Perspectives in Company Law and Financial Regulation

EDITED BY MICHEL TISON,
HANS DE WULF,
CHRISTOPH VAN DER ELST AND
REINHARD STEENNOT

CAMBRIDGE

PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION

This collection of essays has been compiled in honour of Professor Eddy Wymeersch on the occasion of his retirement as professor at Ghent University. His main international academic peers explore developments on the crossroads of company law and financial regulation in Europe and the United States, providing a unique view on the dynamics of regulatory competition in an era of economic globalization, whether in the fields of rule making, organizing the mobility of capital or the enforcement of rules. The deepening of European financial integration and the transatlantic regulatory dialogue has generated new paradigms of rule setting in a multinational framework and reinforced the need to develop adequate instruments for cooperation between regulators. Regulators increasingly use concepts such as equivalence or mutual recognition to regulate cross-border relations.

MICHEL TISON, HANS DE WULF, REINHARD STEENNOT and CHRISTOPH VAN DER ELST are professors at the Financial Law Institute at Ghent University.

INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION

Recent years have seen an upsurge of change and reform in corporate law and financial market regulation internationally as the corporate and institutional investor sector increasingly turns to the international financial markets. This follows large-scale institutional and regulatory reform after a series of international corporate governance and financial disclosure scandals exemplified by the collapse of Enron in the United States. There is now a great demand for analysis in this area from the academic, practitioner, regulatory and policy sectors.

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521515702

First published 2009

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Perspectives in company law and financial regulation : essays in honour of
Eddy Wymeersch / [edited by] Michel Tison ... [et al.].
p. cm. – (International corporate law and financial market regulation)
ISBN 978-0-521-51570-2 (hardback) 1. Corporation law. I. Wymeersch, E.
II. Tison, Michel. III. Title. IV. Series.
K1315.P47 2009
346′.066–dc22
2009002692

ISBN 978-0-521-51570-2 hardback

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He was chairman of the High Level Group of Company Law Experts set up in 2001 by the European Commission to advise it on a modern regulatory framework for company law in Europe. The Group in January 2002 first advised on issues related to takeover bids. The final report of the Group on a Modern Regulatory Framework for Company Law in Europe (November 2002) was the basis for the Commission's Company Law Action Plan.

He was a member of the Dutch Corporate Governance Committee, chaired by Morris Tabaksblat, that has drafted the Dutch Corporate Governance Code of December 2003.

Jaap Winter is a member of the European Corporate Governance Forum set up by the European Commission in 2004 to advise it on corporate governance developments in Europe. He received the 2004 International Corporate Governance Award from the International Corporate Governance Network. He is also a member of the Supervisory Board of the Dutch securities regulator AFM.

FOREWORD

The wide-ranging content of this book can be seen as a reflection of the academic career of the person it is dedicated to, Eddy Wymeersch. After receiving a Law degree at Ghent University in Belgium and a Master of Laws degree at Harvard Law School in the USA, Eddy Wymeersch ventured into academia as an assistant to Professor Jean Limpens at Ghent University. He briefly worked for the Belgian banking supervisor, then called Banking Commission, but soon left, only to return as the chair of its executive committee in 2001. In 1972 he was appointed professor at the newly established University of Antwerp. In 1984 he returned to his alma mater, Ghent University, to remain there until his retirement in 2008. At Ghent University, Wymeersch and his colleague Guy Schrans founded the Financial Law Institute in 1990, as a research center but also as a forum where (Belgian) academics and practitioners can meet to discuss new developments in company and financial law. Professor Wymeersch is still a source of inspiration to all members of the Institute and we all hope he will continue to stimulate younger members with his direct and critical but always constructive comments.

