Model Business Corporation Act for Europe — The Alternative to Harmonisation by Directives, or?

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1 Introduction

In September 2001, the European Commission set up the High Level Group of Company Law Experts (the High Level Group) with the objective of initiating a discussion on the need for the modernisation of company law in Europe. To this end, the High Level Group was given a dual mandate: first, to address the concerns expressed in 2001 by the European Parliament during the negotiation of the proposed take-over bids Directive (the 13th Company Law Directive) and secondly, to provide the Commission with recommendations for a modern regulatory framework for European company law. In January 2002, the High Level Group presented its conclusions on the issues relating to take-over bids. The members of the High Level Group were Jaap Winter (chairman), José Maria Garrido Garcia, Klaus J. Hopt, Jonathan Rickford, Guido Rossi, Jan Schans Christensen and Joëlle Simon.

At the beginning of 2002, the High Level Group published a consultative document with the title "A Modern Regulatory Framework for Company Law in Europe" (Consultative Document). In the consultative document the High Level Group invited all parties interested in and concerned with company law in Europe to comment on the issues discussed in the consultative document. The High Level Group received more than 2,500 pages of responses and comments to the consultative document. Based on the responses received, on discussions in a hearing held on 13 May 2002 and on its own discussions, the Group presented its conclusions and recommendations to the Commission and to the public on the 4th November 2002 in its "Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe" (The High Level Group Final Report). It was stated that the report by the High Level Group will form the basis for a working plan on the future of the harmonisation of company law in Europe which will be presented later in 2003.

The 21´st of May 2003 the Commission presented a Communication to the Council and the European Parliament with the title "Modernising Company Law

and Enhancing Corporate Governance in the European Union — A Plan to Move Forward" (Communication). In the relatively extensive communication presented by the Commission the Commission outlines the approach that it intends to follow specifically in the area of company law and corporate governance.

The purpose of this article is not to discuss the High Level Group Report nor the Communication presented by the Commission. Instead the purpose is to discuss the issue of an alternative approach to the past, current and future work which has been done within the field of company law in the European Union. This alternative approach is concerned with the question if the European Union should have a an different, far less regulatory, approach to harmonisation of company law in Europe and in this respect rather should depend on one or several Model Business Corporation Act/s, if legislation is regarded as necessary (but then as recommendations) and, if not or as a supplement, should depend more on the "natural" law that competition between Member states enhance the law rather than the opposite.

To be able to analyse the past, current and future work in company law in the European Union it is, however, necessary to describe to some extent the past development in European company law as well as the current and future development. As to the current and even more so the future development of the company law in the European Union is necessary to give a description and a rudimentary analysis of the proposal put forward by the High Level Group as well as the Commission in its Communication. Therefore, I will make a description of them below.

2 Past, Current and Future Development in European Company Law - a Summary

The nine Company Law Directives produced to date has been based on a provision in the EC Treaty, namely Article 44 (2) (g) EC (ex Art. 54 (3) (g)):

> by coordinating to the necessary extent the safeguards which, for the protection of the interests of the members and others, are required by Member States of companies or firms within the meaning of the second paragraph of article 48 with a view to making such safeguards equivalent throughout the Community.

The Directives as such cover a very wide range of topics in national company law. From mergers and demerges to ultra vires and capital protection. From publication of company documents and nullity of a company to company branches and auditors.[1] To this should be added the regulations on European Economic Interest Groupings (EEIG:s) and the European Company. The first regulation has, as far as I know, never been a legal-commercial success in

1 I do not dicuss the developments which have taken place concerning accounting rules both for individual companies and groups of companies, which is an area of the law with its own problems and international development including the new Regulation on the subject within the European Union.

respect of numbers of EEIG:s. The regulation on the European Company with the following directive will not come into force until October 2004, and it is very unclear whether it will be a success or not. A common opinion amongst legal scholars in the Nordic countries is that this will not be the case. Personally, I am perhaps less sceptical since the SE in the business environment might be seen as a European "symbol" and therefore useful (and not a choice because of purely legal reasons or legal-economical reasons), for example in the case of cross-border mergers between a Swedish and French company (*cf.* for instance the infamous proposed Volvo-Renault merger, which failed partly because of national deliberations). We just have to wait and see.

