Walter van Gerven Lecture

COMPANY LAW AS IUS COMMUNE?

Leuven Centre for a Common Law of Europe

First Walter van Gerven Lecture

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CHRISTIAAN W.A. TIMMERMANS
Judge at the Court of Justice of the E.C.

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Editors

Wouter Devroe
Dimitri Droshout

Leuven Centre for a Common Law of Europe

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Christiaan W.A. Timmermans

Collegium Falconis, Tiensestraat 41, 3000 Leuven, Belgium
Phone: + 32 16 325 543 Fax: + 32 16 325 314
ccle@law.kuleuven.ac.be
http://www.law.kuleuven.ac.be/ccle

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Introductory remark

To be invited to give the first annual Walter van Gerven lecture is a great honour. You will already have understood that the title of my lecture is a tribute to the man to whom this lecture is dedicated.

At the same time, this title leaves me ample freedom to broach a number of topics as to the future of European company law. [1]

First of all, however, I owe you an explanation for using (or misusing) the reference to Ius Commune in the title of my speech.

In the Foreword to their impressive and most valuable casebook on Tort Law, the first book in the series of Ius Commune casebooks for the Common Law of Europe, Walter van Gerven and his co-authors Jeremy Lever and Pierre Larouche describe the objective of the book, and indeed of the whole series, as *"to help uncover common roots, notwithstanding differences in approach of the European legal systems with a view to strengthening the common legal heritage of Europe, not to strangling its diversity (…).*
It is not the intention of this book, or of the series as a whole, to unify the existing laws (…). That would not be possible, nor would it be desirable."[2]

It is in this sense that I understand their reference to a Ius Commune: to uncover, patiently and prudently, as legal archaeologists, what is common. At the same time, divergencies and varieties will be established that might enrich and possibly inspire future evolution, also on the level of national case law and rule making. However, whether in the absence of a common approach, an existing ius commune, a unification or harmonisation is desirable or even necessary, as a matter of policy, either at the European level or wider international level, is, of course, a completely different matter.

The comparative analysis in order to establish what is common and what is not, is in itself indispensable to the question whether and to what extent an initiative to unify or to harmonise is required at all. Once such an initiative has been taken and successfully completed, it results in a ius commune, but one of a less noble nature. This is not a ius commune which has grown historically and, so to speak, organically, but one which is artificially created, superimposed by the force of law.

When we apply the notion of ius commune to company law, there is another noble element missing from the outset. The specific historic

connotation of that expression relates, of course, to the applicability of Roman law as the law in force, at least as a subsidiary source of law, for many countries throughout Europe (and some other parts of the world), before the emergence of the modern state in the nineteenth century and the codification movements linked thereto.

Using the notion of ius commune in relation to company law harmonisation or unification might therefore sound prima facie ambiguous, even presumptuous. It might well be that Walter van Gerven himself will regard the use of that notion in this context as somewhat distortive. To anticipate that reaction, I added a question mark to the title of this lecture. At any rate, it is with this meaning that I shall speak about company law as ius commune, in other words not in the sense of what existing company laws in Europe already have in common, but rather in the sense of whether and how company laws of the Member States of the European Union might be brought into the mould of a ius commune, where they are still divergent. And so, if you will permit the expression, I shall not speak about a ius commune from below, but about one imposed from above by legal instruments enacted on a supranational, European or other international level.

The EU/EC as Source of Ius Commune for Company Law

The most important source for a ius commune in the field of company law is, of course, the European Union, more particularly the European Community. Therefore, I shall first discuss the present and future policy of the European Community with regard to company law and consider subsequently whether other relevant international sources might be detected.

Fifteen years ago, I wrote in a paper for an international conference that EC company law harmonisation lacked clear objectives and a clear programme, and was therefore mainly a matter of "muddling through".[3] Now, fifteen years later, the situation has not changed very much; however, with the adoption of the European company statute and the establishment of the Winter committee, which is also expressly mandated to give its views on the future of company law harmonisation, it seems justified to reconsider these issues.[4]

