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Nordic Company Law Regulation and Why Harmonisation Through Competition Is Necessary

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Abstract
The Nordic countries have traditionally cooperated in different legislative areas, although lately to a lesser extent. The experience with Nordic company law development illustrates particularly well the problems related to harmonisation. Although the difficulties were alleviated by the fact that the harmonisation programme took place on a small scale, with few countries involved and with large similarities in the cultural, social and political environment, many goals could not be achieved. The EU, with its current 28 Member States and their differences, in similar respects, has faced and will continue to face far greater problems. The Nordic countries, and knowledge of their history in this respect, can provide some guidelines for possible solutions regarding harmonisation.

Despite the cooperation in company law, the Scandinavian countries have adopted different regulatory strategies because of political and other factors. Significant differences can be seen in the extent and type of regulation used, but also between countries that use one law for regulating companies and those that use, or have used, separate laws for the regulation of private and public companies. Small company regulation is a highly topical issue in view of the Commission proposal for the SPE.

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In conclusion, knowledge of the Nordic countries and their history in harmonisation and small company regulation can provide valuable information for possible solutions.

Keywords: private company, regulation, model law, historical perspective.

1. INTRODUCTION

In the Nordic countries, regulation of companies started in the middle of the 19th century. A first decree for companies was issued in Sweden in 1848,[1] which was followed by a Finnish decree for companies, modelled on the Swedish one, in 1864.[2] The process continued with the enactment of company laws in both Sweden[3] and Finland[4] in 1895. In Norway and Denmark, company laws were not enacted until the turn of the 20th century, but when they finally were, they had many features in common with Swedish and Finnish company regulation. A tradition of Nordic[5] company law regulation had thus begun.[6]

More direct cooperation in Nordic company law regulation developed, ultimately resulting in similar company laws in Denmark, Finland, Norway and Sweden in the 1970s. While these laws showed a high degree of uniformity, the initially intended very high level of uniformity was never reached. More recent company laws show less similarity, but have still been influenced by the laws from the 1970s.

The experience in the Nordic countries illustrates particularly well the problems related to harmonisation of company law. Although the difficulties were alleviated by the fact that the harmonisation programme took place on small scale, with only a few countries involved and with large similarities in the cultural, social and political environment, some goals could not be achieved due to insurmountable obstacles. The EU with its current 28 Member States and their differences, in similar respects, has faced and will continue to face far greater problems in harmonising company law, as well as other areas of law. Some of the difficulties can be addressed easily, whereas some may not. The Nordic countries, and knowledge of their history in this respect, can provide some guidelines for possible solutions regarding harmonisation.

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[1] 1848:43.

[2] 28/1864.

[3] ABL 1895:65.

[4] OYL 22/1895.

[5] The Nordic countries are Denmark, Finland, Island, Norway and Sweden. For different reasons, but primarily for lack of legal sources, Iceland is not discussed in this article.

[6] The Nordic countries have traditionally cooperated in different legislative areas, though lately to a lesser extent. An important example is the contract law from the early 20th century, while cooperation in company law is less well known.

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Despite the cooperation in company law, the Nordic countries have adopted different regulatory strategies because of political and other factors. Significant differences can be seen in the extent and type of regulation used, but also between countries that use one law for the regulation of companies and those that use, or have used, two laws for their regulation. It is the intention of this article to take a closer look at four regulatory strategies that are in, or have recently come into, use in the four Nordic countries and to present them in a historical perspective. The discussion is angled from the point of view of the small company – a type of company that fundamentally differs from large companies and, consequently, has different requirements in terms of efficient regulation. The historical perspective provides a depth from which the different strategies for achieving harmonisation can be discussed, as well as an opportunity to see how the different regulatory strategies have come into existence.

2. Four types of company laws in a historic perspective

2.1 Sweden – one long law

Swedish company regulation began with the Decree for Companies in 1848.[7] As a result of a procedure of concession, it was possible to keep this Decree very short. It consisted of only 15 articles. The Decree was exchanged for the first modern company law in 1895.[8] The concession procedure was replaced by a normative system, which resulted in the introduction of a large number of rules as well as a more frequent use of mandatory rules. The rules that were introduced included the rule prescribing a minimum share capital (set at 5,000 SEK) and the requirement that the minimum number of owners be five and that liquidation take place if the number of shareholders would later drop below five.[9,10] The total number of rules amounted 81 articles. In 1910, a new company law replaced the previous law.[11] The intention was to introduce new and stricter rules in order to address misuse of the limited liability company.[12]

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7 1848:43.

8 ABL 1895:65.

9 Sandström, at pp. 47-48.

10 In the early days of company law, the Nordic legislators intended to use the limited liability company form for larger companies. They therefore prescribed minimum numbers of establishers and shareholders. However, in reality, the limited liability company form was frequently used also by one-man companies. A fairly simple procedure to evade the said requirement involved transferring four shares to persons close to the 'owner' or a similar person (Rodhe, at p. 23).

11 ABL 1910:88.

12 Sandström, at p. 17.

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It soon became evident that these twice-extended and increasingly stricter rules could not prevent misuse either. The failure of Ivar Kreuger's finance empire, Kreuger & Toll, in 1932 exposed a great many risks and, subsequently, weaknesses in the company legislation. To deal with deficiencies in the law, the legislator, once again, introduced new rules. The resulting Swedish Companies Act of 1944[13] was very detailed and extensive. It contained strict and complicated rules on minority protection, capital maintenance and groups of companies, including rules on the closing of accounts and inspection.[14] This legislation process was moreover influenced by the views of the working class movement of the 1930s. Their goal was a new society with an actively regulated state including a corresponding highly detailed company law.[15]

The Nordic cooperation in the 1960s and 1970s led to a more reserved attitude by the Swedish legislator. With the Swedish Companies Act of 1975,[16] the aspiration to provide extensive and detailed regulation was toned down in favour of modernisation and debureaucratisation of the regulation.[17]

In 1994, Sweden became a member of the EEA and, a year later, of the EU. It was reasoned that the harmonisation of Swedish company law with EU requirements did not compel any fundamental changes in its company law. Nor were the expected differences in regulation between the two company types (public and private companies) considered large enough to justify two separate company laws. It was decided to distinguish between two company categories, private and public, in one company law.[18] The decision to continue regulation in one law was in line with experience with previous Swedish legislation. In 1974, the introduction of a separate company type with limited liability was considered, but the government never got as far as making a law proposal because of the amount of negative criticism.[19] With legislative committee reports 1999/2000:LU10 and 2002/03:LU8 further attempts to introduce a separate company type for small companies were made, but the outcome was the same: the proposals were denied.

In January 2006, the new Swedish Companies Act of 2005[20] was enacted. The law clarified a number of issues where the legal status had been unclear.[21] Upon its enactment, it contained as many as 787 articles (which had increased by approximately

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[13] ABL 1944:705.
[14] Mähönen and Villa, at p. 15.
[15] Sandström, at p. 50.
[16] ABL 1975:1385.
[17] af Sandberg, at pp. 17-18.
[18] Prop. 1993/94:196, at pp. 67-74.
[19] Prop. 1993/94:196, at p. 73.
[20] ABL 2005:551.
[21] One issue where the law clarifies a previous unclear status is the transfer of values from the company (see af Sandberg, at p. 9).

