Introduction

I. Overview

After the economic meltdown of 2008 it has been widely recognized that the crisis was not just the effect of greedy bankers, but of an unsound system which now needs to undergo far-reaching changes. The broad consensus in politics and the public was that the conditions leading to the economic crisis had to be revised in order to prevent it from happening again. Among the multitude of reforms aiming to achieve that, one of the most controversial ones is structural reform. Ring-fencing has become a buzzword for certain structural reform measures: in order to protect deposits and services considered vital to the real economy, it has been proposed to separate these services from investment banking and other financially risky activities. Alternatively, it has been proposed to separate certain investment banking activities deemed particularly risky from the rest of the bank. Both concepts aim to mitigate systemic risk and the too-big-to-fail problem and should ultimately lead to more stability, less risk taking and the effect that tax payer bailouts can be avoided.

This dissertation establishes a concept and definition of ring-fencing that allows to distinguish it from related bank structural reforms. While ring-fencing legislation has been implemented in many countries, the focus of this dissertation is on the legal developments on a European Union level and on national structural reform legislation of Europe's three most important financial players: the United Kingdom, Germany and Switzerland. Regarding the European Union, it assesses legislative steps already taken and the withdrawal of the file by the European Commission and discusses potential alternatives for installing a union-wide ring-fence. Regarding the three countries of interest, it conducts a legal comparative analysis, discussing conceptual differences in national bank structural reform legislation and exploring whether the countries adopted legislation that matches the established concept and definition of ring-fencing, which is especially important regarding Switzerland's unique approach.

II. Current State of Scientific Research

Assessing the state of scientific research, one finds many academic articles discussing the various structural reforms. Many of these cover the legislation in the United States in particular. One of the reasons for this may be that in the United States, the discussion about the separation of traditional commercial banking and investment banking is especially fierce due to the country's historical experience with the Glass-Steagall Act.[1] The Volcker Rule of the USA Dodd-Frank Act,[2] which was introduced as part of the post-crisis regulatory framework, is criticised heavily in academic literature. Another reason may be that the United States adopted its structural reform legislation earlier than its European counterparts. In Europe, the so-called Vickers Report[3] concerning structural reform in the United Kingdom was the first to receive worldwide attention. Its ring-fencing proposal was implemented to a large extent by the UK Banking Reform Act 2013,[4] which has remained a topic of discussion up until today. On a European Union level, the so-called Liikanen Report[5] and the draft regulation of the European Commission[6] have been subject of scientific debate. The negoti-

1 "Glass-Steagall Act" is a popular term for certain provisions of the Banking Act of 1933, Public Law 73–66, 73d Congress, H.R. 5661. Most authors consider it to refer to Sects. 16, 20, 21, 32 of the Banking Act of 1933, (e.g. *Masciandaro/Suardi* (2014) Public Interest and Lobbies, 308; *Pace* (2012) Business of Banking, 12; *Manasfi* (2013) Systemic Risk, 185 Fn 9); *Wilmarth* also includes Sec. 5(c) (*Wilmarth* (2005) Universal Banks, 564 Fn 8). This provision extends the securities limitations for national banks on state-chartered banks (see *Carpenter/Murphy* (2010) Permissible Securities Activities, 5 Fn 27).

2 "Volcker Rule" refers to Sec. 619 of the Wall Street Reform and Consumer Protection Act, Public Law 111–203, 111th Congress, H.R. 4173, July 21, 2010, which is commonly known as the Dodd-Frank Act.

3 *ICB* (2011) Vickers Report. While the official title of the report is "Final report of the Independent Commission on Banking", it is usually referred to as the "Vickers Report", named after *John Vickers,* who chaired the *Independent Commission on Banking*.

4 Financial Services (Banking Reform) Act 2013, c. 33.

5 *HLEG* (2012) Liikanen Report. While the official title of the report is "Final report of the High Level Expert Group on reforming the structure of the EU banking sector" it is usually referred to as "Liikanen Report", named after *Erkki Liikanen*, Governor of the Bank of Finland, who chaired the expert group.

