Eur J Law Econ (2015) 40:179–182
DOI 10.1007/s10657-014-9440-5

BOOK REVIEW

Barbara Gabor: Regulatory competition in the internal market: comparing models for corporate law, securities law and competition law

Lars Hornuf

Published online: 3 April 2014

The virtues and drawbacks of regulatory competition have been subject to a long-standing academic debate. While proponents of regulatory competition have argued that it constitutes a mechanism by which firms and individuals can overcome costly regulation, that in turn was created by captured politicians or corrupt bureaucrats, opponents have claimed that regulatory competition results in a race to the bottom, as a result of which the laxest standards will ultimately prevail. More recently, a convincing welfare analysis was conducted by Sinn (2003), who stated that if a piece of regulation is legitimate in the first place (for instance to overcome a market failure) and then becomes subject to regulatory competition on a higher regulatory level, such competition is detrimental to overall social welfare.

Gabor (2013) set out to investigate regulatory competition by focusing on the internal market. Her book is highly appreciated as to my knowledge no other book exists that summarizes the academic debate on regulatory competition in the European Union. After describing different models of competition and the actors involved, Gabor continues her analysis by investigating regulatory competition in three legal fields: company law, securities law and competition law. She justifies this choice by arguing that the fields have been "selected according to several criteria, but some determinative features are that the regulated unit is the firm, but the regulated relationships, and thus the market failures that they aim to correct, are different" (p. 52). While the inclusion of competition law is in a positive way though-provoking, as competition through free choice or mobility is not likely to emerge in this legal field, critical scholars might wonder why Gabor did not examine regulatory competition in insolvency law. That legal arbitrage takes place in this area was prominently shown by the insolvency proceedings of Deutsche Nickel and Schefenacker. The reform of the German Bondholder Act (Schuldverschreibungsgesetz—SchVG) might even be considered as evidence for regulatory competition.

L. Hornuf (✉)
University of Munich, Munich, Germany
e-mail: lars.hornuf@jura.uni-muenchen.de

Apart from the overall structure of the book (analytical framework, three legal fields and conclusion), the logical structure of the analysis remains somewhat dubious. Gabor admits that by noting that conclusions drawn "do not mirror the structure of Chapter 1, since not all aspects identified there resulted in relevant conclusions, or not with the same weight. Some further aspects that were not identified in Chapter 1 have also emerged through the analysis" (p. 259). It would certainly help the reader if the analysis matched the research agenda set out in the introduction.

This touches upon more serious weaknesses of the book. Although Gabor lists numerous research questions she apparently seeks to explore in her book (pp. 50–54), she de facto lacks a clear cut research agenda. Instead, Gabor explains on many pages what is not feasible in the book, leaving the critical reader wondering, what it actually is, she is seeking to investigate. She rules out "a comprehensive comparative analysis of national rules" (p. 161) and "a complete model that would allow us to precisely calculate the likelihood of the emergences, the precise functioning and predicted welfare implications, of (regulatory) competition" (p. 258). Moreover, she states that she will not apply a "rigorous methodology that would allow a direct causal relationship to be established" (p. 49) or that the "chosen methodology therefore does not aim to accurately describe the exact welfare results of regulatory competition, nor is it intended to give a precise cost-benefit analysis" (p. 107).

Moreover, it is not clear what method Gabor applies to answer her research questions. While not every scholar is willing and able to pursue a rigorous theoretical analysis (such as the one by Sinn 2003) or to analyze selected research questions by means of empirical methods, a serious researcher should nevertheless state what method she applies and which hypotheses are to be tested. Moving from one topic to the next, Gabor leaves open what the core issues raised in the book are and what it is she precisely is seeking to prove or falsify.

In the subsequent chapter Gabor describes the channels and functioning of regulatory competition in company law. It is more than welcome that the author begins with discussing the sophisticated academic literature in the United States. However, an up-to-date descriptive empirical analysis of regulatory competition in Europe would have been equally appreciated at this point. Instead, Gabor relies on data from Becht et al. (2008), which gives an overview that ends 8 years before Gabor's book was published. The same holds for the literature cited. Noting that the book was published in 2013, less than six percent of the articles cited were published after the year 2008. While it might be the case that the academic debate stopped at this point, Gabor simply might not have been willing to make a last effort to thoroughly update her PhD thesis, which she submitted in 2010.

Although Fabrizio Cafaggi states in the foreword that Gabor "uses sophisticated law and economics tools" (p. ix), underlying concepts such as "perceived costs for firms" (p. 112) should have been defined more clearly. Moreover, it is not clear what Gabor means when she claims that "the SPE introduces a regime similar to that of the SE, but for private companies" (p. 83). After all, the SPE never saw the light of the legal world. Furthermore, Gabor claims that "as for the role of lawyers, and legal services in general, the same can be said in the European context as in the

American example" (p. 105). Whatever she means by that phrase, Gabor further argues that European lawyers are not yet trained in a (winner) legal system such as Delaware in the United States so that they cannot easily provide legal services to companies that wish to use that other jurisdiction as their governing law (p. 105). I would strongly contest this conclusion, as innumerable legal counsels all around Europe have advised firms on incorporating as a Societas Europaea (Eidenmüller et al. 2010) or a British limited liability company (Braun et al. 2013). Moreover, debt securities of any European issuer are nowadays almost exclusively issued under British law (Engert and Hornuf 2013).