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70 articles by spring 2014).[22,23] Editorial changes were made to improve the intelligibility and readability of the law. In particular, much space is provided for governance schemes in private companies, and in several respects the legislator also aimed at stipulating different rules for private companies than for public companies.[24]

The all-pervading fundamental idea behind this law is that both small private and large public companies can be regulated within one single law and with a majority of rules being more or less the same for both company types. When the law was enacted, 700 articles out of the 787 articles were the same for both company types. Four justifications are provided by the legislator for the use of one-law regulation.[25] As it seems, they all build on the assumption that rules required to govern small and large companies are the same and can therefore most appropriately be stipulated uniformly in one law.[26] Flexibility is intended to enable required adjustments.

This regulation will likely lead to reduced accessibility of the law and increased transaction costs as a result of more commonly occurring opt-out procedures, especially for small companies since rules tend to be shaped according to the needs of large companies.[27] If there are no opt-out procedures, the result will be non-optimally arranged companies, and again this tends to occur more often among small companies, where solutions adjusted for large companies will govern relationships. In addition, the legislator will face problems of keeping approximately 850 articles updated. One can only wonder if the number of rules is not above the equilibrium of what should and should not be regulated.

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[22] Andersson 2005, at p. 39.

[23] In a European perspective, the UK Companies Act of 2006 is a seemingly similar type of extensive regulation, with more than 1300 sections. However, it is important to mention that a straight comparison in terms of articles would not be appropriate. The drafting techniques for the statutes are very different. One reason for these differences is that English judges tend to use a restrictive method of interpreting statutes, as they regard them as exceptions to rules in common law. To counterweight this tendency, the legislator addresses issues in statutes as clearly as possible. The result, however, tends to be that statutes become highly detailed and lengthy, even for the simplest matters. In contradiction, Nordic courts often interpret statutes by analogy. A second reason for the high level of detail and lengthiness of the English legislative language is a certain formalism of legal thought. Regarding this issue, a Continental European statute would lie somewhere in between the English and Nordic approach (Zweigart and Kötz, 1997, at pp. 274-275; *idem*, 1998, at p. 283; see also Hellner, 1990, at pp. 41, 44 and 156).

[24] Prop. 2004/05:85, at p. 202.

[25] See prop. 2004/85, at p. 199. In short, these four justifications are: (i) most rules would be needed in both laws anyway; (ii) a shared law will provide better possibilities for uniform regulation; (iii) it will be an advantage for a growing company if the fundamental features of the rules for small and large companies are the same; and (iv) the essential issue is not whether rules are in a separate law, but that they provide solutions that are as simple and flexible as possible and that the rules are well arranged and shaped as clearly as possible.

[26] Andersson 2005, at pp. 44-47.

[27] The Norwegian legislator has pointed out that the actual focus will be on public companies when rules are formed, which will make adjustments required for private companies more difficult (Innst O nr 45 (1994-95)), at p. 1.

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Swedish company law has provided for thorough and seemingly exhaustive regulation for most of the 20th century. This inclination to provide extended regulation was, to some extent, suppressed by the Nordic cooperation during the 1960s and 1970s. However, with the decreasing influence from the other Nordic countries, the Swedish legislator is again allowed more freedom. With the Swedish Companies Act of 2005, regulation has become extensive again.

In 2009, other company forms were contemplated once more, this time in a governmental report, but again considered unnecessary, partially on the ground that the Societas Privata Europaea[28] (SPE) might become a reality in the near future.[29] Symptomatic for the Swedish approach to modernisation and 'deregulation' of the Swedish Companies Act of 2005, aimed at making the law more flexible for small companies, were the minor changes proposed in the aforementioned 2009 governmental report that would even further increase the number of articles, exceeding the current approximately 850 articles.

The rule of the Swedish Companies Act of 1895[30] that prescribed a minimum number of establishers was eventually changed, as were the company laws in the other Nordic countries, to reflect the true use of the limited liability company. These changes facilitated the use of the limited liability company form for the smallest companies, including one-man firms, with direct approval of the legislators. However, even with the latest Swedish Companies Act of 2005[31] it seems questionable that the possibility for the smallest companies to become limited liability companies has changed the rules such that these companies, which is the majority of all firms, have a genuine opportunity to organise themselves as limited liability companies.

2.2 Finland – one short law based on principles

The Decree for Companies of 1864[32] was the start of Finnish company regulation. This Decree was intended to make the main principles as well as many details uniform with the Swedish Decree for Companies of 1848.[33,34] In 1895, simultaneously with the then enacted Swedish company law,[35] the first Finnish Companies Act[36]

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28 For the original Proposal for a Council Regulation on the Statute for a European private company (Societas Privata Europaea, SPE), see COM(2008) 396/3 2008/xxxx (CNS), available at: <http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf>.

29 See SOU 2009:34.

30 ABL 1895:65.

31 ABL 2005:551.

32 28/1864.

33 1848/43.

34 KM 1969:A20, p. 45.

35 ABL 1895:65.

36 OYL 22/1895.

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replaced the said Decree. Again inspiration was sought from Swedish company regulation. However, there were disparities, for example, the Finnish law did not, like the Swedish law, stipulate a requirement regarding a minimum share capital.[37]

The liberal thinking of the late 19th century was clearly visible in the Finnish Companies Act of 1895.[38] The law was founded on the main principle of freedom of contract, which supported the idea that everyone was to look after his own rights. In general, the rules of this law were scarce and formal, except for some detailed provisions on the establishment of companies and the distribution of profits. The law lacked minority protection rules, except to the extent that the principle of equality could be deduced from the law. Minority protection rules were added in 1935.[39,40]

The law was in force for a very long time and was not replaced before the joint Nordic Companies Act[41] was enacted in 1978. The law-drafting department made the following observation:[42]

> The updating of our company law has, except for what has been said about the detrimental effect of our outdated company law on companies' possibilities to take part in international cooperation, the particularly important implication that foreign companies will not, after the reform, have any laxer company law regulation than in their home countries.

In 1994, Finland became an EEA member and, a year later, an EU member. The legislator chose to make the required changes in company law through alterations of the company law of 1978. The law was considered to cover enough in terms of its structure and to still be appropriate.[43] With these changes, Finnish company regulation started to distinguish between private and public companies, but within the limits of one law.

In 1997, the Finnish Ministry of Justice established a working group to evaluate the possible enactment of a separate law for small companies or, alternatively, a chapter for small companies to be added to the company law. The group rejected both proposals and instead recommended rewriting the company law, whereby particular attention would be paid to the requirements of small companies.[44]

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37 Mähönen and Villa, at p. 12.
38 Ibid.
39 L 350/1935.
40 Mähönen and Villa, at pp. 12-13.
41 OYL 734/1978.
42 Oikeusministeriön lainsäädäntö osaston julkaisu 1974:9, at p. 10.
43 KM 1992:32, at p. 16.
44 Pienyhtiöt ja yhtiölainsäädäntö. Työryhmän mietintö (Oikeusministeriön lainvalmisteluosaston julkaisu 1/1998), at p. 21.