6 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, COM(2014) 43 final (*European Commission* (2014) Proposal for a Regulation).

ating stance of the Council of the European Union[7] has not attracted comparable attention. The recently announced decision by the European Commission to withdraw the Bank Structural Reform has been discussed sparsely, alternative ways of imposing a ring-fence are expected to become more important in the discussion. In Germany the Trennbankengesetz,[8] which translates a number of recommendations of the EU's Liikanen Report into German Law has been discussed heavily. The exceptional Swiss Too-Big-To-Fail legislation[9] has mainly been discussed within the country and has received little attention abroad.

There are also numerous articles comparing the different approaches. They mostly include a detailed description of the United States' approach and are thus usually restricted by the length of an article. As structural reform legislation is constantly evolving, many articles do not refer to the current legal situation. Especially with regards to national legislation in Germany, the United Kingdom and Switzerland, a methodical legal comparison such as the one described by *Zweigert/Kötz*[10] is missing in the scientific debate.

Despite the importance of the topic, there are few dissertations on the subject, let alone ones taking a comparative view on the different structural reforms in Europe.[11]

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7 *Council of the EU,* Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, 10150/15 (*Council of the EU* (2015) Negotiating Stance).

8 Gesetz zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen, August 7, 2013, Bundesgesetzblatt Part I, 3090 (German Ring-fencing Act).

9 See, in particular, Art. 8(1), Art. 9(2)(d) Bundesgesetz über Banken und Sparkassen, November 8, 1934, SR 952.0 (Swiss Banking Act); Art. 60 et seqq. Verordnung über die Banken und Sparkassen, April 30, 2014, SR 952.02 (Swiss Banking Ordinance). See also *Expertenkommission* (2010) Schlussbericht.

10 *Zweigert/Kötz* (1996) Rechtsvergleichung, 4, 42; See also *Zweigert/Kötz* (1998) Comparative Law 5, 43–44.

11 An interesting dissertation comparing the Swiss too-big-to-fail regime to the United Kingdom ring-fencing rules is *Hofer* (2014) Structural Reforms. However, since 2013 the situation in both countries has evolved and therefore requires new research. *Hofer* furthermore undertakes a very detailed review of Swiss legislation, whereas the intent of this dissertation is to outline the major differences of the national approaches, allowing to acquire an understanding for each nation's plan for structural reform while ensuring that the reader does not lose perspective of the bigger picture. A dissertation comparing a wide range of structural reforms is *De Vogelaere* (2016) Bank Structure Reforms. Due to the wide scope of the legal comparative analysis (Belgium, Germany, France, U.S., UK, EU and the respec-

Considering the terminology, one finds significant ambiguities. While some authors use the terms "ring-fencing",[12] "ring fencing",[13] "ringfencing",[14] "activities-oriented ring-fencing",[15] or "functional ring-fencing",[16] others describe the concept simply as "structural reform".[17]

From the perspective of economics, there is extensive research on various topics connected to ring-fencing such as on implicit subsidies[18] and on economies of scale and scope for banks.[19]

It can therefore be concluded that there is neither a comparable up-to-date examination of the EU's rocky path towards structural reform, nor a comparable comparative legal analysis of national legislations concerning structural reform in Germany, the United Kingdom and Switzerland.

III. Research Problem

In the years before the global economic crisis, there had been large changes in the realm of international banking. Due to a number of factors, financial institutions had become bigger in size and scope, more complex and more interconnected.[20]

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tive preparatory works), its findings are limited. It furthermore only takes into account a fraction of the available academic literature on the topic.

12 See e.g. *Schwarcz* (2013) Ring-Fencing; *Hardie/Macartney* (2016) EU Ring-Fencing; *Zaring* (2014) Ring-Fencing.

13 See e.g. *Masciandaro/Suardi* (2014) Public Interest and Lobbies.

14 See e.g. *Brown* (2014) With this Ring, I Thee Fence.

15 See *Binder* (2015) Ring-Fencing; *Binder* (2014) To ring-fence or not, and how?.

16 See e.g. *D'Hulster* (2014) Ring-Fencing, 2 Fn 2.

17 See e.g. *Krahnen/Noth/Schüwer* (2016) Structural Reforms; *Guynn/Kenadjian* (2015) Structural Solutions. This dissertation falls in line with the original use of the word, namely "ring-fencing".

