Ringe, above n 30, at 1–2.
208 Eidenmüller, above n 5, at 739; Eidenmüller, above n 8, at 473; Ringe, above n 30, at 18.
209 Eidenmüller, above n 5, at 736; Eidenmüller, above n 8, at 478, 482; Ringe, above n 30, at 18; Steffek, above n 132, pp 707, 711.
210 Walters and Smith, above n 205, at 183.
211 Eidenmüller, above n 8, at 477.
about applicable insolvency law regimes would only translate into higher costs for external finance.\textsuperscript{212}

Nonetheless, the risk of forum shopping is likely to be tempered by the large costs, delays and difficulties associated with moving a company’s COMI,\textsuperscript{213} the secondary proceedings mechanism\textsuperscript{214} and national protective measures. Many states have legislation in place to protect creditors affected by a company’s transfer\textsuperscript{215} and national courts have regarded with suspicion attempts to move a company’s COMI in the vicinity of insolvency.\textsuperscript{216} Creditors may play a role in the choice of insolvency jurisdiction, through agreeing to a company’s migration,\textsuperscript{217} or steering the company in the direction of a quick, flexible insolvency law system with high creditor satisfaction rates.\textsuperscript{218} Forum shopping remains a worrying development in the EU; however, there are indications that creditor safeguards already exist at a national and transnational level and that corporate migration for the purposes of profit restructuring could be to the benefit of creditors.\textsuperscript{219} In the \textit{Proposal on Insolvency Proceedings}, the European Commission suggests that further clarifying member states’ jurisdiction in main and secondary insolvency proceedings would help to reduce the spectre of ‘abusive COMI-relocation’.\textsuperscript{220}

V Interaction between National and EU legal frameworks

A burning question then emerges. If the core goal of the MoMiG reform is to promote the attractiveness of German company law and the interests of local creditors; to what extent are its efforts mutually compatible with the EU’s aims of enhancing the overall competitiveness of the single market?

A Ease of incorporation and the single market

The freedom of establishment has been a significant impetus behind trends to improve the flexibility, speed and cost of incorporation at a national and transnational level. As the example of the MoMiG demonstrates, increased competition from other regulatory systems has provided an incentive to modernise aspects of German company law. The freedom of establishment principle has also sparked attempts to enhance the flexibility of rules and structures for the benefit of cross-border mobility. At a national level,

\begin{itemize}
\item 212 Ringe, above n 30, at 18.
\item 213 See generally Eidenmüller, above n 8, at 482; Ringe, above n 30, at 12, 14, 16; Steffek, above n 132, pp 706, 710; Wymeersch, above n 22, at 662.
\item 214 \textit{European Insolvency Regulation}, Recitals [12], [19], Art 3(2), (3); See also Büttler, above n 116, at 276; Eidenmüller, above n 8, at 468, 478; Ringe, above n 30, at 21; Steffek, above n 132, p 723.
\item 215 Ringe, above n 30, at 21.
\item 216 Eidenmüller, above n 8, at 482; Ringe, above n 30, at 21, 12–14; Walters and Smith, above n 205, at 182.
\item 217 Eidenmüller, above n 8, 479; Ringe, above n 30, at 19.
\item 218 Eidenmüller, above n 5, at 736; Eidenmüller, above n 8, at 477; Ringe, above n 30, at 1, 19–20.
\item 219 Ringe, above n 30, at 22.
\item 220 \textit{European Commission Proposal on Insolvency Proceedings}, above n 122.
\end{itemize}
countries have made it easier for domestic companies to conduct activities abroad and for foreign companies to operate locally. At a transnational level, proposals such as the 14th Directive and SPE have been floated, to improve the cross-border arrangements for small and medium enterprises.

Overall then, the relationship between ease of incorporation and the single market can be explained through the lenses of regulatory competition and ‘reflexive harmonisation’. According to Deakin’s theory of reflexive harmonisation, unified principles should be developed mainly in the areas of conflict of law resolution and combating market distortions, leaving considerable room for legislative innovation at a decentralised level. In the context of the internal market, there is growing consensus that the EU’s role in company law should be limited to facilitating the freedom of establishment and settling conflict of laws issues, in order to address areas of legal uncertainty and ease cross-border mobility. This preserves the legislative autonomy, local interests and legal traditions of member states, but creates incentives to experiment with new corporate forms, modernise aspects of a state’s regulatory system and learn experientially from other states.

All in all, EU initiatives to foster economic integration have exposed member states to greater competition and new perspectives in the area of company law. Yet national legislative reforms and debates about the SPE and 14th Directive reveal that the protection of third parties and prevention of market distortions have not been lost as key regulatory ideals.