Speaking and/or reading Dutch, English, French, German and Italian and, being from little, outward-looking Belgium, Wymeersch has always closely monitored legal developments internationally, both in Europe and the USA, at a time when many were only interested in the technical intricacies of their national legal systems. This partly explains his exceptionally good nose for what would become the topics of future legal research in European company and financial law. He was a pioneer in many fields related to securities, corporate and banking law. In the 1970s the European Commission charged him with a seminal study on "The Control of the Securities Markets in the European Community" (published in 1978). Hardly anything had been written on the topic at that time, but Eddy Wymeersch revealed a wealth of important issues, many of which were only dealt with in European regulation at the start of the twenty-first century, by which time he had become the chairman

of the Committee of European Securities Regulators (CESR). He established contact with Klaus Hopt and together they would embark on a series of groundbreaking conferences, which were always accompanied by important and widely consulted conference volumes and which brought together many of the leading, internationally minded scholars in areas such as banking, securities and corporate law from across Europe and the USA. The first two such conferences dealt with Insider dealing and takeover bids in Europe. Later Guido Ferrarini would transform the couple into a triumvirate of close friends. They would continue to meet each other in various fora and locations. The award of the prestigious Max Planck Research Prize in 1998 enabled Eddy Wymeersch to fund some of the later conferences. Other fora, such as the International Faculty for Corporate Law and Securities Regulation, or the Forum Europaeum, which worked on principles of group law, were equally productive in terms of academic output.

In 1992 Eddy Wymeersch spoke about corporate governance at Cambridge, at a (still just pre-Cadbury) time when hardly any scholar, board member or institutional investor on the Continent had heard about the concept. He would soon start spreading the gospel, leading to him more or less single-handedly writing the Belgian Corporate Governance Act of 2002, being involved in the drafting of every official Belgian corporate governance Code for listed companies and being chosen as a member of the European Corporate Governance Forum. At that time he already had years of consulting for, among others, the IMF and World Bank behind him, which had given him the opportunity to advise several eastern European states on the introduction of stock exchange regulation and other aspects of what was for these countries, in the immediate aftermath of the fall of the Berlin Wall, the new capitalist system of funding companies. Eddy Wymeersch also chaired the European SLIM-working group (which stands for Simpler Legislation for the Internal Market) that had a significant impact on the modernization and simplification of the First and Second Company Law Directives related to legal capital and disclosure.

For European legal academics under 45 years old who write in English – still a small but rapidly expanding minority – some knowledge of basic law and economics concepts is self-evident. This was certainly not always the case, and Wymeersch was an early, although always cautious enthusiast of the movement and even more of purely economic literature and attention to empirical data. For Professor Wymeersch, multidisciplinarity is essential for the legal scholar: legal research must be open to

other disciplines like economics and even politics. But one should avoid meta-analysis of rules without first familiarizing oneself with their often important technical details, and think twice about developing grand theoretical schemes that stand no chance whatsoever of being applied to real world situations. He also force-fed the *Financial Times*, the *Economist* and *Harvard Business Review* to anyone who wanted to write a doctoral thesis under his guidance – and being prepared to write a PhD was a requirement if you wanted to become a full-time researcher at the Financial Law Institute. Another requirement was learning enough German to understand the German literature that is often two or three years ahead of the rest of Europe. Not a year went by in which Eddy Wymeersch did not visit at least two or three German universities and academic conferences and from the beginning of the 1990s onwards he published more in German and other foreign journals than in Belgian ones, turning him into one of the most downloaded European authors on SSRN and making some junior Belgian colleagues wonder whether he was actually truly Belgian. Anyone familiar with Eddy Wymeersch knew, though, that for him an international outlook had never been incompatible with an interest in local developments. On the contrary, awareness of what was going on elsewhere seemed to him to be essential if one wanted to intervene in a useful way in national debates. In his farewell speech at the academic session organized to mark his official retirement as a professor at Ghent Law School in October 2008, he expressed his worries about the decline of the knowledge of French among Flemish professionals, including academics. It would prevent them, he warned, from performing the bridge function his generation had tried to play between the "Germanic" and "Latin" worlds of northern and southern Europe – worlds that meet in places like Brussels, 50 kilometers from Ghent.