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The new Finnish Companies Act of 2006[45] was enacted in accordance with the outlines of a later report, published by the Finnish Ministry of Justice in 2000.[46] The report stated the following:[47]

> A reform of company law would be aimed at achieving a more flexible law, which would ensure possibilities for companies to carry out more diverse activities. This would improve business conditions for small and large companies as well as their competitiveness and abilities regarding employment. Increased flexibility would give the law better opportunities to last in changing circumstances. Improved clarity, obtainable through modernisation, would especially serve small companies.

A concern was expressed that such a flexible law should be predictable and legally clear.[48] To deal with relevant problems of this kind, eight selected courts were chosen to rule on company law matters, whose judges were expected to have more opportunities to develop special skills. Appeals were to lie directly to the Supreme Court in order to shorten the time of trial. However, the legislator estimated that the total number of company law cases would be relatively small.[49]

In the years after the enactment of the new company law, the number of company law cases was small, on average less than 30 a year. Furthermore, following the renewal of the courts of first instance in 2009, whereby their number was reduced from 51 to 27, it was reasoned that specially appointed company courts were no longer needed. In addition, a fairly weak connection between the points of dispute and company law led to cases being totally or partly transferred to the company courts, which was often considered not particularly appropriate.[50] Now, general courts of first instance decide on company law matters, unless arbitration is stipulated in the articles of association. Arbitration is also stipulated by law for certain redemption disputes.

With the Companies Act of 2006, the Finnish legislator clearly recognises possibilities for future competition for incorporations between countries. The strategy is to provide sufficient opportunities for companies to carry out their activities in any new environment that companies might encounter.[51] The increased competitiveness of the Finnish legislation will increase the possibility to keep Finnish companies in Finnish possession and will make Finland more appealing as a country of

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45 OYL 624/2006.

46 Oikeusministeriö. Osakeyhtiölain uudistaminen – Tavoitteena kilpailukykyisempi yhtiöoikeus 2000.

47 Ibid., at p. 1.

48 RP 109/2005 rd., at p. 36.

49 Ibid., at pp. 33 and 35.

50 Ibid.

51 RP 109/2005 rd., at p. 16.

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establishment. The effects of incorporations are believed to be positive for the national economy.[52]

The law contains 290 articles, which is about the same as the previous law,[53] but clearly less mandatory rules,[54] instead providing for the extended use of presumptive rules.[55,56] The distinguishing feature of the law is the wide use of principles,[57] giving the law a highly flexible character.

The strategy of the Finnish legislator – introducing the extended use of principles – seems intended to remedy problems of overregulation (more or less with the Swedish company regulation in mind as a deterrent example, though not explicitly so stated), as well as those related to the reduction of rules, the alternative remedy for overregulation. The problem of reduced predictability, which is the likely result of the wide use of principles, can be mitigated. For example, the Swiss *Zivilgesetzbuch* of 1907 is characterised by the frequent use of general clauses and in order to counteract the uncertainty that would otherwise prevail, the Swiss courts have relied on carefully worked out commentaries on the law and high standards of jurisprudence.[58] Therefore, if properly handled, the increased flexibility of the Finnish

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52 Ibid., at p. 34.

53 Toiviainen, at p. 29.

54 Reininkanien, at p. 27.

55 Mähönen and Villa, at pp. 7 and 10.

56 Presumptive (opt-out or default) rules apply unless the shareholders agree otherwise. Provisions contrary to a mandatory provision of the company law or another law or contrary to the rules of appropriate conduct shall not be included in the articles of association (main principle (ix)).

57 The legislator justifies and describes the use of the main principles in the following manner: while the operations regulated by company law are becoming more complicated, at the same time as possibilities of operation of companies are extended, emphasising these principles is justified because thus problematic situations can be solved. The principles are to be judged in totality, in relation to each other and in relation to the detailed rules of the law. It is the rules that are to be obeyed in the first place (RP 109/2005 rd., p. 37). The weaker the detailed rules regulate an issue, the more the steering effect of the principles is enhanced (OM 2003:4, at pp. 46 and 84-85; RP 109/2005 rd., at pp. 17-18). Airaksinen, et al. (at p. 4; see also RP 109/2005 rd., at p. 37) have pointed out that it has been considered likely that the importance of these principles is enhanced by the passing of time, because their interpreting effect is particularly large when surroundings of the companies change, and these changes would make detailed rules inappropriate to steer actions of shareholders and management. The application and main principles of the law are, in short: (i) the law applies to both public and private companies. A private company shall not be admitted to public trading; (ii) legal personality and limited liability of shareholders; (iii) the capital and its permanence; (iv) transferability of shares; (v) the purpose of a company is to generate profits for the shareholders, unless otherwise provided in the articles of association; (vi) the principle of the majority rule; (vii) equal treatment, i.e., all shares shall carry the same rights in the company, unless otherwise provided in the articles of association; (viii) duty of the management, i.e., the management of the company shall act with due care and promote the interests of the company; and (ix) discretion of shareholders, i.e., the shareholders may include provisions on company operations in the articles of association.

58 Hellner 1990, at p. 34.

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law can be managed, while at the same time the necessary adjustability and flexibility of modern company law is achieved. What should be noted is that the small number of company law cases might constitute a problem for the development of reliable precedents and special skills of the judges, a problem aggravated as result of the abolished company courts.

However, what is more crucial is that the use of principles seems unable to solve the problem of regulating two different company types within one law. It is a characteristic of principles that there are limits to how far they can stretch. If the objects regulated are too varied, as the two company types are, judges will have to vary their conduct such that predicting the outcome will become difficult.[59] A hypothetical remedy would be to develop two separate practices in courts, one for each company type, but then the conduct of the courts would have to be consistent and separate in regard to each company type; how this is to be done with only one law and a single set of principles remains a mystery. An alternative strategy is to settle for one type of practice. But then the immediate risk seems to be that such practice would suit one company type but not the other.

If a wide use of principles likely reduces the predictability of a law, even though alleviated by commentaries and high standards of courts, that law should be of particular concern to small companies. These companies do not normally have the same capabilities to interpret intricate rules as large companies and will thus be more dependent on advice from legal professionals. This advice will come at a higher cost, while uncertainty caused by the principles will result in time-consuming and difficult investigations. In addition, litigation will tend to be longer and more complex and will more often occur as a result of the uncertainty in legal status.[60] Larger companies will consequently have better possibilities than small companies to influence the development of precedents in courts. The development of the law in courts will therefore tend to favour large companies, unless the above-mentioned 'double' interpretation is adopted. To the extent that arbitration is used, resulting higher costs will likely hit small companies harder.

Since the Finnish Companies Act of 2006 does not seem especially well suited for, or even directed at, small companies, one may only wonder if the real intention behind this flexible law was to adjust the law to be competitive for incorporations and, to a lesser degree, to serve a more varied group of companies, including small firms, as stated.