The European Commission describes the past development in the area of company law in the following way in its Communication of the 21st of May this year (p 6, footnotes omitted):

> Over the years, the EU institutions have taken a number of initiatives in the area of company law, many leading to *impressive achievements*. Between 1968 (adoption of the First Company Law Directive) and 1989 (adoption of the Twelfth Company Law Directive), nine Directives and one Regulation were adopted. Although the exact situation may differ from one Member State to the other, these European measures have had an *important impact* on national company law. Moreover, their influence was not limited to the types of companies expressly covered in the Directives, because many Member States decided to extend their provisions to other legal forms.
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> *Over the last ten years*, the EU company law legislative process has been characterised, in the wake of the Maastricht Treaty of 1992, by more political deference to national law (with a high number of references to national rules in the legislative proposals). This *more flexible approach* to harmonisation made possible, in particular, the adoption of the European Company Statute (Societas Europaea), in October 2001.

The Commission's way of describing its own work is not surprisingly very positive. The real truth is perhaps not as positive, many arguments can be brought forward against the work done within the EU so far and what in reality has been achieved.[2] In the end, I think one can conclude that the past harmonisation work has lead to *some achievements in European company law and some impact on national company law*. As for the work being done the last ten years in the area, which is not particular much, it is certainly true that there has been more deference to national law. As to whether the result of this development can been seen as a more flexible approach to harmonisation of company law is, however, another question since it is questionable if a reference in community legislation to national law promotes harmonisation in itself (which is a entirely different matter than competition between Member States). Furthermore, the adoption of the European Company Law statute was hardly a

2 See for a short list of the shortcomings for instance Andersson J, *The High Level Group and Issue of European Company Law Harmonisation — Europe Stumbles Along?*; Forthcoming aticle 2003 in Denmark and the UK (Sweet & Maxwell). Neville, Mette and Engsig Sørensen, Karsten (eds.) *The Regulation of Companies*, Thomson (Denmark) and Sweet & Maxwell (UK).

result of a "new and well thought through" legal idea, but rather an (fortunate or less so) act of political prestige.

In the Consultative Document put forward by the High Level Group of Company Law Experts in March 2001, it was stated that the system of harmonising company law through directives, which have to be implemented by Member States, has led to a certain "petrifaction". Once Member States have agreed to a certain approach in an area of company law and have implemented a directive accordingly, it becomes very difficult to change the directive and the underlying approach.[3]

However, there is a growing need to adapt existing rules continuously in view of rapidly changing circumstances and policies. The High Level Group goes on to say that the "shelf life" of law tends to become shorter as society is changing more rapidly, and company law is no exception. Fixed rules in primary legislation may offer the benefits of certainty, democratic legitimacy and usually strong possibilities of enforcement. But this comes at the cost of little or no flexibility, and the inability to keep pace with changing circumstances. In practice, EU directives are even more inflexible than primary legislation.[4]

In the Commissions Communication to the Council and the European Parliament it is stated that now is the right time to give a fresh and ambitious impetus to the EU company law harmonisation process. Furthermore, new initiatives, aiming either at modernising the existing EU company law instruments or at completing the EU framework with a limited number of new, tailored instruments, are needed for several reasons. Amongst those reasons are the following:[5]

> (i) *Making the most of the Internal Market*: the growing trend of European companies to operate cross-border in the Internal Market calls for common European company law mechanisms, inter alia, to facilitate freedom of establishment and cross-border restructuring.
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> (ii) *Integration of capital markets*: dynamic securities markets are vital to Europe's economic future. This requires giving both issuers and investors the opportunity to be far more active on other EU capital markets and to have confidence that the companies they invest in have equivalent corporate governance frameworks. Listed companies want a more coherent, dynamic and responsive European legislative framework.
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> (iii) *To maximise the benefits of modern technologies*: the rapid development of new information and communication technology (video conferencing, electronic mail and above all the Internet) is affecting the way company information is stored and disseminated, as well as the way