While his roots and interests are certainly in the academic sphere, Eddy Wymeersch never limited his academic research to a purely dogmatic, positivist dissection of texts, as is still rather common in Europe. After he had given a solid foundation to his academic career, Wymeersch placed his knowledge and insights at the disposal of practice and policy: to name only a few of them, he was appointed to the Belgian Council of State (which vets Bills before they are introduced into Parliament); became a member of the board of Governors of the National Bank of Belgium; chairman of the board of BIAC, the national airport company; chairman of the executive committee of the Belgian banking and securities supervisor, which he transformed into the Belgian Banking,

Finance and Insurance Commission (CBFA) by incorporating the previously independent insurance supervisor; followed by the chairmanship of the supervisory board of this CBFA. In 2007 he was elected as chairman of the Committee of Securities Regulators (CESR).

This book is dedicated to Eddy Wymeersch. It was accompanied by an international conference, 'Perspectives in Company Law and Financial Regulation', held in December 2008 in Ghent in honour of Eddy Wymeersch. This conference was an attempt by Eddy Wymeersch's successors at Ghent Law School to emulate the success of the Siena and Syracuse conferences and to fruitfully combine intellectual work and food for thought in an atmosphere of friendship.

This collection of essays is the result of the collective effort of Eddy Wymeersch's main academic peers and friends worldwide. We are extremely grateful to every one of the contributors for having freed scarce time to participate in this tribute to Eddy Wymeersch. Eilis Ferran, Howell Jackson and Niamh Moloney kindly hosted the collection of essays in the *International Corporate Law and Financial Market Regulation* series they edit at Cambridge University Press. We are also grateful to the publishers at Cambridge University Press, notably Kim Hughes and Richard Woodham, and to Jamie Hood at Out of House Publishing Solutions for their relentless efforts and patience through all the productions stages of this volume. Finally, the assistance of the researchers at the Financial Law Institute (Filip Bogaert, Diederik Bruloot, Isabel Coppens, Wendy Dammans, Sarah De Geyter, Delphine Goens, Evelyne Hellebuyck,, Kristof Maresceau, Sara Pauwels, Fran Ravelingien and Lientje Van Den Steen), and of its secretariat (Nicolle Kransfeld and Annelies Rademaker) in the editing and proof-reading of the manuscripts was critical in meeting the production deadlines.

The more than 30 contributions in this volume highlight a wide range of current issues in company law and financial regulation in various jurisdictions, both in Europe, the USA and Japan. Most contributions were finalized during Spring 2008, and could not, therefore, incorporate the most recent market and regulatory developments that have characterized the current financial crisis since the second semester of 2008. We hope this volume will provide some more inspiration for future research to Eddy's no doubt already overflowing list of things to do once CESR and officialdom give him back some time – although we will not stop him if he prefers to take his cue from Voltaire and dedicate himself to the most civilized of all tasks, tending his magnificent garden – where

he also produces some of the most red and fleshy tomatoes north of the Alps.

We wish Eddy Wymeersch all the luck for his future activities and other new inspiring challenges and ventures. We also hope and are convinced he will continue to spend some of his valuable time to share his views, ideas and inspiration with the Financial Law Institute at Ghent.

Hans De Wulf
Reinhard Steennot
Michel Tison
Christoph Van der Elst

PART I

Perspectives in company law

SECTION 1

European company law: regulatory competition and free movement of companies

1

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 authors[1] 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.

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 summarily[2] – 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.*

solution effectively allows the use of 'states as laboratories' to develop competing corporate models[3] 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', *ECGI- 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. Søndergård 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 contribute 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. Airaiksinen '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.

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.

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 börsrätten indom EU – ny vind I seglen?', *NTS (Nordisk Journal of Company Law)*, (2001), 331; R. Skog, 'Harmoniseringen af bolagsrätten indom EU – fortfarende 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.

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 law[13] 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.

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 Act[17] 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.

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 States[20] 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.*

formulation of recommendations at a central source in spite of legislative competence remaining lodged with decentralized, individual states. For the purposes of this paper, a brief sketch of the US experience should suffice.[21] The EMCA drafting commission will seek to benefit from the experience gained in the United States by bringing in a US legal expert as a consultant.

