INSTITUTE FOR LAW AND FINANCE

THEODOR BAUMS/ PAUL KRÜGER ANDERSEN

# THE EUROPEAN MODEL COMPANY LAW ACT PROJECT


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Theodor Baums / 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 Law Act" (EMCLA). 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 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 EMCLA, introducing the members of the EMCLA Working Group, and explaining the Group's preliminary working plan.

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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*, 2006, p. 263 *et seq.*; T. Baums, *'The law of corporate finance in Europe – an essay'*, in: Nordic Company Law, 2008 p. 31 *et seq.*; also *see* Ebke's earlier proposal to set up a "European Law Institute" modeled 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, 1998, p. 189, 212 *et seq.*, and J. Wouters, *'European Company Law: Quo Vadis?'*, Common Market Law Review 37, 2000, 257-307, especially p. 298.

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

### *1. 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 EU 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 Law 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

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[2] See the detailed discussion by C. Teichmann, *Binnenmarktkonformes Gesellschaftsrecht*, 2006, pp. 73 *et seq.*, and e.g. K. Engsig Sørensen/P. Runge Nielsen, *EU-retten*, 2004, pp. 675 *et seq.*

conforms to the minimum needs of the Union. Although this 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 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

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[3] For a detailed discussion of competition between legislatures, *see* E. M. Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, 2002; K. Heine, *Regulierungswettbewerb im Gesellschaftsrecht*, 2003; C. Teichmann, op. cit. n. 2, p. 330 *et seq.*, J. Armour, '*Who should make Corporate Law? EC Legislation versus Regulatory Competition*,' ILF Working Paper Series No. 41 (Nov. 2005) available at: http://www.ilf-frankfurt.com/uploads/media/ILF_WP_041.pdf; J. Andersson, '*Competition between Member States as Corporate Legislator*,' in U. Bernitz, ed., op. cit. n. 1, p. 143 *et seq.*; H. Søndergård Birkmose, '*Regulatory Competition and the European Harmonisation Process*', European Business Law Review, 17, 2006, p. 1079-1097. 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/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/K. Engsig Sørensen (eds.), *Company Law and Finance*, 2007, pp. 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. Makönen, *'Capital Maintenance and Distribution Rules in Modern European Company Law'*, in *Company Law and Finance* (op.cit.), pp. 119, and M. Airaiksinen '*The Delaware of Europe Financial Instruments in the new Finnish Company Act'*, in *Company Law and Finance* (op.cit.), pp. 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* , 2007, pp. 313, 329 with further references.

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.

## *2. 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* analyzed the development from the sixties (the adoption of the first series of directives) until the year 2000.[6] During the sixties, 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 development gradually stopped. It turned out that it was impossible to realize full harmonization in several areas, and the goal of harmonization was

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5 See H. Søndergård Birkmose, '*A Race to the Bottom in the EU*', Maastricht Journal of European and Comparative Law, Vol. B, no. 1, 2006, p. 35-80.

6 J. Wouters, *'European Company Law: Quo Vadis?*', Common Market Law Review 37, 2000, p. 257-307.

subjected to debate. *Wouters* describes the EU's activity in company law around the turn of the Millennium as characterized by a fourfold 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

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7 J. Wouters , op. cit., p. 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, pp. 331; same, '*Harmoniseringen af bolagsrätten indom EU – fortfarende vind i seglen?* ' NTS 2007:1, pp. 66.

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

12 See the Action Plan, op. cit. n. 9, at p. 4.

on a European level. Creating a European Model Company Law Act is completely in line with this view expressed by the Commission.

### *3. Concluding Thoughts on the EU Company Law Program*

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 program 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.

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13 *See* footnote 4, *supra.*

14 *See* footnote 3, *supra.*

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, 1991, pp. 35, 40 *et seq.*

16 On this point see the literature and references in footnote 3.

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, 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.

### *4. The functions of an EMCLA*

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 Law *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

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[17] Regarding the type of corporations that should be regulated by the EMCLA, see *infra* Part IV.1.

way. Alone on the basis of having a member from each of the 27 EU member states,[18] the EMCLA 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 EMCLA. 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 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 favor 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.

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[18] See *infra* Part IV.2.

[19] See in this regard the reports by T. Baums, op. cit. n. 11, above, and D. Weber-Rey, '*Effects of the Better Regulation Approach on European Company Law and Corporate Governance*', European Company and Financial Law Review, 2007, pp. 370, 374 *et seq.*

## 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 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 EMCLA 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 1920's. 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

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[20] For a general discussion, ***see*** K. Zweigert/H. Kötz, ***An Introduction to Comparative Law***, 3rd ed., 1998, § 17 III; specifically on company law, R. Romano, ***The Genius of American Corporate Law*** , 1993, p. 128 ***et seq.***; J. von Hein, ***'Competitive Company Law: Comparisons with the USA'***, in U. Bernitz, ed., op. cit. n. 1, p. 25 ***et seq.***

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

[22] ***See*** Hamilton, loc. cit. n. 21, p. 1457.

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 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 1990's, however, small entrepreneurs came for tax and other reasons to favor the Limited Liability Company (LLC), and all of the 50 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 behavior for boards and shareholders in a form of "soft law".

## IV. Individual Issues

This Part will discuss answers to individual questions that are currently being raised regarding the EMCLA project. The first question, which will be discussed in Section 1,

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[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 EMCLA/national law.

[24] Reprinted in M. A. Eisenberg, *Corporations and Other Business Associations. Statutes, Rules, Materials, and Forms*, 2007, p. 677.

[25] Reprinted in M. A. Eisenberg, op. cit. n. 16, p. 418.

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

regards the EMCLA's contents, i.e., the definition of the topics and areas that are currently expected to be regulated by the draft EMCLA. The second question, discussed in Section 2, 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 3.

### *1. The content of the EMCLA*

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 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 EMCLA 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 EMCLA 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.

### *2. The Drafting Commission*

Each of the 27 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 EMCLA 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.

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[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).

### *3. The preliminary working plan*

As one would expect, the work on the EMCLA 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 analyze 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 EMCLA.

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 indeed be found in this very important but hitherto un-harmonized area.

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

# WORKING PAPERS

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