2.3 Norway – two long laws

Norwegian company regulation is characterised by considerable continuity. This means that old case law from the beginning of the last century still plays an impor-

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[59] Cheffins, at pp. 283-284.
[60] Ibid., at p. 284.

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tant role.[61] Another implication is that the achievement and preservation of this continuity have affected the development of the law. Reforms made in 1957, 1976 and 1997 have not changed it significantly. The Norwegian regulation will thus also shed light on the previous regulations of the other Nordic countries through the close relationships between their laws.

When the Nordic cooperation began in the 1960s, Norway hesitated to take part. The reason for this hesitation was that fairly recently, in 1957, Norway had enacted a new Companies Act.[62] Norway decided to take part in the cooperation, because staying on the outside was not considered appropriate either.[63] The resulting Norwegian Companies Act of 1976[64] did imply a change in the structure of the law,[65] but the fairly modern feature of the previous law and the country-specific solutions[66] made it possible to preserve the Norwegian company regulation throughout the Nordic cooperation. Nevertheless, the law was extended[67] to 175 articles.

In 1989, a project was launched aimed at modernising company law in Norway. The original intention was to carry out a general follow-up of the company law of 1976, but with Norway's EEA membership in 1994, adjusting the law to the EU requirements[68] became an important part of the work.[69] However, the changes needed were not that significant, because already before its membership Norway had adjusted its company law to the trends on the continent.[70] The most visible change was the adoption of a two-law type of regulation for companies.[71] But the initially intended regulation was of a one-law nature.

The work carried out resulted in the first preparatory work *NOU* 1992:29, which proposed to continue regulating companies within the framework of one single law, but with a separation between private and public companies. No particularly large differences between the two company forms were proposed.[72] The one-law type of regulation suggested was more or less repeated in government proposal *Ot prp* 36 (1993-94) and forwarded to the *Stortinget* (Parliament). However, it was rejected with a large majority (50 to 26),[73] mainly because not enough attention was paid to the circumstances of small companies.[74] Accessibility of the law was not considered

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61 Aarbakke, et al., at p. 22.
62 Lov 6 juli 1957 om aksjeselskaper.
63 Skåre, at p. 608.
64 Lov 4 juni 1976 om aksjeselskaper.
65 NOU 1992:29, at p. 16.
66 Krüger Andersen, at p. 11.
67 NOU 1992:29, at p. 16.
68 EEA Treaty, Art. 77; cf. Appendix XXII.
69 NOU 1992:29, at p. 17.
70 Ibid., at p. 26.
71 By private companies is meant non-listed companies.
72 Bråthen, at p. 222.
73 Ibid., at pp. 223-224.
74 Ot prp nr 23 (1996-97), at p. 13.

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satisfactory either.[75] It should be noted that this legislation process generated large political interest, intensified as a result of the 'no' vote on Norway acceding to the EU.[76]

The government was requested, through *Innst O nr* 45 (1994-95), to prepare a new proposal based on two laws, one for small and one for large companies. The task set was to carry out a full review of the law, for each company type. Each law was to be adjusted in accordance with the particular company type it was to serve.[77]

According to the resulting preparatory work *NOU* 1996:3, the two company types were to become independent and there should be a specific scope of application for companies with different qualities.[78] However, when the government finally forwarded the new proposal *Ot prp* 23 (1996-97) to the *Stortinget*, it had, in many respects, more in common with the old *Ot prp* 36 (1993-94) than with the new preparatory work *NOU* 1996:3.[79] Proportionally large similarities between companies regulated by the private and the public company law were proposed[80] and, as a result, the Public Companies Act of 1997 and the Private Companies Act of 1997[81] were not only systematically designed in a similar manner, with parallel rules,[82] but are also very similar in many respects.[83] The two laws provide for fairly extensive regulation, with about 270 articles each,[84] and, as a starting point, both laws contain all relevant rules governing the organisation of activities in companies and the relationships between shareholders.[85] It should be noted that there is more room for private arrangements[86] in the private than in the public company law.[87]

It is claimed that codes of private law are marked by the particular historical situation in which they were produced.[88] This may partly explain the resemblance between the two Norwegian laws. The legislation process shaping these two laws was everything but straightforward. The two laws might therefore reflect to a larger extent differences in opinion on the issue of providing one or two laws for companies, and to a lesser degree differences in the two company types which these two

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[75] Innst O nr 45 (1994-95), at p. 2.
[76] Bråthen, at p. 224.
[77] Innst O nr 45 (1994-95), at p. 2.
[78] Bråthen, at p. 234.
[79] Ibid., at p. 238.
[80] Ibid., at p. 239.
[81] Lov 13 Juni 1997 nr 44 om Aksjeselskaper and lov 13 juni 1997 nr 45 om allmennaksesellskaper.
[82] Ot prp 23 (1996-97), at p. 21.
[83] Aarbakke, et al., at pp. 26-27.
[84] Bråthen, at p. 238.
[85] Aarbakke, et al., at p. 28.
[86] Private arrangement refers to private contracting, i.e., the shareholders may opt out of presumptive rules.
[87] Aarbakke, et al., at p. 29.
[88] Zweigart and Kötz, 1997, at p. 149.

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laws are to serve. In addition, strategic decisions were made, unavoidably resulting in a greater resemblance between the laws.

NOU 1992:29[89] states that there will probably be proportionately many issues where different aspects will be relevant in small and large companies, but it also points out that the question of whether it is appropriate that these differences are reflected as differences in the rules is another matter.[90] The *Økomkrim*[91] (Economic Crime Unit) stated the following (a statement also referred to by the legislator[92]):

> Motives have been presented for enacting simpler regulations for small enterprises. We want to draw attention to doubts with respect to these motives, also presented by the *aksjelovutvalget* (p. 27). It is a fact that, especially in small companies, we register economic crime and misuse of the company form. The *Økomkrim* is therefore of the opinion that it is hazardous to introduce considerable simplifications of the rules governing small companies, since this company form might then be perceived as a convenient instrument for economic crime.

The legislator states that forming rules such that they enable circumvention and tactical adjustments will have a negative effect,[93] meaning that larger companies, which ought to be governed by the more extensive regulation in the public company law, would organise as the 'wrong' company type, i.e., under the private company law. It is also pointed out that Norway not only has small or large companies. The laws must be designed such that attention is paid to all kinds of companies. Furthermore, it is pointed out that shaping rules on private companies exclusively for small family businesses and similar enterprises would be detrimental.[94]

It seems, however, that the trend in Norway has now taken another direction. A recent proposal[95] to the *Stortinget* concerning simplification of company law – proposal 111L (2012-2013) *Endringer i aksjelovgivningen mv.*[96] – states that it aims to provide for a simpler regulatory framework for companies, with particular emphasis on small enterprises. Indeed, the changes will make a difference but then again, most of them are implemented for public companies as well.

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[89] The rejected proposal Ot prp nr 36 (1993-94) and NOU 1992:29 are still considered valid as preparatory work for the two company laws enacted in 1997 (see, for example, Aarbakke, et al., at p. 20).