US attempts to draft a corporation statute to unify the laws of the individual US states date back to the 1920s. The NCCUSL completed a Uniform Business Corporation Act (UBCA) in 1928. The UBCA was conceived as a *uniform* act governing all corporations, and was to be uniformly adopted in identical form without change by the states. However, the UBCA was not a success (it was adopted by only a few small states, such as Louisiana, Washington, and Kentucky) and in 1943 the NCCUSL changed its status into the more flexible form of a *model* act, although this did not bring about an improvement in its fortunes and the Act was withdrawn in 1958. During this period, the American Bar Association (ABA) had independently set out to develop its own 'Model Business Corporation Act' (MBCA), which it released in 1946, and it eventually took over the NCCUSL's project, which has since that time been carried forward by the ABA's Committee on Corporate Laws of its Section on Corporation, Banking, and Business Law.[22] In contrast to the UBCA, the MBCA has been a great success and has been adopted by the majority of US states and has served as a resource of company law doctrine for state legislatures and courts.[23] The MBCA was thoroughly revised in 1984, and released as the 'Revised Model Business Corporation Act (RMBCA).[24] The Model Business Corporation Act is

[21] For a more detailed discussion, see R.W. Hamilton, 'The Revised Model Business Corporation Act: Comment and Observation. Reflections of a Reporter', *Texas Law Review*, 63(1985), 1455; J. Macey, *Macey on Corporation Laws* (Aspen Publishers, 2002), Introduction.

[22] See Hamilton, 'The Revised Model Business Corporation Act', (note 21, above), 1457.

[23] See R. A. Booth, 'Model Business Corporation Act – 50th Anniversary', *Bus. Law.,* 56 (2000), 63. The article discusses statistics proving that the MBCA has been remarkably influential not only for state statutes, but also for court decisions. The Act has also been cited or discussed in numerous law review articles. See also J. A. Barnett et al., 'The MBCA and state corporation law – a tabular comparison of selected financial provisions', *Bus. Law.,* 56 (2000), 69. In US law schools corporate courses are usually based on the Model Act, often combined with, e.g., the Delaware General Corporation Law. Similar developments could arise in the EU with respect to EMCA/national law.

[24] Reprinted in M. A. Eisenberg, *Corporations and Other Business Associations. Statutes, Rules, Materials, and Forms* (New York: Foundation Press, 2007), 677.

revised every year, and proposed revisions are published in the ABA's *Business Lawyer* magazine.

The basic entity intended to be created under the RMBCA is a publicly held corporation. To this end, the RMBCA is accompanied by a Model Statutory Close Corporation Supplement, which was first released in 1982. Beginning in the 1990s, however, small entrepreneurs came for tax and other reasons to favour the Limited Liability Company (LLC), and all of the fifty US states now have some form of LLC statute. The NCCUSL published a 'Uniform Limited Liability Company Act' in 1995, and this model was revised in 2006.[25]

In addition to these model acts, the American Law Institute's 'Principles of Corporate Governance', which were first released in 1994, have great importance for company law.[26] The Principles are not recommendations to the states for possible implementation, but rather restate leading judicial decisions and scholarship in the field of corporate governance, synthesizing best practice behaviour for boards and shareholders in a form of 'soft law'.

IV. Individual issues

Here we discuss answers to individual questions that are currently being raised regarding the EMCA project. The first question, which will be discussed in Section A, regards the EMCA's contents, i.e., the definition of the topics and areas that are currently expected to be regulated by the draft EMCA. The second question, discussed in Section B, is on the drafting commission itself, its members, *modus operandi* and relation to the European Commission. Lastly, the preliminary plan for drafting the Act itself will be discussed in Section C.

A. The content of the EMCA

The drafting commission will initially occupy itself with public companies limited by shares (*Aktiengesellschaft*, *société anonyme*, *società per azioni*, etc.), including listed companies. Private limited companies will be drawn into the project at a later date. This does not imply any

[25] Reprinted in Eisenberg, *Corporations and Other Business Associations.* (note 24, above), 418.