18 For an overview of various studies attempting the difficult quest of assessing implicit subsidies see e.g. *European Commission* (2014) Impact Assessment Part 2, Annex A4.1.

19 For an overview of various studies on the mentioned topics see e.g. *Gambacorta/Van Rixtel* (2013) Structural Bank Regulation Initiatives, 8–9; *HLEG* (2012) Liikanen Report, 130 et seqq.

20 *HLEG* (2012) Liikanen Report, 88; see also e.g. *Blundell-Wignall/Wehinger/Slovik* (2010) The Elephant in the Room, 16–17 (noting that G-SIBs looked more like *"large highly-leveraged hedge funds"* than banks); *Martel/Van Rixtel/Mota* (2012) Business Models of International Banks, 99 (underscoring the intensified *"internationalisation of the banking industry"*); *Laeven/Ratnovski/Tong* (2014) Systemic Risk, 7 et seqq. (discussing bank growth); *Boot/Ratnovski* (2012) Banking and

The economic meltdown of 2008 was followed by an unprecedented wave of bailouts in the United States and Europe. Taxpayer money was used to rescue banks that had run into difficulties due to tremendous losses suffered because of speculation with complex financial products. Often governments felt to have little choice in the matter of bailing out banks to secure the provision of services considered vital to the real economy and to prevent a run on banks' deposits.[21]

The central problem ring-fencing rules are meant to address is therefore the danger that depositors' savings and the provision of services considered vital to the real economy are jeopardized by risky activities.[22]

Ring-fencing aims to insulate these functions from functions deemed riskier and less important.[23] Banks shall be kept from risking their deposits and their ability to provide important services in order to prevent negative consequences for the financial system as a whole and to ensure the continuity of financial services.[24]

Proponents of ring-fencing claim its implementation would tackle various problems in today's financial world: ring-fencing can protect desired

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Trading, 4 (underscoring that in Europe banks overexposed themselves to trading); *Blundell-Wignall/Atkinson/Roulet* (2013) Bank Business Models, 76–77 (discussing the "*extreme systemic importance*" of G-SIBs); *Boot* (2014) Financial Sector, 131 (describing the "*increased fluid and complex nature of the banking industry*").

21 See *Lehmann* (2014) Ring-Fencing, 2–3. For Switzerland see e.g. *Schiltknecht* (2010) "Too Big to Fail", 435. History has shown that politicians "*have proven unable to resist the temptation of 'bailouts'*" (*Sester* (2010) Bank Restructuring Law, 515); This willingness to bail out banks has been examined in numerous studies, (for a good overview of factors influencing governments" bailout decision, see Hofer (2014) Structural Reforms, 114 et seqq.). Between 2008 and 2016, the EU Member States alone spent 653.8 billion € on capital-like aid instruments and 1.3 trillion € on liquidity aid instruments. In 2016, state aid was at its lowest since the beginning of the financial crisis. It was also the first year in which no recapitalisations were needed (*European Commission*, State Aid Scoreboard 2017, http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html; see also *European Parliament* (2013) Report on Structural Reform, 4).

22 Cf. *Gambacorta/Van Rixtel* (2013) Structural Bank Regulation Initiatives, 1 (using the term "structural reform"). See also *ICB* (2011) Vickers Report, 11; On European Union level, the protection of the activities mentioned above is not emphasized as the key objective and is mostly noted together with other benefits, presented in the next paragraph (see *European Commission* (2014) Proposal for a Regulation, 15 Sec. 12); The Swiss too-big-to-fail legislation also stresses the importance of the continuation of systemically relevant services (Art. 8(1), Art. 9(2)(d) Swiss Banking Act; see *Bahar/Peyer* (2013) Systemrelevante Banken 409).