3 Consultative Document, question 2, at 5 and High Level Group Final Report at 31.

4 Consultative Document, question 2, at 5 and High Level Group Final Report at 31.

5 Communication at 6 f.

> corporate life is conducted (e.g. virtual general meetings, video-link board meetings, exercise of cross-border voting rights).
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> (iv) *Enlargement*: the forthcoming enlargement of the EU to 10 new Member States is another gilt-edged reason to revisit the scope of EU company law. The new member countries will increase the diversity of the national regulatory frameworks in the EU, underlying further the importance of a principles-based approach able to maintain a high level of legal certainty in intra-Community operations. In addition to that, initiatives to modernise the EU Acquis will become more urgent than ever to ease the rapid and full transition of these countries to becoming fully competitive modern market economies.
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> (v) *Addressing the challenges raised by recent events*: Recent financial scandals have prompted a new, active debate on corporate governance, and the necessary restoration of confidence is one more reason for new initiatives at EU level. Investors, large and small, are demanding more transparency and better information on companies, and are seeking to gain more influence on the way the public companies they own operate. Shareholders own companies, not management — yet far too frequently their rights have been trampled on by shoddy, greedy and occasionally fraudulent corporate behaviour. A new sense of proportion and fairness is necessary.

If then the Commission is going to put a renewed effort into the harmonisation of European company law, the next issue is which instruments will be used to this end. The High Level Group discusses in its Final Report the harmonisation issue briefly (pp. 31-33) and acknowledges in its report a movement in Member States to use alternatives for primary legislation by governments and parliaments, which allow for greater flexibility. According to the High Level Group such alternatives include:[6]

1. Secondary legislation by the government, based on primary legislation in which broad objectives and principles are laid down; the secondary regulation can be amended more quickly when circumstances require change. (This process also often enables more effective consultation and reflection of an expert consensus.)

2. Standard setting by market participants, or by a partnership between government and market participants, through which best practices can be developed, adapted and applied; monitoring and reliance on market response and general governance powers on the basis of a "comply or explain" rule can often replace formal legal enforcement in company or securities law.

3. Models laws, which can be used voluntarily and varied where the circumstances warrant this, e.g. where different types of companies are concerned. A high level of uniformity in company law has been achieved by a process of "natural selection" on the basis of model laws in the United States of

6 Consultative Document, question 2, at 5 and High Level Group Final Report at 31.

America, offering the benefits of more responsive adaptability and scope for variation.

While the report of the High Level Group presents a good picture of alternatives to primary legislation, the High Level Group does "forget" one fundamental alternative which is of interest as an instrument for harmonisation, namely competition between Member States. It should be stressed that even if competition in itself might be seen as being in opposition to harmonisation, the result in United States of America has actually been harmonisation of company law. The high level of uniformity in company laws in the United States of America is not only a result of the Model Busniness Corporation Act (MBCA), but presumably equally a result of the attention and importance which have been paid to the companies legislation above all in Delaware. It should be kept in mind that an issue which is distinct from this question is whether this development should be seen as a "race to the bottom" or a "race to the top" (*cf*. below).

Europe is not comparable to the United States of America. One clear distinction between the two is the prevailing doctrine of the main seat theory in many Member States in Europe. But even so, in my opinion it is clear that there is already competition between Member States with regard to companies legislation. Some of the recent legal developments in the Nordic countries, and presumably also reforms in, for example, Germany, can be attributed to this competition. For instance this concerns the purchase by companies of their own shares. At the same time there is competition between Europe and the United States of America, which might to some degree explain the demand for changes in both national companies legislation and European companies legislation.

In any serious discussion on the future of harmonisation of company law in Europe, competition between EU Member States as a means to achieve direct or indirect harmonisation must, in my opinion, be taken into account. You may dislike it, disapprove of it, or not think it is a proper alternative because the results will be inadequate. But to ignore competition between Member States as an alternative instrument of harmonisation is tantamount to putting one's head in the sand (although presumably it was left out by the High Level Group because of the systematic approach used by the High Level Group).

In my opinion the different options available to European legislators can be described as follows:

1. European "federal" legislation whether in the form of regulations or directives or any other future equivalent form, with or without secondary detailed regulation.
2. Models laws, standards set by market participants etc.; such alternatives may be more or less officially supported and sanctioned by the EU.
3. Competition between the Member states.

All three are major options which include separate sub-options, which might vary to a large extent between them. I will discuss the Model Act-alternative more extensively in part 3-5 below.