[26] American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, 1994.

recommendation that a unified law on business corporations, as exists in some member states, should be offered.

A further question regards those areas that, through EU directives, have already largely been harmonized, such as the disclosure of market relevant information and capital contributions and maintenance. This existing harmonization and the fact that national legislatures may not deviate from existing directives in force speaks for the position that the EMCA should not include proposals deviating from the existing *acquis communautaire*. Exceptions may present themselves in cases where change is being discussed at the EU level, so that a concrete possibility would exist that member states could legally adopt EMCA provisions deviating from outgoing EU law.

The stock of norms that are grouped together under the rubric 'company law' is defined differently in the various member states. Functional analysis shows that a number of rules from tort law, civil procedure, insolvency law, securities regulation, and international private law (conflict of laws) can be seen as integral to company law. A convincing, conceptual distinction between company law and these overlapping areas can only be achieved through examination of the individual fact patterns addressed by the provisions, evaluation of the solutions currently used by member states for such situations, and formulation of the most appropriate, proposed boundary – irrespective of whether this rule would be considered part of company law in one legislation and part of, e.g., tort law or insolvency law in another.

A similar method or approach seems to recommend itself for the law of corporate groups. Legal issues in connection with the domination of a group of companies, information problems within the group, and the liability of the dominant company and its management, *inter alia*, must all be examined in the respective context. The extent to which a separate set of legal rules on company groups would be found advisable will then be a technical question.

Options will have to be preserved for the seating of employee representatives on boards and the division of the board into management and supervisory components for those member states that currently have co-determination or a two-tier board structure, or may be interested in adopting one of these governance tools. This would not exclude the possibility of formulating recommendations in this area, such as with regard to the size of the supervisory board or the board of directors.

B. The Drafting Commission

Each of the twenty-seven EU member states is represented by a company law expert in the drafting commission.[27] This Commission is chaired by Professor *Paul Krüger Andersen* of the Aarhus School of Business, University of Aarhus, and the Group's secretariat is situated at that location and headed by Associate Professor *Hanne Søndergård Birkmose*. The drafting commission will, as needed, consult experts in specialized topics for assistance as such questions arise. The EMCA project is not sponsored by the European Commission, although the two bodies have agreed to regular exchanges of information, and the European Commission may dispatch its own people to represent it at working group meetings.

C. The preliminary working plan

As one would expect, the work on the EMCA will proceed in a number of individual stages that correspond to the individual chapters of the Act. Each member of the drafting commission will prepare a report on his or her national law to accompany the drafting of each chapter of the Act. A general reporter for each chapter will analyse the national reports and prepare a summary report, setting forth the various solutions and making recommendations, which the drafting commission will then discuss, supplement and adopt. It is expected that there will be plenary meetings every six months. The proposals, i.e., the recommended provisions with explanatory comments and references to national rules, will be published chapter by chapter so that the entire academic and business community can take part in the process of developing the EMCA.

Chapters currently in progress are the rather technical provisions for the formation of companies (whether through incorporation or reorganization) and the central chapter on 'directors' duties', the drafting of which is an exploration of whether a common position can

[27] As of January 2008, the following persons comprise the Commission: Susanne Kalss (AT); Hans de Wulf (BE); Alexander Belohlávek (CZ); Theodor Baums (DE); Paul Krüger Andersen (DK; Chair); Juan Sanchez-Calero (ES); Matti Sillanpää (FI); Isabelle Urbain-Parleani (FR); Evanghelos Perakis (GR); András Kisfaludi (HU); Blanaid Clarke (IR); Guido Ferrarini (IT); André Prüm (LU); Harm-Jan de Kluiver (NL); Stanislaw Soltysinski (PL); José Engrácia Antunes (PT); Rolf Skog (SE); Maria Patakyova (SK); Paul Davies (UK).

indeed be found in this very important but hitherto unharmonized area.

The difficulties standing in the way of successfully completing this project are not few and should not be underestimated, but we believe that the EMCA drafting commission can overcome such difficulties, and we also believe that the project will contribute to the efficiency and competitiveness of European business.