23 Cf. *Gambacorta/Van Rixtel* (2013) Structural bank regulation initiatives, 1.

24 *Proctor* (2014) International Banking, 16.

activities from losses incurred in other areas of operation. It can end the subsidisation of risky activities by means meant to support desired activities, such as central bank lending facilities and deposit guarantee schemes. It may readjust costs of risk-taking and decrease moral hazard in other areas of operations. Furthermore, it may reduce the complexity as well as potentially the size of banks, which would improve their manageability, transparency, and resolvability. It may further keep the aggressive risk culture of certain areas of operation away from desired activities. All of these benefits would reduce the probability of future tax payer bailouts.[25] Ring-fencing may therefore tackle systemic risk and the too-big-to-fail problem.[26]

Since the financial crisis, many countries have decided to adopt legislation implementing a ring-fence. Although mostly guided by the same principles, the various approaches differ considerably. While the EU structural reform of banking was recently announced to be withdrawn following failure to reach an agreement in the European Parliament,[27] it has strongly influenced the academic and political discourse and thus developments on a national level. Due to the advanced stage in the legislative process, it will remain a benchmark for future structural reform proposals both in the EU and abroad. Alternative ways of imposing a ring-fence are expected to become more important: certain provisions of the BRRD[28] and the SRMR[29] are considered potential gateways for union-wide ring-fencing,[30] and may approximate the EU solution to the Swiss'.

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25 *Gambacorta/Van Rixtel* (2013) Structural Bank Regulation Initiatives, 2; See also *Van Kann/Rosak* (2013) Regierungsentwurf des Trennbankengesetzes, 1476; *HLEG* (2012) Liikanen Report, 100, 102; *ICB* (2011) Vickers Report, 35–36; *FSB* (2014) Structural Banking Reforms, 3.

26 See *European Commission* (2014) Impact Assessment Part 1, 26; see also *FSB* (2014) Structural Banking Reforms, 3; *ICB* (2011) Vickers Report, 163; *Expertenkommission* (2010) Schlussbericht, 54.

27 *European Commission* (2017) Commission Work Programme 2018: Annex 4, 2.

28 Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, L 173/190 (BRRD).

29 Regulation 806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, L 225/1 (SRMR).

30 In particular Art. 17 BRRD and Art. 10 SRMR. See e.g. *Alexander* (2015) Universal Model Banking, 494–498; *Binder* (2014) Resolution Planning, 16 (noting with regard to the BRRD that "*[o]n the basis of their powers given under this part of the Directive, authorities could go a long way towards implementing fully-fledged structural*

Some European countries have already adopted and some have even made use of their national legislation concerning structural reform. In a time of increased competition between financial centres and their participants, it is crucial to apply a legal comparative view to the instruments already in place. The objective is not just to assess their character and effectiveness and to gain insights for potential future bank structural reform initiatives but also to allow for an evaluation of the competitive position of the locations and their participants.

IV. Research Questions

The main research questions of this dissertation are therefore:

1. What comprehensive concept of ring-fencing as a category of bank structural reform can be established and how can its definition be contributed to?
2. What are the current developments concerning ring-fencing on EU level and in what direction is it expected to evolve?
3. What structural differences can be found in a legal comparative analysis of bank structural reform legislation in the United Kingdom, Germany and Switzerland and do they match the established concept of ring-fencing?

V. Scientific Approach

A. Part I

In the first part of the dissertation, the foundation for the main research questions shall be set. After a short introduction to its economic and political background, a comprehensive concept of ring-fencing as a category of bank structural reform shall be established.[31] It shall then be put into per-

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reforms of banking in the relevant jurisdictions, even without a more specific formal mandate to do so"); see also *Binder* (2015) Gleichung, 165 (noting that a segregation of commercial and investment banking may be introduced via these provisions).

31 While "structural reform" is an umbrella term, ring-fencing is to be identified as an own concept, as it can be clearly delimited from other structural reforms. Three core characteristics are established that identify ring-fencing as a concept of structural reform on its own, and that are used to delimit it against other struc-

spective by delimiting it from two related structural solutions: full separation[32] and the *activities ban* of full separation.[33] In this context, a digression looking at United States legislation, in particular the Glass Steagall Act and the Volcker Rule of the Dodd-Frank Act is considered useful.[34]

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tural reforms of banking: (i) the separation of commercial banking activities and certain investment banking activities, (ii) the establishment of a fence, (iii) the full maintenance of universal banking.