In the chapter on securities law Gabor touches upon the issues of adverse selection and moral hazard, without providing a clear description of the fundamental problem. Instead she engages in a lengthy explanation of how ESMA works (p. 151 ff). Gabor concludes this chapter by stating that "choosers of norms are mainly the issuer firms. But investors are also given the freedom to choose to invest in different products" (p. 184). If that were the case, one wonders whether issuers do not anticipate investors' preferences and whether investors will not ultimately be the one's choosing the norms. Some of her other conclusions are tautological. One example is the finding that welfare implications depend on information asymmetries between issuers and investors (p. 185). Unfortunately, Gabor at this point stops short of identifying which particular welfare costs occur, which information asymmetries precisely trigger them and how they could be avoided. Moreover, while Gabor states that "less than optimal outcomes can be expected from free choice of law if investors cannot fully and freely put value on the quality of the governing law of issuers" (p. 266), she ignores the empirical evidence that exists. In a case study Choi et al. (2011) have shown that investors in Greek government bonds are well aware of legal quality differences of the governing law and also put value on them. The paper finds that even before the outbreak of the crisis Greek-law Greek bonds have shown a considerable yield spread over an English-law Greek bond.

In the chapter on regulatory competition in competition law, the reader is tempted to ask what Fabrizio Cafaggi meant with "sophisticated law and economics tools". Analyzing the evolution of collective redress mechanism in competition law, Gabor cites three reports by Stuyck et al. (2007), BEUC (2010) and Linklaters (2011). She acknowledges that there is "no doubt (that) the interpretations of authors differ as to what counts as readily available collective action" (p. 234). While a serious researcher might at this point refrain from drawing conclusions out of the empirical evidence available, Gabor infers: "But clearly, more and more jurisdictions introduce such redress mechanisms" (p. 234).

In the concluding chapter Gabor makes an interesting proposal, a test that determines whether subsidiarity principle requirements are fulfilled for EU action to shape regulatory competition in the internal market (p. 289). That is indeed an intriguing idea, which should be elaborated further. The analysis remains sloppy on other ends though. For instance, when Gabor states that "rules that build the institutional context of any policy area may lock the legal actor into a path dependent situation or may be efficient" (p. 291), it could be countered that path dependence can be welfare maximizing if the standard firms or individuals are locked-in is superior to any other standard and standardization itself is desirable.

Furthermore, while the book by Sinn (2003) has been cited for the terminus "systems competition" (p. 12) but not for the sharp-sighted analysis, other fundamental works such as "The Law Market" by O'Hara and Ribstein (2009) have not been considered.

Finally, as Frederic Mishkin put it in the Academy Award winning film Inside Job: "If there's a typo, there's a typo." Being aware of the fact that no one is free of typos, the fact remains that Gabor's book is peppered with wrongly spelled authors. Luca Enriques is cited as "Enriquies" (p. 103), Eva-Maria Kieninger as "Keininger" (p. 97), Rafael La Porta as "Laporta" (p. 139), Larry Ribstein as "Ribstien" (p. 185, p. 318), Mathias Siems as "Seems" (p. 274), Andrei Shleifer several times as "Schleifer" (p. 14, p. 40, p. 311), Jean Tirole as "Tirol" (p. 33) as well as Tobias Tröger as "Troeger" (p. 166) or often "Troger" (p. 163, p. 168, p. 175, p. 177, p. 179, p. 311). Furthermore, citations are provided in the text without indication of the year of publication "Fox (?)" (p. 142) or "La Porta et al. (?)" (p. 274). Some articles cited in the text, e.g. "Becht et al. (2008)" (p. 87), do not appear in the bibliography at the end of the book. As Gabor's analysis is the first that brings together the relevant legal and economic literature, it is particularly unfortunate that more care has not been exercised. While her book is deeply needed, the best conclusion was drawn in the conclusion of the book itself: "Further analysis would be worth pursuing in order to explore these questions better" (p. 273).

References

Becht, M., Mayer, C., & Wagner, H. F. (2008). Where do firms incorporate? Deregulation and the cost of entry. *Journal of Corporate Finance, 14*(3), 241–256.

BEUC (2010). Country survey of collective redress mechanisms: Where does collective redress for individual damages exist?, http://www.beuc.eu/publications/2011-10006-01-e.pdf. Accessed 28 March 2014.

Braun, R., Eidenmüller, H., Engert, A., & Hornuf, L. (2013). Does charter competition foster entrepreneurship? A difference-in-difference approach to European company law reforms. *Journal of Common Market Studies, 51*(3), 399–415.

Choi, S. J., Gulati, G. M., & Posner, E. (2011). Pricing terms in sovereign debt contracts: A Greek case study with implications for the European crisis resolution mechanism. *Capital Market Law Journal, 6*(2), 163–187.

Eidenmüller, H., Engert, A., & Hornuf, L. (2010). How does the market react to the Societas Europaea? *European Business Organization Law Review, 11*(1), 35–50.

Engert, A., & Hornuf, L. (2013). Can network effects impede optimal contracting in debt securities? Stanford Law and Economics Olin Working Paper No. 434, http://ssrn.com/abstract=2155958. Accessed 28 March 2014.

Gabor, B. (2013). *Regulatory competition in the internal market: Comparing models for corporate law, securities law and competition law*. Cheltenham: Edward Elgar.

Linklaters (2011). Collective actions across the globe—A review, www.linklaters.com/pdfs/mkt/london/1103_Collective_actions.pdf. Accessed 28 March 2014.

O'Hara, E., & Ribstein, L. E. (2009). *The law market*. Oxford: Oxford University Press.

Sinn, H.-W. (2003). *The new systems competition: A construction principle for Europe*. Malden, MA: Blackwell.

Stuyck, J. et al. (2007). An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings—Final report, http://www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf. Accessed 28 March 2014.