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978-0-521-51570-2 - Perspectives in Company Law and Financial Regulation: Essays in Honour of Eddy Wymeersch

Edited by Michel Tison, Hans De Wulf, Christoph Van der Elst and Reinhard Steennot

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PART I

Perspectives in company law

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SECTION 1

European company law:
regulatory competition and free
movement of companies

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The European Model Company Act Project

THEODOR BAUMS AND
PAUL KRÜGER ANDERSEN

I. Introduction

On 27 and 28 September 2007, a commission formed on the initiative of the authors¹ held its first meeting in Aarhus, Denmark to deliberate on its goal of drafting a European Model Company Act (EMCA). This project, outlined in the following pages, aims neither to force a mandatory harmonization of national company law nor to create a further, European corporate form. The goal is rather to draft model rules for a corporation that national legislatures would be free to adopt in whole or in part. Thus, the project is thought of as an alternative and supplement to the existing EU instruments for the convergence of company law. The present EU instruments, their prerequisites and limits will be discussed in more detail in Part II, below. Part III will examine the US experience with such ‘model acts’ in the area of company law. Part IV will then conclude by discussing several topics concerning the content of an EMCA, introducing the members of the EMCA Working Group, and explaining the Group’s preliminary working plan.

¹ See P. Krüger Andersen, ‘Regulation or Deregulation in European Company Law – a Challenge’, in U. Bernitz (ed.), *Modern Company Law for a European Economy – Ways and Means*, (Stockholm: Norstedts Juridik Förlag, 2006), 263 *et seq.*; T. Baums, ‘The law of corporate finance in Europe – an essay’, *Nordic Company Law*, 31 (2008), *et seq.*; also see Ebke’s earlier proposal to set up a ‘European Law Institute’ modelled on the American Law Institute in order to draft a European Model Company Law Statute; W. Ebke, ‘Unternehmensrechtsangleichung in der Europäischen Union’, in *Festschrift für B. Großfeld*, (Heidelberg: Recht und Wirtschaft, 1999), 189, 212 *et seq.*, and J. Wouters, ‘European Company Law: Quo Vadis?’, *Common Market Law Review*, 37 (2000), 257–307, especially 298.

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II. European company law legislation: traditional instruments and a new tool

A. *The limits of European company law legislation*

Until now, the European Union has employed three tools to ensure that the legal rules in the area of company law are compatible with the goal of a functioning internal market: first, the *harmonization of national company law* through directives adopted under art. 44(2)(g) Treaty Establishing the European Community (EC Treaty) that national legislatures must implement; second, the *creation of new supranational organizational forms* on the basis of art. 308 EC Treaty, forms which exist alongside their national counterparts as alternative vehicles for companies; and third, the *judicial policing of national company law under the right of free establishment* (arts. 43 and 48 EC Treaty) as performed by the European Court of Justice (ECJ), which in a series of landmark decisions since 1999 – among them the well-known *Centros*, *Überseering* and *Inspire Art* cases – has rejected a number of national limitations and thus triggered a ‘regulatory competition’ among national corporate laws, the results of which are not yet foreseeable.

Each of these methods of structuring the law has its own prerequisites and conditions of application – which here will be mentioned only summarily² – that make supplementation through a uniform, albeit non-mandatory, European Model Company Act both meaningful and desirable.

Harmonization by means of directives is understood as a technique for achieving less than full unity of law and is subject to the Treaty condition that the measure be implemented only if and to the extent required for reaching the goal of a common market (arts. 3(1)(h) and 44(2)(g) EC Treaty). This approximation of laws presupposes the existence of a variety of individual national legal systems that will continue to exist, and also of diverse, possible legal solutions. As a form of ‘harmonization *lite*’, it seeks merely to ensure that each member state enacts provisions that do not disrupt the internal market. Beyond that floor, each member state remains free to shape its company law in any way it chooses, provided the result conforms to the minimum needs of the Union. Although this

² See the detailed discussion by C. Teichmann, *Binnenmarktkonformes Gesellschaftsrecht* (Berlin: de Gruyter Recht, 2006), pp. 73 *et seq.*, and e.g. K. Engsig Sørensen and P. Runge Nielsen, *EU-retten*, (Copenhagen: Jurist- og Økonomforbundets Forlag, 2004), 675 *et seq.*

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solution effectively allows the use of ‘states as laboratories’ to develop competing corporate models³ and helps counteract a petrification of a status quo reached by centrally developed norms,⁴ beyond the minimally harmonized area a basic tension remains with the expectations of corporations operating on a European scale, which rather ask for standardization of operating rules and seek uniformity in laws on investor protection and the disclosure of information, so as to reduce their information and transaction costs.