32 Full separation is regarded by some as a form of ring-fencing. See e.g. *Brown* (2014) With this Ring, I Thee Fence, 1038–1039; However, in the author's opinion it is rather to be regarded as a related form of structural reform, because, *inter alia*, it is much more far-reaching and invasive and cannot be subsumed under the concept of ring-fencing identified above, in particular because it does not allow for universal banking and because there is no fence.

33 The *activities ban* of full separation can be described as *the prohibition of a limited set of investment banking activities, which are considered high-risk, for the whole banking group, thereby limiting universal banking*. As pointed out by the Vickers Report, it is categorically a a *"form of full separation in that it prevents common ownership of banks and entities which conduct such activities". ICB* (2011) Vickers Report, 45. It is most prominently featured in the Volcker Rule and is sometimes combined with ring-fencing legislation, for example in the European Commission's draft regulation.

34 In the United States, a full separation was in place for most of the 20th century in the form of the Glass-Steagall Act. Adopted in 1933 during the Roosevelt administration's New Deal, the Glass-Steagall Act up until today holds significant appeal for politicians and the public. This is demonstrated by the fact that it was referenced frequently during the 2016 U.S. presidential election. The future of the Volcker Rule has come under considerable pressure by President Trump, (see e.g. *Dexheimer*, Volcker Rule Change Backed in House Panel's Dodd-Frank Remedy, Bloomberg (March 21, 2018); *Buhayar*, Trump May Ax Volcker Rule, Ease Banks' Burden First, Whalen Says, Bloomberg (November 10, 2016); *Jenkins/McLannahan*, Trump's deregulatory stance expected to dilute financial reforms, Financial Times (November 10, 2016)), who has made it a key target of his deregulation efforts (see *U.S. Department of the Treasury* (2017) Treasury Report, 71 et seqq.). The U.S. has taken a pioneering role in both the Glass-Steagall Act and the Volcker Rule and has significantly influenced European ring-fencing legislation. To understand the origins of certain ideas in the European legislation, a short digression to U.S. structural reform is considered beneficial. Furthermore, both structural reforms are sometimes associated with ring-fencing, which is to be opposed; they therefore need to be delimited from the concept.

Subsequently, the basic rationale and goals of ring-fencing shall be set out[35] and different methods of ring-fencing shall be identified.[36] Due to the ambiguity of terminology mentioned above, it is critical to develop a definition that reflects the concept established and helps to differentiate it from other bank structural reforms.[37]

B. Part II

The second part of the dissertation shall examine the European Union approach, discussing the three legislative steps taken before the withdrawal by the European Commission: the recommendations of the Liikanen Report, the European Commission's Draft Regulation and the Negotiating Stance of the Council of the European Union. The dissertation aims at identifying an overall trend, beginning with the relatively stringent recommendations of the Liikanen Report, turning into a quite strict draft regulation and then turning into a rather lenient negotiating stance by the Council of the EU, which preceded the recently announced withdrawal. The events in the European Parliament shall be briefly touched upon, dur-

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35 The division between the basic rationale of ring-fencing and other objectives that may also be reached by its implementation is considered useful as it highlights that the protection of systemically important activities is an essential precondition for the achievement of the other objectives.

36 Its variety of forms can be subsumed under two key methods, which are both based on the underlying assumption that the large variety of different services provided by universal banks can be divided into three groups, of which two are highlighted: desired activities, which include deposit-taking and other financial services essential for the real economy; and risky activities, which include trading activities, such as proprietary trading, market making and dealing in derivatives. The (i) *defensive method* protects desired activities by separating them and isolating them within a ring-fence. The (ii) *containment method* protects desired activities by separating risky trading activities. Both methods share the same aim and use similar tools to reach it.