The High Level Group received many responses to its consultative document. As for the question of modern companies legislation, the majority of the

respondents agreed with the idea of making more use of alternatives to primary legislation by Directives, as indicated by the High Level Group. Most respondents agreed that Directives are inflexible and can lead to petrifaction, and should therefore be limited to wider principles. The differences between national systems can be respected better in secondary regulation. Others thought that a pragmatic combination of all methods would be preferable, mainly because "comply or explain" rules cannot fully replace enforcement in full. A few respondents, whilst not against alternatives, did not believe that model laws will prove particular useful.[7]

Some respondents recognised, however, that secondary legislation can lack transparency and democratic legitimacy and should only be used by way of exception and with care. An important group of the respondents, mostly German respondents, thought that mainly because of these disadvantages, the EU should in principle make use of directives. Some of these respondents thought the procedure for amending directives should be simplified.[8]

Areas which were frequently mentioned by the respondents as being particularly suited for an alternative regulatory approach included corporate governance (e.g., the conduct of general meetings) and accounting (and disclosure in general). Other areas mentioned by some of the respondents included the use of IT or other rapidly changing or newly emerging topics; an optional uniform model law, especially for listed companies (*cf.* the United States of America[9]), a framework for a whole legal entity (e.g., a European Private Company); fundamental organisational rules and rules on shares registers; listing rules (and the content of prospectuses etc.) and other areas with capital market relevance.[10]

In the Final Report the High Level Group points out that the efforts of the EU in the area of company law have so far been limited to primary legislation through directives, normally to be implemented in formal company law by the Member States. The High Level Group is of the opinion that, as a way of moving forward, the EU should consider making wider use of the alternatives to primary legislation referred to above. In many areas, company law in Member States can be modernised without needing to agree to specific detailed rules in a Directive. The Lamfalussy-process has been set up in order to be able to promote the development of integrated financial markets in Europe by using primary legislation to lay down concepts and principles in Directives, using secondary legislation for implementation, and finally using co-ordination

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7 The High Level Group Final Report at 141. The European Commission was assisted by the company law department of the Faculty of Law of the Erasmus University in Rotterdam to support the High Level Group in analysing and summarising the comments which the Group had received in response to its Consultative Document. The team at Erasmus University was led by Professor Jan Berend Wezeman and included Martijn Bras, Ageeth Klaassen, Michelle Reumers and Maarten Verbrugh. A summary of the comments is found in the High Level Group Final Report at 136 et seq. Some differences may be found between this summary of comments and the High Level Group's summary of the comments.

8 The High Level Group Final Report at 141.

9 My note: A strange reference though, since most listed companies are incorporated in Delaware, which is not an "MBCA-state". *Cf.* below.

10 The High Level Group Final Report at 141.

between the securities regulators of the Member States for interpretation and enforcement. According to the High Level Group, this is an example of an effort to introduce more flexible law making to an area closely related to, and to some extent overlapping with, company law.[11]

Furthermore, many respondents commented that where primary legislation by a Directive would still be necessary, the Directive should be restricted to laying down principles and general rules, leaving the detailed rules to secondary regulation. Where recourse is made to secondary regulation, democratic legitimacy must be ensured. Respondents agreed with the High Level Group that secondary regulation and mechanisms for standard setting or co-ordination of standard setting would be most suitable in such areas as corporate governance and the conduct of the general meeting of shareholders, in order to encourage the development of best practice.[12]

According to the High Level Group, there was more hesitation about the use of model laws. Respondents commented that due to considerable differences in legal technique and substantive law, the development of model laws which could be applicable throughout Europe, would be interesting in concept, but difficult in practice. Some respondents did see scope for a co-ordinated effort to produce model documents in certain areas, such as model (electronic) proxy forms for voting by shareholders *in absentia*. Model documents and formats may be particularly helpful where modern technology is needed and helpful to allow efficient co-ordination of transactions, e.g. voting of shares across different legal and business structures. The High Level Group also where of the opinion that, where the EU would consider the introduction of new legal forms, the model approach may offer an alternative through which an informal and organic convergence of the national regulations of such legal forms may be achieved (see Chapter VIII on co-operatives and other forms of enterprises in the High Level Group Final Report).[13]

The High Level Group goes on to state, that for all alternative forms of regulation that may be introduced in the future, and for any new primary companies legislation at EU level, it is important to ensure that full and proper consultation takes place with industry, commerce, services, professions and other interested parties. Consulting all parties involved in business is indispensable, where the aim is to make company law rules which will facilitate efficient and competitive business in Europe. This is also one of the key elements of the Lamfalussy procedure for securities regulation. The High Level Group recommends that wide consultation should be an integral part of any future legislative initiative taken at EU level in the area of company law.[14]