As to the present results of company law harmonisation, I can be brief. The originally highly ambitious programme of the European Commission aiming at a full scale harmonisation with regard to both public and

private limited liability companies got bogged down after the adoption of the First Directive in 1968 (with the exception of the financial accounting Directives).[5] Subsequent efforts to harmonise the rules for public companies first on a step by step basis, which started with the Second Directive on capital protection, were only moderately successful.[6] A few more Directives were enacted on more exotic issues of company law, like internal mergers, divisions of companies, one man companies[7], but attempts to harmonise classic issues of company law such as the institutional structure of the public company, minority protection, and directors' liability, failed.[8] Over the last fifteen years, no major new initiative has been taken by the European Commission. Efforts have been concentrated on getting the Statute for the European Company adopted. As far as harmonisation is concerned, the accounting directives have been amended on points of minor importance, apart from the more important recent amendment regarding fair value accounting.[9] A general debate with Member States experts was organised by the Commission in 1998 on future harmonisation but apparently this has not led to any specific new initiatives.[10] A pre-draft for a Directive on transfer of a company's seat was made public some years ago, but in a recent hearing in a case before the European Court, the agent for the European Commission said that that draft had been drawn up by a national expert temporarily attached to the Commission's services, and that the Commission itself did not want to take any responsibility for it. Apart from a pending, and quite interesting proposal for a regulation to incorporate International Accounting Standards into Community Law[11], to which I shall return, the only new initiatives which have been announced, some time ago now, are in essence operations of deregulation: an operation of trimming and slimming the First Company Law Directive, other existing Directives, particularly the Directive on Capital maintenance being a further candidate for deregulation.[12]

The reasons for this failure of the original, ambitious harmonisation programme are not difficult to explain. But it might be useful to analyse them briefly, once again, in view of ongoing work on a possible new harmonisation program. Two reasons in particular should be mentioned:

(i) The intrinsic difficulties of a harmonisation process of this scope. Difficulties of substance (how to agree on workers' participation, for instance) and difficulties of decision making. The First Directive was decided by six Member States, the Second by nine, and the Eleventh by twelve. At present, fifteen Member States

participate in the decision making in the Council, although a qualified majority is sufficient. Two years from now, the number of Member States may increase from fifteen to twenty-five. However, the decision-making process in itself is not a sufficient explanation. There are other sectors, where the objective difficulties for harmonisation are no less considerable, and where the decision-making procedure is sometimes even more cumbersome (unanimity required for a Council decision). Nevertheless progress appears to have been possible (VAT harmonisation, harmonisation regarding intellectual property rights: we have a European Trade Mark, which was adopted much more rapidly than the Statute for the European Company).

(ii) The second and, in my view, main reason for this lack of progress is that there has never been a clear view shared by Member States and EC institutions, let alone a consensus between them as to the need for company law harmonisation and the objectives to be attained by such harmonisation. A discussion on the need for this harmonisation seems even more necessary now, after completion of the internal market. Indeed, the internal market has been completed without the completion of the harmonisation of company law. That could give the impression that the one does not need the other. The various merger booms of the end of the eighties, and again during the last years of the nineties with a massive increase in intra-community cross-border direct investment, would seem to confirm this. There have been no clear signals to the contrary from European industry or business lawyers, apart from fairly moderate demands regarding the European Company Statute and a few specific issues like international mergers and cross-border transfer of a company's seat.

Napoleon once said: *"Cela resserre les liens des nations d'avoir les mêmes lois civiles."* The methods Napoleon himself used to achieve that goal are, fortunately, not available to the European Union. Apart from that, such a goal would in itself not be sufficient to justify a harmonisation of company law on the basis of the EC-Treaty. In past debates on how to justify this harmonisation and what objectives are being pursued by the Treaty provision requiring this harmonisation, faithful lip-service has been paid to the principle of no harmonisation for harmonisation's sake. And, indeed, the relevant Treaty Article, the legal base for company law harmonisation, requires and at the same time allows such harmonisation only "to the necessary extent." This is, in a way, a reference to the subsidiarity principle avant la lettre, that is before the

principle was explicitly introduced in the EC Treaty by the Treaty of Maastricht.

In the past, the possible aims of company law harmonisation have been, sometimes vehemently, discussed, but mainly amongst academics.[13] Strangely enough, it might be said in retrospect that the EC institutions themselves, European Parliament, Council and Commission, started and sustained the harmonisation process, the one more enthusiastically than the other, but they did not set out clearly the goals to be achieved and did not agree on the rationale of this harmonisation. For any future harmonisation, it seems to me of primordial interest to reconsider which objectives one wants to achieve. That is not only a legal necessity in terms of the available legal base under the Treaty, but, at the same time, a precondition for achieving any results. For that reason, I would like to go back, briefly, to the old debate on these objectives.