B Creditor protection and the single market

At a member state level, creditor interests have not necessarily been sacrificed on the altar of regulatory competition. As Germany’s reform process indicates, states have often regarded creditor interests as critical for the minimisation of risks and costs in an efficient company and insolvency law system. Given the diversity of member states’ economic, social and political interests and business law traditions, it is hardly surprising that the desire to attract incorporations has not been the sole regulatory goal in company law reform. In states with a history of protecting creditor interests through a combination of proactive and reactive means, regulatory competition is unlikely to undermine these standards, even if levels of accountability and liability come to acquire different forms.

Creditor interests have remained a legitimate consideration in EU

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221 See, eg, GmbHG § 4a; See also Alio, above n 24, at 59; Teichmann, above n 8.
222 Deakin, above n 6, p 445.
223 See generally Commission of the European Union, above n 120, p 6; Dashwood et al, above n 6, p 679; High Level Group of Company Law Experts, above n 64, p 4.
224 Deakin, above n 6, p 440; Siems, above n 8, at 58.
225 Vaccaro, above n 8, at 1364.
226 Deakin, above n 6, p 446; See generally Teichmann, above n 8, p 170.
227 Teichmann, above n 8, p 170; Witt, above n 8, at 930.
228 Bebchuk, above n 6, at 1451–3.
229 Steffek, above n 81, pp 825, 880, 884.
negotiations and have found explicit protection in legislative instruments, such as the 11th Directive. The EU’s focus on disclosure requirements and insolvency law seems to diverge from the traditional penchant of German law for a combination of incorporation and capital requirements and director and shareholder responsibility. It may well be that the ECJ’s recognition of the incorporation theory, coupled with the COMI requirement, has initiated trends towards liberalisation of incorporation requirements, creditor self-protection mechanisms and greater liability in insolvency law.\textsuperscript{230} Through preserving the substantive content of member states’ insolvency laws, but opening up the gates to increased interaction between national courts, there could be moves towards convergence of insolvency norms, such as grounds of insolvency, in the future.\textsuperscript{231}

Viewed through the prism of reflexive harmonisation, the EU’s main role in creditor protection would lie in establishing legal certainty and preventing distortions of the single market. Areas which might witness further jurisprudential and legislative development include the COMI concept, justified limitations on the freedom of establishment, forum shopping and the unbundling of company and insolvency law provisions.\textsuperscript{232} Owing to the large differences in insolvency norms within the EU, harmonisation is unlikely in the short-term, but ultimately there may be moves to adopt flexible model legislation in this field, on the basis of expert advice.\textsuperscript{233} For example, the European Commission indicated in December 2012 that it intends to further analyse the impact of differences in national insolvency laws on the functioning of the internal market.\textsuperscript{234}

\textbf{VI Conclusion}

The tension between creditor and entrepreneurial interests has significance in both national and EU contexts. Regulatory competition has led to an adjustment and modernisation of national protection standards and prompted debates on the respective advantages of local and transnational law-making. In response to influences from other jurisdictions and existing legal traditions, member states have adopted diverse paths in company and insolvency law to enhance the attractiveness of their national incorporation procedure and maintain sufficient structures for creditor protection. As the MoMiG reform in Germany illustrates, this has frequently taken the form of a liberalisation of incorporation requirements and enhanced compensatory and restitutionary principles in insolvency law. By contrast, the EU has pursued its goals of economic integration and international competitiveness through developing conflict of laws norms, eliminating national barriers to free movement and responding to adverse market developments. Striking an effective balance

\textsuperscript{230} Verse, above n 95, at 1123.
\textsuperscript{231} Steffek, ‘Unternehmenssanierung und Unternehmensinsolvenz’, above n 115, pp 350, 353.
\textsuperscript{232} Eidenmüller, above n 5, at 742.
\textsuperscript{233} See generally Bebchuk, above n 6, at 1493; Commission of the European Union, above n 143, pp 1–2; Dashwood et al, above n 6, at 687; Deakin, above n 6, p 453; Eidenmüller, above n 5, at 742; High Level Group of Company Law Experts, above n 64, pp 5–6; Steffek, above n 132, p 721; Steffek, ‘Unternehmenssanierung und Unternehmensinsolvenz’, above n 115, p 331; Wessels, above n 194, p 2.
\textsuperscript{234} European Commission Communication, above n 122.
between entrepreneurial freedom and creditor protection is central to the overall efficiency and competitiveness of member state company and insolvency law systems. At the same time, the EU, as gatekeeper for the freedom of establishment principle, has a key role to play in resolving legal uncertainties and tackling barriers and corporate abuse in transnational settings.