Supranational organizational forms like the European Company (SE), the European Co-operative (ECS) or the European Economic Interest Grouping (EEIG) would only meet these needs if the statutes of the individual member states in which they are based had substantially similar content. This is a condition that the current state of affairs does not meet, given that the statutes creating supranational entities contain

³ For a detailed discussion of competition between legislatures, see E. M. Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, (Tübingen: Mohr Siebeck, 2002); K. Heine, *Regulierungswettbewerb im Gesellschaftsrecht*, (Berlin: Duncker & Humblot, 2003); Teichmann, *Binnenmarktkonformes Gesellschaftsrecht*, (note 2, above), 330 *et seq.*; J. Armour, ‘Who should make Corporate Law? EC Legislation versus Regulatory Competition’, *ECGL- Law Working Paper*, 54 (2005), available at <http://ssrn.com/abstract=860444>; J. Andersson, ‘Competition between Member States as Corporate Legislator’, in U. Bernitz (ed.), *Modern Company Law for a European Economy – Ways and Means* (Stockholm: Norstedts Juridik Förlag, 2006), 143 *et seq.*; H. Söndergård Birkmose, ‘Regulatory Competition and the European Harmonisation Process’, *European Business Law Review*, 17 (2006), 1079–97. The discussion on competition is particularly related to the European Legal Capital Regime as determined by the Second Company Law Directive. Thus, there is a debate on what the directive allows – is it possible for the member states to create a competitive new model for regulations within the framework of the directive, or is it necessary to create an alternative system? In a newly published contribution to that debate (P. Santella and R. Turrini, ‘A contribution to the debate on the legal capital regime in the EU: What the Second Company Law Directive allows’, in P. Krüger Andersen and K. Engsig Sørensen (eds.), *Company Law and Finance*, (Copenhagen: Thomson, 2007), 85 *et seq.*), the authors argue that the Second Company Law Directive is a very flexible instrument which to a very large extent allows member states to develop new and efficient capital rules. An example to illustrate this could be the new (2006) and liberal Finnish Company Act. See J. Mahönen, ‘Capital Maintenance and Distribution Rules in Modern European Company Law’, in Andersen and Sørensen (eds.), *Company Law and Finance*, p. 119; and M. Airaïksinen ‘The Delaware of Europe Financial Instruments in the new Finnish Company Act’, in Andersen and Sørensen (eds.), *Company Law and Finance*, 311.

⁴ On the disadvantages of centrally developed norms (keywords: elimination of regulatory competition; ‘petrification’ of the law because of the EU legislative process; costs of change) see C. Teichmann, ‘Wettbewerb der Gesetzgeber im Europäischen Gesellschaftsrecht’, in E. Reimer et al. (eds.), *Europäisches Gesellschafts- und Steuerrecht*, (Munich: Beck Juristischer Verlag, 2007), 313, 329 with further references.

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numerous references to national laws as gap-fillers. In this way, the enacted company forms by no means create uniform rules, but rather each member state presents a different mosaic of supranational and national rules to the market. In the case of the SE, above all, EU law creates a mere torso of a corporation. There are undisputable advantages to this type of form (e.g., combining free structuring with a uniform 'European Trademark'). However, the advantages of a truly unified corporate form remain beyond reach. It remains to be seen whether it will be possible to develop a genuinely European company in the planned 'European Private Limited Company' (EPC).

Judicial policing of national company law for conformance with the right of free establishment can in the final determination only clear away barriers on a case-by-case basis, but cannot serve to positively create workable forms. Although offending national norms are removed, they are not replaced with provisions serving the internal market. Rather, ECJ company law decisions have since 1999 launched a competition for corporate charters in which member states have started to adopt differing measures within the open area left by the ECJ. In this respect it has been argued that the establishment of a market for corporate charters does not necessarily lead to regulatory competition as the supply side (the member states) lack sufficient incentives to compete for charters.⁵ The work of the Group might help to improve this as its procurement of detailed information on national company law will create the transparency that is a prerequisite for competition.