[90] NOU 1992:29, at p. 27.

[91] Ot prp nr 36 (1993-94), at p. 36.

[92] Ibid.

[93] Ibid., at p. 38.

[94] Ibid.

[95] The proposal was based on the Report 'Forenkling og modernisering av aksjeloven' of 7 January 2011, by Gudmund Knudsen.

[96] Prop. 111 L (2012-13).

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The Norwegian regulation with two laws will nevertheless improve clarity of company law, while relevant rules for each company type can be found in separate laws, though the differences between the laws are not that significant.

2.4 Denmark – one long and one short law

By international comparison, Danish company law is relatively simple.[97] This tradition of providing simple rules and regulations already started with the enactment of the first Danish company law in 1917.[98] However, it was soon realised that such pruned regulation – the law contained 60 articles[99] – was insufficient. Scandals, such as the failure of the *Landmandsbank*,[100] revealed the need for revision and extension of the law.[101] In 1930, a new company law[102] was enacted. This law provided for more extended regulation in 91 articles. Despite the increase in the number of rules, the law was still fairly simple in comparison with the other Nordic company laws.[103]

Denmark became an EEC member in 1972. The company law of 1930 was amended[104] in accordance with the First EEC Company Law Directive[105] in place at that time.[106] A year later, simultaneously with the enactment of the joint Nordic company laws, Denmark adopted a two-law type of regulation, much as a result of its EEC membership and the expansion of the regulation.[107] However, the enacted public and private company laws did not differ significantly. The Private Companies Act of 1973[108] contained 138 articles and the Public Companies Act of 1973[109] 179.[110] Both laws had the same chapter structure and regulated the same issues. Regarding mandatory protection rules, both laws contained more or less the same rules.[111] The limited influence of EEC membership made it possible to draft the public company law to a large extent in accordance with the joint Nordic company law proposal.

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97 Krüger Andersen, at p. 2.
98 Aktieselskabsloven nr. 488 af 29 september 1917.
99 Gomard, at p. 20.
100 U 1923.871.
101 Krüger Andersen, at p. 11.
102 Aktieselskabsloven af 15 april 1930.
103 Gomard, at pp. 20 and 26.
104 Lov nr. 503 af 29 november 1972.
105 68/151/EEC.
106 Krüger Andersen, at p. 13.
107 Gomard, at p. 34.
108 Lov om anpartsselskaber nr. 371 af 13 juni 1973.
109 Aktieselskabsloven nr. 370 af 13 juni 1973.
110 Gomard, at pp. 20-21.
111 Krüger Andersen, at p. 15.

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In the years after the adoption of the two-law type of regulation, the small differences that initially separated the two company laws started to disappear. Changes in company law were generally made correspondingly in both laws. This contributed to increasing similarities[112] but also meant that the number of rules regulating relationships in the private company by far exceeded what was appropriate.[113]

The resemblance between the two company laws was recognised by the legislator and in spring 1990 the Danish Ministry of Industry commissioned a company law panel to simplify company law. As regards the public company, the panel was especially asked to aim for precise and clear 'protection rules' in order to decrease the elements that were to be estimated,[114] and concerning the private company its task was to considerably simplify the law, only including essential mandatory rules and a limited number of presumptive rules.[115]

The general rule was still that the fundamental ideas and many details of the mandatory protection rules were similar in both laws.[116] However, it should be noted that the Private Companies Act of 1996 lowered the minimum capital requirement from 200,000 DKK to 125,000 DKK (now 80,000 DKK and for *Iværksætterselskab* (IVS)[117] 1 DKK) but, in return, some other protection rules were enenhanced.[118] The level of these protection rules even exceeded those in the public company law.[119]

In distinction to other European countries, which had opted to carry out single large revisions of their company law, Denmark chose to make continuous adjustments in the regulation of companies.[120] It should also be noted that Danish company law aimed at reducing transaction costs by creating clear, simple and effective regulation. The intention was to reduce administration costs for businesses in order to make Denmark one of the most competitive societies.[121]

The aim of the Danish legislator was to provide a limited number of mandatory rules and of presumptive rules on matters of importance to the typical private company: a smaller enterprise with few participants.[122] The legislator mentioned the possibility of limiting economic risk when establishing a business, which is especially important for persons who have the means and incentive to start a business

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112 Ibid., at p. 26.
113 Ibid., at p. 54.
114 Betænking 1251:1993, at p. 7.
115 Ibid., at p. 8.
116 Krüger Andersen, at p. 31.
117 IVS is a special type of private company that builds up its capital through the company's business. Once it has generated 50,000 DKR, it may register as a private company.
118 Ibid., at p. 26.
119 Ibid., at p. 132.
120 Ibid., at p. xv.
121 Gomard, at p. 38.
122 Betænking 1251:1993, at pp. 41-42.

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but hesitate for fear of risking the welfare of their family.[123] The difference with the Norwegian strategy in the 1990s is evident. Norway's intention was to provide a complete set of company-adjusted rules, but there the two target company types became proportionately similar. It appears that the Danish strategy did have some additional advantages.

The Danish private company law was particularly intended for

> companies with a smaller number of participants, for companies where owners to a considerable degree take part in the running of the company and for companies which do not have 35 or more employees and are therefore not concerned by rules regarding co-worker representation.[124]

In such companies, relationships are usually close and thus participants have opportunities to negotiate and contract with each other. A limited number of mandatory rules provided participants with the necessary space to formulate mutually advantageous and socially optimal solutions, as preferred by Coase, who stated:[125]

> Whenever people encounter legal rules which do not suit their interests, they may well negotiate around those rules (note that the parties must be well informed and able to bargain at low cost) and formulate mutually advantageous and socially optimal solutions.

The small number of presumptive rules also offered advantages. Since the group of small companies is varied, more so than that of larger companies, it follows that participants' preferences vary more than in the case of larger companies. If the legislator is to provide presumptive rules that are in accordance with what a majority of company participants prefers, which is done to minimise transaction costs,[126] the number of rules to be set by law for small companies will not be as high as when the preferences are more uniform. The aim of providing a smaller number of presumptive rules in the Danish private company law, but still in accordance with a majority's preferences, was thus in accordance with economic theory.

However, when the private company law was drafted, the deregulation process was taken further than what was suggested in Betænking 1251:1993. This strategy can be explained by the threshold feature of presumptive rules,[127] i.e., some participants will remain governed by non-optimal arrangements as a result of high transaction costs or unawareness of required opt-out procedures. Thus, if this threshold is taken into account, fewer standard contract solutions will be required.

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123 Ibid., at p. 38.
124 Ibid., at pp. 41-42.
125 See Coase.
126 Cheffins, at pp. 258 and 262.
127 Ibid., at pp. 257-258.

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An opt-in procedure was defined by the Danish legislator.[128] More complicated rules, relating to matters irrelevant for most companies, such as those regarding the decision-making process, came under the public company law.[129] These permissive rules, relevant for only a small minority of companies, were not to burden the private company law and the majority of companies, but could nevertheless be applied by a smaller majority if necessary.