In the opinion of the High Level Group, making use of alternative forms of regulation, as suggested, requires a new structure to be built. The first area where this is required is corporate governance. The High Level Group specifically recommends the Commission to issue Recommendations to Member States on aspects of the functioning of the shareholder meeting and the role of

11 High Level Group Final Report at 31 et seq.

12 High Level Group Final Report at 32.

13 High Level Group Final Report at 32.

14 High Level Group Final Report at 32 et seq.

non-executive and supervisory directors, and recommends that the EU should actively co-ordinate the corporate governance efforts of Member States.[15]

In addition to this, the High Level Group believes there is a case for setting up a more permanent structure which could provide the Commission with independent advice on future regulatory initiatives in the area of EU company law. Such advice should, as far as possible, be evidence based. An important method of gathering evidence is consultation with industry, commerce, services, professions and other interested parties. The structure set up could be made responsible for organising such consultation. The High Level Group recommend that the Commission should investigate how such a structure can best be set up.[16]

The Commission seems in its Communication to have accepted many of the ideas brought forward by the High Level Group in its Final Report. However, the Commission does not — at least in the Communication — as a individual question *per se* discuss which the different instruments available for harmonisation are and to which extent they can be used to this end. On the other hand, it is quite clear that the Commission is aware of this issue. For instance, the Commission states that key to achievement of the object of economic growth and job creation, for which a sound framework of company law is important, is the setting up of proper balance between actions at EU level and actions at national level. The Commission then goes on to say:[17]

> Some company law rules are likely to be best dealt with, and updated, more efficiently at national level, and some competition between national rules may actually be healthy for the efficiency of the single market.

The Commission certainly seems to recognize the fact that competition between Member States might contribute to harmonisation of European company law and at the same time promote legal development. But in what way and to what extent the Commission will base its work on this proposition is unclear. Nothing in the Communication indicates any real analysis concerning competition as a basis for non-EU-legislative intervention in some areas as opposite to other areas where such intervention is necessary and contributes to economic development.

Any reference to one or several types of Model Act-legislation cannot be found in the Communication.

Both the use of competition between Member States and Model Act legislation will be discussed briefly below.

The Communication indicates in its communication that the future work should be promoted along the following lines:[18]

> (i) EU initiatives in the area of company law should certainly address a number of specific *cross-border issues*, where Community action may be the only way to achieve the pursued objectives. In the area of cross-border

15 High Level Group Final Report at 33.

16 High Level Group Final Report at 33.

17 Communication at 9.

18 Communication at 9.

issues, the Commission in its Communication indicates that they will in the short term[19] present a new proposal for a Tenth Company Law Directive on cross-border mergers as well as a proposal for a Fourteenth Company Law Directive on the transfer of seat from one Member State to another.[20] In the Communication the Commission also stresses the need for enhancing the exercise of a series of shareholders` rights in listed companies (right to ask questions, to table resolutions, to vote in absentia, to participate in general meetings via electronic means) across the EU, and states that specific problems relating to cross-border voting should be solved urgently. The Commission considers that the necessary framework should be developed in a Directive, and regards the relevant proposal as a priority for the short term.[21] In this context one must also mention the Commissions intention to facilitate a study concerning the need for and possible a legislative proposal on a European Private Company (EPC).[22] The Commission, furthermore, intends to actively support the ongoing legislative process engaged on a Regulation on the Societas Cooperative Europaea (SCE) and statutes for a European Association and a European Mutual Society.[23]

(ii) In addition, the Commission is of the opinion that necessary attention should be paid to the other initiatives which the promotion of business efficiency and competitiveness requires. As stated above, a certain degree of harmonisation of *defined national issues* reduces legal uncertainties and can thereby significantly enhance business efficiency and competitiveness. Amongst such issues is the modernisation of current directives such as (with changes to the First Directive under way) the Second Directive with the SLIM-proposals and in the future perhaps a more modern capital regime, the Third Directive and the Sixth Directive.[24] Furthermore, the Commission intends to take an active role in the development of corporate governance in as much as it suggests that a common approach should be adopted at EU level with respect to a few essential rules and adequate co-ordination of corporate governance codes should be ensured.[25] A large portion of the Communication is indeed devoted to corporate governance.[26]

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19 In the Communication the Commission makes a distiction between actions in three phases, namely short term (2003-2005), medium term (2006-2008) and long term (2009 and onwards). See at 10 and extensively at 24 ff).