37 The quest for a definition will begin with a literal interpretation of the word "ring-fencing", which will identify two important aspects already inherent in the expression: (i) a defensive element, in that a fence represents a barrier or an obstacle and (ii) a valuing element, in that something precious needs protection. As the term ring-fencing has also been used in contexts other than structural reform, those too will be briefly touched upon. Subsequently, the chapter will narrow down to definitions for bank structural reform. Ultimately, it will try to establish its own definition for bank structural reforms that match the established concept of ring-fencing.

ing which the assembly's Economic and Monetary Affairs Committee vetoed a draft approach of moderate structural banking rules for being too lenient.[38] The European Parliament therefore had to restart its negotiations, something that has not occurred with any other major financial reform package.[39] As no agreement could be reached, the Commission announced its withdrawal recently.[40] Both the withdrawal and potential alternatives for installing a union-wide ring-fencing regime shall be discussed.[41]

C. The Concept of Ring-Fencing II

While the fate of the European Union's regulation had long been uncertain, a number of countries in Europe already adopted structural reform legislation with some of them even having applied it already. The third part of the dissertation shall analyse and comparatively discuss national legislation in Europe's most important financial centres: the United Kingdom, Germany and Switzerland. This shall be achieved by identifying a number of aspects, which will then be used to examine the different approaches allowing an aspect-to-aspect comparative analysis.[42] The intention is to outline the major differences between the national approaches, allowing to acquire an understanding for each nation's plan for structural reform while ensuring that the dissertation does not lose its perspective on the bigger picture. The unique approach of Switzerland comprising of rather scarce legislation and giving lots of power to authorities makes it

38 See further *Moshinski*, EU Bank-Structure Rules Falter with Parliament Divided, Bloomberg, (May 26, 2015).

39 *Hogan*, Bank Ring Fencing Edges Closer in Europe, KPMG Insights, (June 28, 2015), https://home.kpmg.com/xx/en/home/insights/2015/06/bank-ring-fencing-edges-closer.html.

40 *European Commission* (2017) Commission Work Programme 2018: Annex 4, 2.

41 Potential alternatives include (i) existing regimes, such as provisions of the BRRD and SRMR, which can be considered potential gateways for union-wide ring-fencing; and (ii) legislative options. An example for the latter are the amendments proposed by Members of Parliament in February 2019, adding a chapter on bank structural reform to CRDV (*European Parliament Committee on Economic and Monetary Affairs* (2018) Amendments CRDV, 81–89).

42 The aspects used, (e.g. the height of the fence, what activities fall on which side of the fence), are in line with the general practice. See e.g. *ICB* (2011) Vickers Report, 35, 36, 62; *Brown* (2014) With this Ring, I Thee Fence, 1047, 1049, 1053; *Hofer* (2014) Structural Reforms, 477, 479, 488.

necessary for the comparative analysis to refer in some areas to the separation process of its largest banks, *UBS* and *Credit Suisse*. It shall further be explored to what extent the jurisdictions match the concept and definition of ring-fencing established in the first part. This will be particularly interesting in the case of Switzerland, as it originally chose not to implement far-reaching structural reforms.

VI. Methodology

The main research questions of this dissertation shall be addressed in a jurisprudential approach. The relevant norms and proposals adopted by both national legislators as well as actors of the European Union legislative procedure shall be analysed legally. The dissertation shall be based upon a thorough review of jurisprudential literature. Most of the sources are from the United States, Germany, the United Kingdom and Switzerland. It will further be beneficial to include sources from the field of economics and political science as necessary. Particularly the second part of the dissertation, addressing the developments on a European Union level, requires political research.

The legal comparative analysis of structural reforms in Germany, the United Kingdom and Switzerland shall be conducted as a micro-comparison as described by *Zweigert/Kötz*.[43] The author has conducted interviews and background talks with experts who have been involved or worked on the respective structural reform projects, including interest group representatives, specialists at banks (as parties affected) and regulators (as executive authorities); the findings of these are incorporated into the dissertation.

43 *Zweigert/Kötz* (1996) Rechtsvergleichung, 4, 42; See also *Zweigert/Kötz* (1998) Comparative Law, 5, 43–44.