The area of the company law regulation field that is not covered by mandatory rules and presumptive and permissive rules was left unregulated by the Danish legislator (a no-rule area of the regulation field). The advantage of not providing rules is that company participants have better possibilities, but also responsibilities, to find efficient solutions. The knowledge resulting from these solutions reflects preferences of the contractors and provides opportunities to develop the law accordingly. The alternative strategy would likely be a supply of rules with poor knowledge of preferences of those governed by the rules. This again would disturb the development of knowledge of preferred conduct and would result in the real risk of losing touch with the governed objects. When mandatory protection rules are provided a close connection with the governed objects will moreover offer the legislator advantages. Rules can be provided, to the extent that they are required, in a way that correlates with real preferred conduct.

Some parties might, however, forgo the responsibility to make company-adjusted agreements, whereby issues are left completely unregulated. The relevant question is how such unregulated issues will be solved. One solution supported by the Danish scholar Gomard was that the abolishment of a rule should be interpreted as implying a possibility for legal usage to develop new presumptive rules.[130] This means that tradition, the private company law of 1973 and the public company law, and the circumstances of the particular case, including of the company and of the situation, should serve as guidance. Hellner,[131] too, supported an interpretation whereby different factors are to be combined in order to arrive at a solution. According to this interpretation, a predominant factor cannot be defined generally.[132] Thus, a dispute not regulated by law and not solved by the parties concerned can be

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[128] Ibid., at pp. 250-256.

[129] Betænking 1251:1993, at pp. 42-43.

[130] Gomard, at pp. 45-46.

[131] Hellner, 1994, at pp. 77-78.

[132] Cf. the teleological method of P.O. Ekelöf. The method infers, in short, that a legislator cannot anticipate all conceivable cases that can be handled by a court. Hence, the legislator should restrict himself to providing rules for those cases the outcome of which can be estimated with some degree of certainty. Guided by the purpose of those rules, it will be possible to draw conclusions on how the law is to be interpreted in those cases not regulated by the rules (Ekelöf, at pp. 54-70). The method has the advantage of improved predictability, while interpretation is based on the law in force (Ekelöf, at pp. 65-69). As it seems, such interpretation runs the risk of becoming static and unable to produce answers and offer the required adjustability to modern company law.

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settled in a pragmatic way (cf. the SPE Regulation, which requires shareholders to regulate certain matters).

The rules of Danish company law contained as few elements to be estimated as possible and were therefore relatively easy to understand. The disadvantage of this kind of hard-line rules is that they are unlikely to be adjustable to new circumstances for which they are not designed. They will thus have a relatively short lifespan.[133] However, the continuous review process of Danish company law provided, at least potentially, ample opportunities for evolutionary company legislation, which could thus be adjusted in line with changes in circumstances and at the same time take preferences of those governed by the law into account. New conduct, compelled by no-rules becoming frequent over time, could be transformed into new standard contract solutions, while other old and less wanted rules could be removed from the law.

It seems like the simple feature of these Danish rules, the right proportion and number of presumptive and permissive rules and the use of the two-law type of regulation contribute to reducing transaction costs and creating good company law for small companies. The conclusion is therefore that this Danish type of regulation is the preferable type of the four Nordic regulations studied.

Nonetheless, the said Danish regulation was abandoned in 2010. In 2006, a committee was appointed to propose new company law regulation. The result was published in 2008 and subsequently rushed through the legislative process by means of the new Danish Companies Act[134] (one-law type of regulation), which entered into force in 2010.[135]

The following statements were made in the preparatory work preceding the legislation as explanation for the change in regulatory approach by the Danish government. One argument in favour of one law was that the similarities and differences between the company forms would become more evident.[136] It was moreover argued that the previous law governing private companies included many cross-references to the law for public companies, which could be avoided with one company law. A last argument, though not decisive in the legislative process, was that the previous legal uncertainty concerning the interpretation of the private company law on issues where it was silent, e.g., should a court interpret by analogy, applying the public company rules, or decide according to old rules in previous company legislation, or adapt to the situation at hand, would disappear with the new company law.

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133 Cheffins, at p. 281.

134 Selskabsloven af 1 marts 2010.

135 See Modernisering av selskabsretten, Betœnking 1498, November 2008. The choice between keeping the old two-law type of regulation or adopting the one-law type is discussed as a regulatory strategy on only half a page in the otherwise extensive report.

136 It should be noted that the Danish Companies Act of 2010 differentiates between private companies, public companies and public companies in which shares are traded.

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Both during and after the Danish Companies Act of 2010[137] came into force, it was and has been criticised for not taking sufficient account of the needs of small companies. Characteristics that made the previous Danish legislation special and preferable from the point of view of small companies have even been presented as reasons for abandoning it.

3. HARMONISATION OF NORDIC COMPANY LAWS

3.1 Four harmonising elements and breakdown of Nordic company law regulation

The Nordic company law regime is one of three main systems of company law regulation, besides the continental European and Anglo-American systems. The Nordic system has been characterised by a high level of uniformity.[138] However, as seen above, later developments have taken the regulations of the Nordic countries in separate directions. Four elements can be distinguished that have contributed to harmonising Nordic company laws: (i) close relationships and similarities between the Nordic countries; (ii) company laws of other Nordic countries as inspiration for legislators; (iii) cooperation between Nordic countries; and (iv) the EU company law harmonisation programme.

Common legal traditions and cultural and social similarities have been considered natural reasons for enacting company laws on a common basis.[139] The first element can be seen as the basis and connecting element of Nordic company regulation.

Nordic legislators have sought inspiration from company laws of other Nordic countries. However, for obvious reasons, copying solutions leads, at best, to a sideways development of law but does not rule out a backward process, i.e., older or outdated solutions are transferred from one jurisdiction to another. The second element has therefore had a profound preservative effect on Nordic company laws.

Thirdly, cooperation between the Nordic countries has taken place at different levels. The meetings of Nordic jurists, a Nordic body of cooperation, held every third year since 1872, have been of significance for the legislative cooperation between the Nordic countries.[140]

One attempt to enact joint Nordic company laws took place in the 1930s[141] but ended without result in 1939. In Finland, it has been noted that some rules proposed

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137 Selskabsloven af 1 marts 2010.
138 RP 109/2005 rd., at pp. 8-9; see also Lau Hansen, at pp. 9-10.
139 Förhandlingarna 1972, at p. 54.
140 Lau Hansen, at p. 6.
141 Gomard, at p. 27.

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by this project were inappropriate and could even be considered as directly harmful in the then unstable economic conditions.[142] The rules, when finally proposed, were unable to accommodate changed circumstances. A later attempt to enact common Nordic company laws, in the 1960s and 1970s, was more successful and of great importance to the achieved high level of uniformity of Nordic company laws.

The initial objective of the later attempt was to achieve uniform company law, of use to both trade and industry in the Nordic countries.[143] A Finnish report[144] described the strategy as follows:

> The company law committee has, in accordance with the assignment given, strived to present a proposal for law that would be not only appropriate from the point of view of the own country, but also, as far as possible, promote conformity of Nordic company law.