B. The present aims of EU regulation: from harmonization to convergence

The objectives of EU regulation in the area of company law have changed substantially over time – in spite of their unchanged basis in Article 44(3)(g) of the EC Treaty. In an article on the subject, Jan Wouters analysed the development from the 1960s (the adoption of the first series of directives) until the year 2000.⁶ During the 1960s, the ambitious goal was to harmonize company law, comprising all aspects of such law from the formation of companies to investment, dividends, mergers and liquidations. After adoption of the first series of harmonization directives, this

⁵ See H. Søndergård Birkmose, 'A Race to the Bottom in the EU', *Maastricht Journal of European and Comparative Law*, 1 (2006), 35–80.

⁶ Wouters, 'European Company Law: Quo Vadis?', (note 1, above), 257–307.

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development gradually stopped. It turned out that it was impossible to realize full harmonization in several areas, and the goal of harmonization was subjected to debate. *Wouters* describes the EU's activity in company law around the turn of the millennium as characterized by a four-fold crisis: conceptually (e.g. participation versus consultation of employees), in relation to competence (i.e., an emphasis on subsidiarity), questioning legitimacy (i.e., a new preference for a decentralized development of the law) and a growing local loyalty (member states' resistance to implementation of EU norms).⁷ He argued that the Commission did not have any coherent vision or agenda in the field of company law. Shortly after the publication of this article, the Commission (on 4 September 2001) set up a Group of Company Law Experts. This Group was due to provide recommendations for creating a modern framework for European company law. Based on the Group's final report,⁸ the Commission elaborated its Action Plan in 2003.⁹ To use the words of *Rolf Skog*,¹⁰ one might well say that EU's work with company law gained new wind in the sails.

Although the initial Action Plan of 2003 has been reviewed and developed further meanwhile,¹¹ the three 'guiding political criteria' that the regulatory activity at the European level needs to respect remain important also in the context of the Model Law Project.¹² These criteria are (1) the *subsidiarity* and *proportionality principle* of the Treaty, (2) that the regulatory response is *flexible in application, but firm in principles*, and (3) that it should shape *international regulatory developments*.

To sum up, the present aim of the EU regulation is *not* to harmonize the companies acts of the member states. Directives are not the primary regulatory tool. Better regulation can include alternative tools – such as a model law that can foster convergence and best practice on a European level. Creating a European Model Company Act is completely in line with this view expressed by the Commission.

⁷ Wouters, 'European Company Law: Quo Vadis?', (note 1, above), 275.

⁸ *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe*, Brussels, 4 November 2002.

⁹ *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward* (COM(2003) 284 Final).

¹⁰ See R. Skog, 'Harmoniseringen af bolags- og børsrätten indom EU – ny vind i seglen?', *NTS (Nordisk Journal of Company Law)*, (2001), 331; R. Skog, 'Harmoniseringen af bolagsrätten indom EU – fortfarande vind i seglen?', *NTS*, 1(2007), 66.

¹¹ See T. Baums, 'European Company Law beyond the 2003 Action Plan', *European Business Organization Law Review*, 8 (2007), 143 *et seq.*

¹² See *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward* (COM(2003) 284 Final), 4.

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[More information](#)*C. Concluding thoughts on the EU company law programme*

As has been shown above, today member states have a significant amount of legislative free space in the area of company law. This area is limited only in certain areas by the ECJ's decisions protecting freedom of establishment, and has been – and will continue to be – harmonized only in certain other areas by EU directives. On the one hand, this free space should, in light of the disadvantages of centrally harmonizing substantive law¹³ and the advantages of decentralized, competing legislative efforts,¹⁴ be retained and defended. On the other hand, as said, certain disadvantages are connected with relinquishing further substantive harmonization of national company law. Thus, the abandonment of central harmonization can cause three conceivable losses: first, the standardization of norms creates economic savings by eliminating the costs of obtaining information about diverse laws and adapting business to them;¹⁵ second, a regulatory competition which is driven primarily by the preferences of managers and investors may not always lead to optimal results for the affected third-party constituencies;¹⁶ third, legislation promulgated from a central government can break through impediments to reform that are well entrenched at the level of individual states.