The original explanation why a provision on harmonisation of company law was included in the EEC Treaty during the negotiations on that Treaty seems to have been the fear, expressed by France in particular, that opening up the borders for trade and investment from other Member States would entail unacceptable risks because of the fairly low standards of protection granted to shareholders and creditors by the company law system of some of those States. France feared in particular that the (in its eyes) very lax Dutch company law of those days would attract massive incorporation by foreign business in the Netherlands as a home base from which to penetrate the common market. Were one to interpret the need for harmonisation in the light of these arguments, harmonisation would be required to bring standards of protection granted by the national company law systems to equivalent levels as a precondition, or at least an accompanying measure, to counterbalance the liberal granting of the right of establishment by the EC Treaty. Closely linked to this objective, derived from the history of Treaty negotiations, is the justification for harmonisation as necessary to prevent a "Delawarisation" of company law in the EC, that is a race to the bottom, with investors choosing the Member State of incorporation for a company according to the least demanding company law system.

What should one think about the relevance of these objectives nowadays? Looking back on the past thirty years of market integration, including the past nine years of a completed internal market, it is obvious that these fears have not materialised despite a far from

completed company law harmonisation. The reasons for that are fairly clear. The Netherlands (or any other Member State for that matter) never stood a chance at becoming the Delaware of Europe. Indeed, the majority of the Member States, including France, do not allow the free movement of a company's charter because they follow the real seat approach with regard to the recognition of, and the law applicable to, foreign companies.[14] Moreover, I should add, the Netherlands, fairly soon after the end of the transitional period which the EEC Treaty provided for the entering into force of the common market, undertook a major reform of their company law, introducing stricter and more detailed requirements. That is perhaps best demonstrated by the fact that the Netherlands itself adopted (effective as from 1 January 1998) fairly severe defensive legislation against quasi-foreign companies in order to prevent Dutch business from escaping Dutch company law too easily by incorporating under more lax foreign laws.[15]

However, even if fears of a Delawarisation did not materialise, it would be too soon to consign this possible objective of company law harmonisation definitively to the attics of community law. Indeed, the evolution of the Court's case-law, particularly forthcoming post-*Centros* case-law, might give a new impetus to company law harmonisation for that purpose. I shall discuss this in a moment.

Let me mention, finally, another objective of company law harmonisation, which, in my view, is still fully relevant nowadays. This is harmonisation as an instrument of European industrial policy to remove obstacles to the free movement of companies within the internal market, and to facilitate operations of structuring and restructuring international groups of companies (international mergers, transfer of seats). What is at stake here is not so much a harmonisation of substantive company law of the Member States as a very topical harmonisation limited to specifically cross-border situations, an approach which has been successfully followed in other, even more nationally sensitive sectors of law, such as direct taxation[16] and social security legislation.[17] With the adoption of the European Company Statute[18], the time has arrived for the Commission to reconsider the existing proposal for a Directive on international mergers[19] and to consider taking an initiative with regard to the cross-border transfer of a company's seat.

Possible Consequences for Further Harmonisation because of the SE

Indeed, the question arises what consequences the adoption of the European Company Statute could have for the harmonisation process. Addressing this issue, allow me to say, first of all, how privileged I feel to do this in the presence of Professor Pieter Sanders. More than thirty years ago, I participated as a young civil servant of the European Commission in the team of lawyers set up by the European Commission to draft a formal Commission proposal, with the aid of Professor Sanders and on the basis of his draft-statute of 1966. It is only fair to say that, if now, so much later, this Statute has finally been adopted, that is in itself a tribute to the quality of the Sanders' proposal from 1967. If Professor Sanders himself were not to be entirely happy with the fate of his offspring, he would at any rate be fully entitled to invoke the *exceptio plurium concubentium*.

It has been said, and rightly so, that the project for a European Company Statute includes all the substantive, nationally sensitive issues of company law, which at the same time are the stumbling blocks to possible harmonisation (the board system, workers' participation, directors' liability, minority protection including with regard to group relationships, to mention a few). Now that the Statute has been adopted, have these obstacles to harmonisation been removed? I fear that can be said only of a fairly limited number of issues. Indeed, the Statute, as adopted, contains uniform rules only on very few issues of company law.

Firstly, with regard to the structure of the board, an option is allowed between the one-tier and two-tier structure, with very few substantive provisions as to the organisation and functioning of the board.[20] The requirement figuring prominently in earlier drafts that a clear distinction be drawn in a one-tier board between executive and non-executive directors has been dropped. Ample possibility is left to apply specific mechanisms as to the board's structure and functioning, applying under the national company law of the Member State of incorporation of the SE. The most far reaching harmonising effect of the Statute on this issue seems to be that the founders of an SE *must* be given the choice between a single board or a two-tier board structure.[21] So, apparently, in the eyes of the Community legislator the two systems are basically equivalent. If that were true, there would be no need for harmonisation of this issue.