However, the question of whether the level of harmonisation should be reduced was raised several times. At a meeting of jurists in Helsinki in 1972, the Swedish Minister of Justice Carl Lidbom showed his distrust of far-reaching harmonisation, arguing the following:

> Societies are changing at an increasing pace, the lifespan of laws seems to become shorter and shorter and the Nordic countries increasingly use laws as a political instrument to influence the development of society and people's social conditions.[145]

He also pointed out that

> today the goal is rather practical coordination of Nordic laws or conformity of law in terms of fundamental features or principles and the relatively equal application of laws.[146]

In 1974, at a Nordic Council meeting in Stockholm, a compromise solution was reached. The goal of the subsequent cooperation was 'to reach harmonisation or, to the extent possible, similar laws or legislative action where Nordic cooperation is considered appropriate'.[147] After the enactment of the Nordic company laws, in the 1970s, the influence of Nordic cooperation on Nordic company laws has been modest,[148] which has several reasons.

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142 KM 1969:A20, at p. 46.
143 Skåre, at p. 609.
144 KM 1969:A20, at p. 52.
145 Förhandlingarna 1972, at p. 53.
146 Ibid., at p. 56.
147 Korte, at p. 711.
148 Cf. Skåre, at p. 620.

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One may wonder whether the achieved level of harmonisation was, to some degree, artificial and could therefore only be of short duration. When the joint Nordic company laws were enacted, the level of regulation in the Nordic countries was brought to a mutually agreed level. This resulted in expansion of the regulation, especially in Finland and Denmark, but also in Norway. This expansion can probably, to some extent, be considered justified in some jurisdictions, e.g., the company law in force in Finland at the time was fairly simple. However, there is also evidence that additional regulation serving less useful purposes was imposed. The implication of the scarce regulation of the Danish company law of 1930,[149] was that, at creditors' and investors' request, companies voluntarily published accounts that contained far more information than required by law.[150] This meant that participants in companies were able to find solutions to problems without the intervention of the law (i.e., mandatory rules). The increase in company regulation was therefore, to some degree, an adjustment to the very detailed and thorough Swedish company law of 1944[151] and, to a lesser extent, an adaptation serving the purpose of developing good company law.

To achieve a common basis for regulation in the Nordic countries, the principle of conformity was given high priority. A high level of harmonisation unavoidably requires compromise solutions, but will also effectively prevent new solutions from being adopted. This is because decisions will have to be made unanimously and achieving unanimity on controversial issues, which new solutions tend to be, is difficult. The joint Nordic company law project was therefore more or less captured in already existing solutions for regulation. Skåre, for instance, who participated in the harmonisation process, commented on the work as not being very innovative.[152]

To combine this static quality of the project with the evolutionary quality of good company law[153] is difficult, if not impossible (see also the second element). Therefore, the resulting Nordic company laws could not result in optimal regulation. It should be noted that both Sweden and Norway did adopt newer company law on their own, at the expense of the Nordic cooperation project.[154]

Fourthly, today Denmark, Finland and Sweden are members of the EU, while Norway is a member of the EEA. The Nordic company laws are therefore influenced by the EU company law harmonisation programme. In comparison with the Nordic cooperation project, the number of company laws to be harmonised is much higher and the legal history of the participating countries far more diverse. The problems in reaching agreements, as experienced in the Nordic cooperation,[155] are

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149 Aktieselskabsloven af 15 april 1930.
150 Gomard, at p. 27.
151 ABL 1944:705.
152 Skåre, at pp. 611-615.
153 Winter, at p. 275.
154 Krüger Andersen, at p. 11.
155 See Skåre, at p. 612.

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therefore magnified but are at the same time alleviated by the fact that harmonisation is generally carried out by means of minimum directives, which, moreover, usually provide several options for implementation. The drawback of these alleviating elements is that the harmonisation that can be achieved through this programme is not very significant.

The dispersing effect of this programme is apparent when considering the trend of the Nordic company laws established under its influence.[156] To the extent that harmonisation is achieved, the relevant question should be: is the achieved harmonisation worthwhile in the sense that it promotes good law for companies, or does the uniformity reached serve nothing but the harmonisation programme itself? As has been pointed out in Denmark, the EU company law harmonisation programme forced Denmark to adopt solutions that would hardly have been chosen without the programme.[157] It is therefore quite likely that the uniformity reached serves the harmonisation programme itself rather than the development of good company law.[158]

The only element of the above-mentioned four harmonising elements that is valid and could thus form a basis for future harmonisation of Nordic company laws is the first element, i.e., the common legal traditions and cultural and social similarities. However, as a harmonising element, it cannot promote harmonisation on its own, as experienced by the Nordic countries.

3.2 Harmonisation through competition and development of company laws

Two main methods of harmonising company law have been discussed so far: harmonisation by means of federal law, as was more or less the initial goal of the joint Nordic company law project, and harmonisation by means of federal minimum legislation, as through the EU company law harmonisation programme. A third method is harmonisation through competition between states, a means widely used in the United States, but also disputed. The main idea behind such competition is that a state with favourable company law will attract companies and, in response, other states that want to keep their companies within their territory will try to enact similar or more favourable legislation. The end result of such competition is harmonisation of company laws.

Two schools of thought have dominated jurisprudence on this issue. One argues that this competition leads to laws in favour of management and therefore consti-

[156] The EU company law harmonisation programme has moreover had a mental effect on Nordic company regulation. The aspirations to harmonise Nordic company laws started to fade with Denmark's EEC membership in 1972 (Skåre, at p. 617).

[157] Krüger Andersen, at p. 17.

[158] Cf. Enriques.

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tutes a process towards inferior company law (race to the bottom), while the other claims that such competition in fact promotes a race towards good company laws, favouring shareholders (race to the top).

According to Cary,[159] who was among the first to advance the 'race to the bottom' theory, the Delaware statute – which has attracted most companies in the United States – and the competition among states result in laws that make little or no effort to protect the rights of investors. The modernisation of company laws has led to laws enabling management to operate with minimum interference. The remedies suggested by Cary[160] are federal minimum legislation, whereby a certain degree of uniformity can be achieved, or, as an alternative solution, a Federal Corpo-Corporate Uniformity Act. The intention is to allow companies to incorporate in the jurisdiction of their choosing, but remove much of the incentives to organise in Delaware or its rival states. The harmonisation of company laws would prevent a race to the bottom.

Winter,[161] one of the main proponents of the race to the top, asserts that competitive legal systems in fact tend towards optimality as far as the shareholders' relationship with the company is concerned. According to Winter,[162] Cary's argument is obscured because it stresses only expected benefits and ignores costs of regulation. Costs would be generated by consumed resources and restrictions preventing participants in companies from arranging their affairs in a manner they find most suitable. There would consequently be an equilibrium where the exercise of control by rules would impose costs on investors that would damage them just as much as the conduct these rules are trying to prevent. Market forces would moreover be a continuous incitement for legislators to change company laws, but in such a manner that they allocate rights of companies optimally. A legal change that would disproportionately favour managers at the expense of shareholders would result in a disadvantage for the companies of that state, if compared to other companies in other states with more optimally allocated rights. The race would therefore be a race towards good company laws.