20 *Cf*. Communication at 20.

21 Communication at 14.

22 *Cf*. Communication at 21 f.

23 Communication at 22.

24 *Cf*. Communication at 17 f and at 21.

25 Communication at 12.

26 *Cf*. Communication at 10 ff.

(iii) *Flexibility* should be available to companies as much as possible: where systems are deemed to be equivalent, maximum room should be left open to the freedom of the parties involved.

Another recommendation from the High Level Group which the Commission intends to follow is expert consultation. The Commission expresses the view in the Communication that expert consultation should be an integral part of the preparation of initiatives at EU level in the area of company law and corporate governance. The Commission therefore will regularly seek advice from representatives of Member States, as in the case of the current Group of Company Law National Experts, but also from representatives of the business and the academic sectors, to provide the necessary external input.[27]

An analysis of the list of actions which the Commission proposes in the Communication reveals that the legislation to be proposed will be in the form of Directives (either the adoption of a new Directive or the modification of one or several existing Directives) or Recommendations. Some of the Commissions initiatives will at this stage only be in form of studies.[28]

The main reason why the Commission has decided to go along this road of legislative initiative and not considered other legislative alternatives is unclear, but one reason might be that the Commission strictly want to adhere to the regulatory powers of the various relevant bodies existing at EU level. Another reason might be that the use of for instance Model Act-type of legislation could, but not necessarily have to, reduce the Commissions influence on the legislative process in European company law.

3 Model Business Corporation Act and Competition as Harmonisation Alternatives — the United States Background

The company law development in the United States has – at least until the Sarbanes-Oxley Act and putting aside prior federal legislation in the area of securities law – developed along two different axes, namely the "Delaware-effect" and the "MBCA-effect". It is not my ambition in this context to present a complete historical overview of the development of companies legislation in the US. I only give a brief description of it.

The first axes being Delaware as the primary state for public companies and incorporation of such companies. Delaware's company law legislation has both been praised and heavily criticized. It has been praised for leading to a race to the top where the "fittest" rules survive the competition and where shareholder value is increased as a result. It has been heavily criticized for leading to "one-sided", primarily management favourable, rules without a balanced protection for shareholders, in particular minority shareholders, and stakeholders such as creditors. Whatever the truth is the fact is that Delaware have a companies legislation which has a great impact on other states as well as the MBCA. However, one must not exaggerate the fact that most of the companies on NYSE

27 Communication at 10.

28 *Cf.* Communication at 24 ff.

and of the top 500 are incorporated in Delaware and conclude that this can be explained (only) by the quality of the companies legislation in Delaware. The truth behind Delaware's success is presumably far more complicated.

The second axes is the work done on the Model Business Corporation Act within the ABA. The MBCA is more or less, and either in present or former versions, influential on more then 40 states in the United States of America and it is not a overstatement to say that this influence has increased over the years. It is regularly updated; currently an update is underway because of the Sarbanes-Oxley Act.

In reality the development of the company law in the United States of America presumably follows along both axes. Many of the states which follow the MBCA in any of its versions are also influenced by Delaware. But there is more seldom an influence in the opposite direction from MBCA to Delaware or other economically important states. Generally, the rule is that states with a large and influential industrial base – such as New York and California – tend to have a companies legislation more or less of its "own kind" without or with very little in common – at least on a first superficial comparison – with the MBCA.

4 Model Business Corporation Act and Competition Between Member States as Harmonisation Alternatives – the EU Perspective

As indicated in part 2 above the Commission is certainly aware of the fact that competition between Member States might contribute to harmonisation of European company law and at the same time promote legal development. The Commission do not however, explicitly explain in what way and to what extent it will base its work on this proposition. Nor does an analysis of the Communication provide any indirect answer to the same questions. Furthermore, there is no reference to one or several types of Model Act-legislation in the Communication (but Recommendations in certain areas).