Secondly, the complex regime with regard to workers' participation does not really amount to a substantive uniformity.[22] On the contrary, it allows for a tailor-made solution based on, and accommodating to, the extent to which it is possible for the regimes of workers' participation applying to the national companies involved in the formation of a SE; an approach somewhat prudishly referred to as the "avant-après", or before-after principle. The absence of any real harmonisation between the existing models is most strikingly illustrated by the possibility granted to Member States to refuse any form of workers' participation for a SE in the case of a European Company founded by way of a merger. The best one can say is that this approach will not facilitate a harmonisation of these regimes. First of all, if it is permissible to create a European Company potentially subject to a regime for workers' participation ranging from the elaborate German or Dutch model to none at all, one wonders why a more ambitious harmonisation should be required for national companies. Moreover, the chances of success for such a harmonisation would seem to be very minimal indeed after the experiences with the decision-making on this subject for the SE.

Thirdly, the Statute, for various important issues of company law (minority protection, liability of directors, for instance), simply refers to the national company law of the Member State of incorporation of the SE. This could be interpreted as establishing at least a presumption of equivalence between the national regimes on those issues. At any rate, existing differences have apparently not been considered so serious as to necessitate more harmonised results. If that is so, the need for harmonisation of national legislation on these issues for national companies would not seem to be obvious.

My provisional conclusion after a first, rather quick, glance at the provisions of the Statute is therefore that, particularly for issues of substantive company law, the Statute could not be said to prefigure solutions for the harmonisation process nor to come up with solutions facilitating that process. One might even say that the acceptance to such a large extent of existing divergences between national company laws pleads against the need for any further harmonisation on these issues. Indeed, the Statute, for that matter, appears to apply, implicitly, the principle of mutual recognition (together with conflict rules), an approach well-known from other sectors of Community law (financial services, e-commerce). If one were to accept this analysis, the proposal for a Fifth Company Law Directive would be an obvious candidate for withdrawal by the Commission.[23]

There are two obvious exceptions to be made to this conclusion. These concern the regime enacted by the Statute for international mergers and the cross-border transfer of a company's seat with the retention of its legal personality. Both regimes could be used as a basis for new harmonisation proposals of the Commission on these two subjects. To oppose the need for such harmonisation by arguing that the SE is designed for just such operations would not really be convincing. Indeed, it would be too cumbersome to oblige companies wishing to carry out such cross-border operations to do so by using a European Company.

Finally, I would think that my provisional conclusion as to the possible impact of the SE Statute on the harmonisation process should still remain provisional for yet another reason. As we have already discussed, the main reason why the EC-Treaty provides for the harmonisation of company law, apart from considerations of industrial policy, is very much linked to a fear of Delawarisation (not a nice expression, but a useful shorthand) of company law in the EC. The authors of the Statute for the European Company have chosen a more radical solution to eliminate that risk rather than drawing up uniform rules for the European Company. As to applicable national law, they have simply opted for the real seat approach (siège réel) in its strictest form. The founders of a European Company might be free to choose the Member State of incorporation but they are obliged to establish and maintain the real seat of the SE, that is its head office, in that same Member State.[24] An SE can move its real seat to another Member State only if it moves its registered seat as well. That entails a change of the applicable national law. In other words, incorporating the SE in a Member State whose law is deemed to be more attractive, and subsequently move its main establishment freely wherever that appears to be economically indicated, is not possible. That being so, there was no need to develop more uniform or harmonised rules for the SE in order to prevent a Delawarisation. That was excluded from the outset.

For national companies the situation might be different, depending on the outcome of the post-*Centros* case law. Before discussing that subject, let me just say in passing that some of the rules of the European Company Statute deserve at least a discussion of their compatibility with the provisions of the EC-Treaty on the right of establishment. Let me mention two examples. Firstly, under the EC Treaty Community companies with their registered office in a Member State but their central administration or principal place of business outside the

Community can nevertheless invoke the right of secondary establishment provided that they have a real and continuous link with the economy of a Member State.[25] One would expect such a company being a beneficiary of the right of establishment to be entitled to participate in the formation of a European company. And indeed, that is explicitly stated in recital n° 23 in the preamble to the Regulation. However, and strangely enough, Article 2, paragraph 5, provides this only as an option for the Member States. Secondly, the possible transfer of the seat of a SE, which is to be regarded as an exercise of the right of establishment, can be vetoed by the Member State where the SE is registered on grounds of public interest without any indication of what such public interest may imply.[26] In the past the European Commission has launched infringement procedures against Member States attacking similar clauses under national law, for instance, in national merger regulations, as contrary to the Treaty (Crédit Lyonnais case).[27]