The potential loss of these benefits does not, however, speak unconditionally for a programme of central harmonization. For example, it does not seem that the competition for corporate charters in Europe that has only just begun has injured third parties to an extent which would call for the prompt creation of harmonized norms for private limited companies. It is also the very purpose of regulatory competition to subject to market competition those local particularities seen by one party as an impediment to reform while valued by the other as desirable options, rather than simply either eliminating or perpetuating them through centralized rules. However, the fact remains that a basic tension exists between the goal of a unified, internal market and the continued existence of different systems of corporate law, a tension that entails both advantages and disadvantages. Can a unified,

¹³ Note 4, above.¹⁴ Note 3, above.¹⁵ See E. Kitch, 'Business Organization Law: State or Federal? – An Inquiry into the Allocation of Political Competence in Relation to Issues of Business Organization Law in a Federal System' in R. M. Buxbaum et al. (eds.), *European Business Law: Legal and Economic Analyses on Integration and Harmonization* (Berlin: de Gruyter, 1991), pp. 35, 40 *et seq.*¹⁶ On this point see the literature and references note 3, above.

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voluntary model law serve to preserve the advantages of decentralized legislative energy and imagination while assuring most advantages of centralized harmonization? The following paragraphs consider this possibility.

D. The functions of an EMCA

A European Model Corporation Act¹⁷ would not lead to a legal instrument issued by the European Union: the member states would neither be ordered to implement an EU directive nor would the Union create yet another European business form. To this extent, the concept of a European Model Company Act must not be misunderstood. Emphasis should be on the word ‘*model*’. The project is to develop a model for a companies act that the member states are free to adopt or reject. The content of the model should include broadly acceptable uniform rules, building on the common legal traditions of the member states and the existing *acquis communautaire*, but also contribute to developing best practice based on experiences from the modern companies acts of various member states. The draft should both leave individual states free space for their own take on the model, so as to account for local and national particularities, and offer incorporators maximum flexibility with which to structure the ultimate business enterprise.

Of course, even now every carefully prepared amendment of law is preceded by a thorough comparative analysis. Nevertheless, such comparative analyses are often restricted to the most economically important jurisdictions and are often performed in a perfunctory way. Alone on the basis of having a member from each of the twenty-seven EU member states,¹⁸ the EMCA drafting commission will incorporate experience from all the legal traditions found in the European Union within its comparative study and draft a model act that takes this experience into account. This should be of use not only for the smaller member states – which are often pressed to staff and dispatch a team of legal experts for the drafting of such measures – when it comes time to consider adopting the EMCA. In addition, it may be hoped that national legislatures, including those of the larger member states, will hesitate before evoking national particularities in order to deviate from

¹⁷ Regarding the type of corporations that should be regulated by the EMCA, see *infra* Part IV.A.

¹⁸ See *infra* Part IV.B.

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the European ‘benchmark’ when faced with a model act that has been specifically designed for uniform use throughout the Union. Lastly, a provision of national law that restricts freedom of establishment will likely be scrutinized even more strictly when it is not compatible with a model act that has been designed and adopted by all member states.

In addition to the advantages discussed above, the development of a model companies act fits nicely within the current legislative plan of the European Commission, see also Part II.2, above. On the one hand, the Commission is currently examining the existing EU norms in the area of company law for possible simplification and deregulation, where this is possible and meaningful.¹⁹ A model act that could replace the imperative command of a directive or regulation with an informed recommendation to the member states could prove a workable alternative to the current EU regulatory mix. On the other hand, by developing genuinely European forms for business organization (SE, SCE, EEIG, and, probably, the EPC) the European Commission is also trying to enrich the assortment of available options for users. For this reason as well, the Commission sees with interest and favour the attempt to develop a model company form on the basis of a thorough comparative analysis that can – unlike existing supranational company forms – operate largely independently from references to other national laws. The next part of this article will discuss the US experience with model laws.

III. Model acts in the United States

Comparative analyses often refer to the work of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in the United States²⁰ as an example of unifying law through the

¹⁹ See in this regard the reports by Baums, ‘European Company Law beyond the 2003 Action Plan’, (note 11, above), 143–160; and D. Weber-Rey, ‘Effects of the Better Regulation Approach on European Company Law and Corporate Governance’ *European Company and Financial Law Review*, 3 (2007), 370, 374 *et seq.*

²⁰ For a general discussion see K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, third edition (Oxford: Clarendon, 1998), § 17.III; specifically on company law see R. Romano, *The Genius of American Corporate Law* (Washington: American enterprise institute for public policy research, 1993), 128 *et seq.*; J. von Hein, ‘Competitive Company Law: Comparisons with the USA’, in U. Bernitz (ed.), *Modern Company Law for a European Economy – Ways and Means*, (Stockholm: Norstedts Juridik Förlag, 2006), 25 *et seq.*