In my opinion the Communication, despite it certainly being an improvement and will contribute to the harmonisation of company law within the EU, therefore lacks a basic framework which in depth answers the questions (1) why harmonisation of company law is necessary within EU, (2) what should therefore be harmonised and (3) how should the harmonisation work progress in the future (i.e. what instruments should be used for this purpose on basis of the answers to questions (1) and (2)).

The first question why harmonisation of company law is necessary within EU might seem trivial, but is essential since any work done under the pretext of harmonisation of company law is necessary, is of doubtful value if it does not derive from economic necessity and contributes to economic development. Furthermore, the question makes it easier to identify such areas which would positively be better off with harmonisation than without, i.e. question two. It should be stressed that some areas might be better of with harmonisation initiatives now, other areas with harmonisation initiatives in the future and in

some areas perhaps the best solution is a "wait-and-see" approach where the outcome of for instance competition between Member States is preferable.

The Commission do to some extent address both question (1) and (2) in its Communication, but in my opinion this is done in a superficial way. The proposal for a Tenth and Fourteenth Company Law Directive respectively is evidence of a step in the right direction. But the Communication does not contain any real analysis on company law in general and the need for harmonisation within EU. It is in many ways a political and legislative "reaction-plan" rather than a political and legislative "action-plan".

Question three is, as the reader noticed, neglected in the Communication. There is no explanation as to why the Commission has not considered other legal instruments than Directives and Recommendations, especially Model Act-legislation and competition as a (possible) non-intervention type of harmonisation instrument.

Since the Commission in its Communication do acknowledges competition between Member States as a mean to achieve harmonisation of company law in Europe —although as a unclear reference — but not Model act-legislation, I will briefly focus on the latter in the next part and its advantages and disadvantages.

5 Model Business Corporation Act — A Model for Europe?

Is then the Model-type of legislation possible within Europe? My answer is without doubt affirmative. However, before I comment this further it is necessary to briefly discuss if a Model-type of legislation should consist of one or several types of Model-acts.

Both the High Level Group and the Commission stresses that a proper distinction should be made between different categories of companies.[29] The High Level Group identified in today's reality three basic types of companies:[30]

> (i) *Listed companies*, which where defined as those companies with registered office in one of the EU Member States whose shares are admitted to trading on a regulated market. For company law purposes, this group should also include companies whose shares are regularly traded outside regulated markets. According to the High Level Group, and to some extent the Commission, a certain level of uniform, compulsory, substantive (and detailed?) rules may be required to sufficiently protect both shareholders (investors) and creditors in listed companies (as well as in companies which have a publicly raised capital[31]).[32]
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> (ii) "*Open" companies*, whose shares are not admitted to trading on a regulated market or otherwise regularly traded, but whose internal

29 High Level Group Final Report at 34 ff and Communication at 8.

30 High Level Group Final report at 35.

31 *Cf.* Communication at 8.

32 High Level Group Final Report at 35 and Communication at 8.

> structures would allow for listing, free transferability of shares and dispersed ownership outside a securities market. The balance of the regulatory approach for open companies (*cf.* "closed" companies below) may according to the High Level Group have to be somewhere between that for listed companies and that for closed companies, or it may be argued that the potential for open companies to tap the market justifies regulating them as if they were listed in some or all cases.[33]
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> (iii) "*Closed*" companies, whose shares are not freely transferable and which therefore cannot be admitted to listing on a stock exchange, and in the case of which dispersed ownership outside a securities market is inconceivable. The High Level Group is of the opinion that, for genuinely closed companies, generally speaking there should be a wider scope for the parties autonomously to determine the structure of the company and the rights, responsibilities and obligations of those participating in it.[34]

For the question of a Model Business Corporation Act for Europe, the distinction between different types of companies presented by the High Level Group is in my opinion relevant. If one for a second assumes that it would be politically possible to develop (national) company law within the framework of a Model type-legislation within the EU (supranational level) and at the same time promote harmonisation, I do not think it is possible to work with only one Model Act. Both the current structure of company law in Europe (the distinction between public and private companies) as well as the different theoretical and practical problems which arises in public versus private companies requires a differentiated approach.

Less necessary might the concept of "open" companies seem like. However, it must be considered as a necessary "in between" type of company, if the differences between public and "ordinary" private companies are considerable. Both in reality and from a regulatory perspective this is certainly the case.

