The Stockholm Promise

KOEN GEENS, PROFESSOR OF COMPANY LAW, JAN RONSE INSTITUTE FOR COMPANY LAW, K.U. LEUVEN, BELGIUM

I have always been puzzled by the real cause of European company law harmonization. As a student, I was educated by a professor who spoke of European directives as small vans that drove faster than the big truck of national company law reform. He was right. Belgian company law professors started drafting a new code in 1951. By the time the draft bill was ready in 1979, it had become urgent to transpose the six Directives that had been issued since 1968, and the draft bill was never enacted. In retrospect, the energy absorbed by those Directives in the six original Member States may now seem well out of proportion. Indeed, certain concepts first addressed or heavily relied upon by these Directives are today either generally accepted (e.g., legal merger) or no longer considered as quite relevant (e.g., legal capital). As always, this a posteriori judgment is somewhat unfair. Looking back, one must admit that the European legislator did a pretty good job. He caused the Member States to modernize the frame of their corporate legislation without interfering with real and inherently 'national' governance issues. By prioritizing third party protection over shareholder interests, Brussels continued to apply the 1601–1807 solution to the most important agency problem: limited liability is a great innovation, but creditors and employees should not suffer too much from it. The bail out of failing banks in recent days once more demonstrated that a legal system neglecting these interests is not up to standards.

The basic reason why governance issues were not addressed by Europe until the twenty-first century is clear as well. The governance of a company is as holy to a nation as is its parliamentary system. This is not only a matter of tradition. It is also a question of how to steer people who fiercely, and of course most effectively, resist to change when it comes to their habits. Europe could impose the German Kapital, but it was not able to get through a two tier, let alone a codetermination system or a coherent regulation of group law. The right gear to make the drafts of the fifth and ninth Directives pass national hurdles was never developed in Brussels. Only financial markets may induce companies to comply with governance standards that differ from their national tradition. Harmonization is then no longer a question of political will but rather of economic necessity. It explains why governance is only subject to European recommendations, and why it became part of corporate financial reporting rather than of 'straight' company law. In 2010, third party protection is no longer the answer to the risk of vehicles that freely move back and forth over the continent. True, the founding fathers wanted to permit free establishment of Dutch companies in other countries – the Netherlands being at time the only country with an incorporation system – without these companies infringing upon third party interests. These days, modern nations resist to the UK Limited by creating a light vehicle themselves.[1] Moreover, the founding fathers never fulfilled their promise: Europe only regulated the big and quite 'unmovable' companies, and most of the time left alone the smart vehicles that can quickly move around.

If downwards harmonization and state competition are the new religion, their instrument can be found in the Stockholm Programme adopted by the European Council on 10/11 December 2009.[2] Somewhere hidden among many other intentions there is a tiny sentence promising a new future to company lawyers. It is as simple in its wording as it will be difficult to realize: Europe should go for a unification of the lex societatis. Europe grew up these last fifty years. In that sentence, more is said than in fourteen Directives and draft Directives: one common principle is better for interstate commerce and free establishment than a heavy set of European rules. Even stubborn 'nationalistic' company lawyers should get modest. The real seat theory still fits for tax purposes. It can no longer be the standard for company law if it truly wants to serve the European interest. The Netherlands, the United Kingdom and Denmark among others were right after all. There is no shame in recognizing that.

1 See the ECL special on *The Light Vehicle Competition*, December 2004, Issue 4.

2 See 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens', adopted by the European Council on 10/11 Dec. 2009, OJ. 2010, C 115, 16: 'There is also a need to study further measures regarding business law, and to create a clear regulatory environment allowing small and medium enterprises in particular to take full advantage of the internal market so that they can grow and operate across borders as they do in their domestic market. There is a need to explore whether common rules determining the law applicable to matters of company law (. . .) could be devised.' See also the Communication from the Commission of 20 Apr. 2010 (COM(2010) 171 final) including the 'Action Plan Implementing the Stockholm Programme', which mentions the preparation by 2014 of a 'Green paper on private international law aspects, including applicable law, relating to companies, associations and other Legal persons', 25.

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