There is no unanimity on whether Cary or Winter is right. However, these two theories can be used to reflect what has been learnt in this study about Nordic company law regulation, and this knowledge questions the usefulness of Cary's remedies for harmonisation of company laws.

The joint Nordic company law project achieved a high level of harmonisation of company laws, thereby reducing incentives for competition. However, the intended very high level of harmonisation could not be reached, and the end result did not come about without sacrifices in terms of (i) unnecessary rules, (ii) compromise

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[159] Cary, at p. 666.
[160] Ibid., at p. 701.
[161] Winter, at p. 254.
[162] Ibid., at p. 258ff.

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solutions, (iii) reduced possibilities for the legislator to develop the law, and (iv) reduced possibilities for those governed by the law to find efficient solutions. It thus seems that costs have indeed been incurred, as suggested by Winter.

The EU company law harmonisation programme has been working towards harmonisation for quite a long time. However, to distinguish any clear evidence of achieved or achievable harmonisation that would prevent possible competition is not easy, as shown by the development in the Nordic countries.[163] Incentives for competition are not reduced, implying that Cary's arguments are not valid. At the same time, the harmonisation programme has imposed costs in terms of unwanted rules, which thus supports Winter's argument.

What can be concluded is that if Cary's suggestions have led to inferior results and Winter seems to have been right, perhaps Winter was right about the direction of the race too, and if Winter was not completely right, an incomplete race might still be a better solution than suffering the disadvantages of the alternative remedies that have already proved unsatisfactory.[164]

With the relatively recent developments in the case law of the European Court of Justice[165] and the implementation of the 10th Company Law Directive,[166] there are more competition possibilities for incorporations in Europe and the Nordic countries than ever. With the knowledge about similar competition in the United States and the higher level of harmonisation achieved there, a new way may have been found to harmonise Nordic company law regulation, whereby at the same time good company law may be promoted and developed.

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163 In this respect, reference can be made to the EU SLIM project carried out in the late 1990s. According to the explanatory memorandum, SLIM's purpose was not to harmonise further, but to slim regulation, a 'deregulatory' exercise (Recommendations by the Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives, at p. 7). It must be admitted that the SLIM project has contributed to decreasing possibilities to achieve harmonisation in certain areas of company law in EU states. However, one may wonder whether the real cause of limited possibilities to achieve harmonisation is, instead, the fact that the harmonisation that could have been achieved through the EU company law harmonisation programme would have come at an unreasonable cost (in the form of laws that would have been too detailed).

164 An interesting parallel can be drawn with Jeremy Bentham (1748-1832). Bentham stated that: (i) it may be an advantage that laws of a country are written by foreigners; and (ii) different persons should come up with alternative proposals for laws so that those in authority can choose the most suitable one. No compensation should be given to those who work out the proposals in addition to what they otherwise may earn in their regular work. Hellner has called these ideas almost bizarre (Hellner 1990, at p. 141). However, if seen in the light of the above discussion, they might not be so strange. Bentham could instead be regarded as an early proponent of the race-to-the-top theory. On the second point, a comparison can also be made with the 'no rules' as a means for developing company law.

165 See *Centros* (C-212/97), *Überseering* (C-208/00), *Inspire Art* (C-167/01), *SEVIC* (C-411/03), *Cartesio* (C-210/06) and *Vale* (C-378/10).

166 1417/2007/EEC.

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3.3 A future Nordic model law

In the United States, the Model Business Corporation Act (MBCA) provides legislative solutions which states can freely use and implement in their laws. The MBCA offers state-of-the-art solutions, which are continuously changed in accordance with new knowledge. The presence of these model solutions is a considerable advantage for smaller states with minor resources. These states do not have to develop company law by themselves and are still able to enjoy the benefits of state-of-the-art company law.

The High-Level Group of Company Law Experts examined the possibility to use model laws in Europe. However, concern was expressed about the development of these laws:[167]

> Due to the considerable differences in legal technique and substantive law, the development of model laws which could be applicable throughout Europe, although conceptually interesting, would be difficult.

The relatively recent report of the Reflection Group[168] shows a more positive attitude towards a European Model Company Act (EMCA). The Reflection Group states the following:[169]

> The aim of the project is to provide a modern and flexible Model Act, looking at the solutions available in Europe and the latest developments in Member States. The initiative does not strive to harmonise national company law by providing a single act, but to facilitate a learning process that will enhance the understanding of the specific features in various national systems that will serve as a model for adaptation and legislation on a strictly voluntary basis by the individual Member States.

The Reflection Group makes the following recommendation:[170]

> The Reflection Group welcomes the work on a European Model Company Act (EMCA), which is a separate project. It promises to facilitate a learning process and serve as a model for adaption and legislation on a voluntary basis. If the final result can serve as an adequate benchmark, the Commission could consider turning the EMCA into a recommendation.

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[167] Report of the High-Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels 2002, at p. 32.

[168] Work on a European Model Act is ongoing. See <http://law.au.dk/en/research/projekter/europeanmodelcompanyactemca>.

[169] Report of the Reflection Group on the Future of EU Company Law, Brussel, 5 April 2011, at p. 12.

[170] Ibid.

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The Nordic cooperation and the process of harmonising Nordic company laws have, to a large extent, implied adjustments to already existing solutions, or, at best, solutions enacted in the other Nordic countries. A new task for the Nordic cooperation, in line with the new demands on company law, could be to provide model laws for the Nordic legislators. The legal histories of the Nordic countries are similar enough, as a result of which the difficulties in developing model laws, as pointed out by the High-Level Group of Company Law Experts, would be reduced. The countries are small and thus outside help in developing company law would probably be welcome. Due to the previous cooperation, the appropriate framework for the task is already in place. It is only the task that needs to be reformulated. Nordic company regulation could focus on moving forward in order to promote the development of good company regulation. A market for incorporations in Europe would not allow the Nordic countries to deviate too much from trends in the rest of the EU, but enough to preserve and respect the shared legal traditions of the Nordic countries.[171] However, to make the past and current harmonisation of company law within the EU a future success story is a big step, and may even seem too big. In the light of history, the EU's aspirations in the field of company law harmonisation can hardly be viewed as a significant contribution to the evolution of company law in Europe.

It also appears that regulation similar to the previous Danish regulation can offer advantages for small companies. Small company regulation is a highly topical issue in view of the Commission proposal for the SPE. The SPE proposal is similar to the previous Danish private company law, as it focuses on small companies and aspires to create light and effective regulation, but is still different on some crucial points. It is of interest to see how the previous Danish regulation was abandoned and how difficult it has been to develop regulations for small companies in the Nordic countries. Therefore, knowledge of Nordic company law regulation is of importance in the development of small company regulation in Europe.

[171] Outsourcing the development of company law to private, non-profit organisations might be a way of reducing the cost associated with updating the legislation (cf. the work carried out by the American Bar Association (ABA) on the MBCA, and possibly the forthcoming European Model Company Act initiated by Paul Krüger Andersen and Theodor Baums).

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