It can therefore be argued that a Model Act legislation in Europe must consist of several types. Preferable one for listed companies, one for open companies and one for close companies.

Another question is whether or not a Model-type of legislation for listed companies (and other types of companies) would interfere with such efforts within the EU as from time to time will result in mandatory legislation in the form of Directives and otherwise. The answer is no. A Model Act is and would be a more refined legislation than mandatory legislation. Historically the nine Directives in company law have mainly been minimum legislation. If one assumes this also to be the case in the future, a Model-type of legislation would go further, and can better be seen as a "best practice" and therefore as recommended legislation. The conclusion must therefore be that there seldom would be a collision.

What purpose would then three types of Model Business Corporation Acts have for Europe? The purposes which a Model-type of legislation can fulfil is

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33 High Level Group Final Report at 35.

34 High Level Group Final Report at 35.

closely related to its advantages. Both the advantages and purposes with Model Business Corporation Acts for Europe can be summarised as follows:

1 Contribute to the harmonisation of company law in Europe.

2 Promote a modern, flexible and complete legislation.

3 Provide shareholders, creditors and others with an adequate protection.

4 Easy to change without unnecessary political and/or legal-political interference.

5 Contribute to legal development based on current economic and legal knowledge.

6 Contribute to common legal concepts and institutes.

7 Reduce necessary legal research and initiatives on national level to a minimum.

Respondents to the High Level Groups Consultative Document commented, as mentioned above, that due to considerable differences in legal technique and substantive law, the development of model laws which could be applicable throughout Europe, would be interesting in concept, but difficult in practice. This argument does not make any sense at all. The reason being that exactly the same argument can be made against Directives which have to be implemented in one form or another. In fact, this applies even more so to directives. A model law is a model law, nothing more and certainly not binding on Member States. It is a source of inspiration and a research tool for legislators, which includes the latest developments inspired by economic and legal sources.

The fact that a few respondents did see scope for a co-ordinated effort to produce model documents in certain areas (instead?) is obviously something very different from Model Act-legislation.

A second argument, which can be made against model laws, is that they lack democratic legitimacy. In my opinion it is actually quite the reverse with model laws. Model laws are based and developed on economic and legal sources. If, when and to the extent that a model law is transformed into legislation, it is subject to ordinary democratic procedures. Because of this, there is a more clear separation between the economic-legal reasoning for a particular rule or set of rules and the political solution to the same problem in the legislation. Therefore, it is easier to analyse and understand a particular solution in the legislation and accept it or not on the basis of its political acceptance/non-acceptance and the motives behind the acceptance/non-acceptance. Furthermore, any political diversion from a solution in a model law which is based on controversial and even objectionable reasons, such as the interests of a particular industry, can more easily be identified and criticized.

A third argument against Model Act-legislation is that it can result in “one sided” rules. A fourth argument is that it takes a long time to achieve

harmonisation by such means. Neither the third nor the fourth argument is in my opinion particular valid.

It is certainly true that Model type-legislation do not result in harmonisation overnight. But this is also the case with all the legislative (mandatory) efforts which the EU has been involved with since the First Company Law Directive in 1968. And the result is far from convincing. In comparison the degree of harmonisation in company law in the United States of America can perhaps be seen as an indicator that another approach might prove more successful. The fourth argument is therefore not convincing.

As to the third argument I do agree with those who might see a danger in "one-sided" rules. At the same time it should be remembered that this is most likely a result from either a bad composition of the Committee responsible for the Model Act or influence from interested parties "outside" or both. Similar problems can be found amongst national legislators and can be avoided although not entirely. Of fundamental importance for any legislation including a Model-type is the composition of the Committee responsible for the legislative work as well as public consultation procedures. I will not address those issues here.

6 Conclusion

It is my belief that the positive aspects of both model laws and competition between Member States as means to achieve harmonisation in company law have been neglected so far within EU. As I have argued above there is several arguments which supports the idea of Model Act-legislation as an instrument to achieve harmonisation. It is not the only instrument, nor perhaps the most efficient one compared to mandatory legislation in a shorter perspective, but it is efficient in the longer perspective which the experience in the United States of America proves (despite many differences between the United States of America and the EU). Whether or not the EU in the future will have a more flexible approach to harmonisation, including support for both competition between Member States in some areas and Model Act-legislation are unclear. I do hope so.