Case Law of the Court

When considering possible sources which might foster the development of a ius commune in the field of company law, the case-law of the Court of Justice of the European Communities should also be taken into consideration; in this context, more particularly the case-law of that Court with regard to the relationship between the right of establishment as granted by the EC Treaty to companies, and rules of Member States on international company law (conflict rules, rules regarding the recognition of foreign companies, and special rules applicable to foreign companies). The consequences of the right of establishment for questions of international company law have been debated in academic writing, from quite early after the entry into force of the EEC-Treaty.[28] However, it took almost thirty years before the Court was confronted with these issues. The two important judgments in this respect have been *Daily Mail* of 27 September 1988[29] and *Centros* of 9 March 1999.[30] I see no need to discuss both cases in detail in view of the abundant literature, particularly on the *Centros* judgment.[31] Let me simply recall that according to the *Daily Mail* judgement a company which benefits from the right of establishment under the Treaty cannot invoke that right to claim the freedom to transfer its seat to another Member State if the national law by which it is governed does not allow such a transfer. Since the Court based its conclusion on the variety of connecting factors referred to by the former Article 58 (now 48) of the Treaty, this judgment has largely been interpreted, in my view wrongly[32], as making the two basic approaches with regard to the

recognition of foreign companies, that is the incorporation and the "siège réel", or real seat approach, immune from any interference by the EC right of establishment.

However, this discussion has been reopened by the *Centros* judgment. *Centros* concerned the case of a pseudo foreign company, a Danish business organised in the form of a UK private company not economically active in the UK. Its request to register as a branch of the private company with the Danish registrar of companies was refused on the grounds that it was not a branch but the main and only establishment of the private company, and that moreover the whole operation had been mounted to circumvent Danish rules on capital protection, especially the minimum capital requirement. The importance of the *Centros* judgment for the debate on the possible consequences of the EC right of establishment of companies for questions of international company law is twofold. First of all, the Court clearly confirms that the right of establishment allows investors to incorporate a business under a more attractive foreign company statute and operate that business in another Member State in the form of a branch. In other words, the phenomenon of a pseudo foreign company appears in itself to be a fully legitimate exercise of the right of establishment. Secondly, *Centros* demonstrates that the extent to which Member States may enact specific rules to regulate pseudo-foreign companies is severely limited. Such rules must be not only non-discriminatory, but also necessary and proportionate, whenever their application entails a restriction on the establishment of the foreign company.

However, the *Centros* judgment has not given a direct answer to the question whether in a similar case the EC Treaty would have allowed a Member State to refuse registration of a branch of the pseudo-foreign company by invoking the real seat doctrine as a conflict rule. But that question was bound to come before the Court. It has indeed been submitted, in parallel with other cases, by the "Bundesgerichtshof" on 25 May of last year.[33] The case presents a frontal clash between the right of establishment and the real seat doctrine. "Überseering", a Dutch "besloten vennootschap" with its entire business activity transferred to Germany, is suing a German debtor in a German court but would see its legal personality and consequently its capacity to sue denied under the real seat doctrine if the consequences normally flowing under German law from that doctrine were to be applied by the German courts. The question raised by the "Bundesgerichtshof" is whether the EC right of establishment precludes such a result. Advocate-general

Ruiz Jarabo Colomer delivered his opinion in this case on 4 December 2001. In his view, denying the capacity to sue would indeed be incompatible with the right of establishment. You will understand that I am not going to discuss this case any further.

Instead, let me invite you to join me on a short trip back into history. On 8 February 1849 the Belgian *Cour de Cassation* delivered judgment in the famous case of *La Compagnie d'Assurances générales de Paris contre Ruelens*. It confirmed the judgment given by the *Tribunal de première instance de Bruxelles* declaring the action introduced by a French insurance company against its failing debtor in Belgium inadmissible, the French company having no legal existence in Belgium. The Cour de Cassation considers that *"la société anonyme, telle qu'elle existe en France (…) est une érection de pur droit civil, un être fictif inconnu dans le droit des gens (…); qu'un tel être créé exclusivement par une loi étrangère, et n'existant que par elle, expire nécessairement là où finit l'empire de cette loi"*.[34] It is a coincidence that the American Supreme Court had expressed the same idea ten years earlier in almost identical wording. In the case *Bank of Augusta vs. Earle* of 1839, Chief Justice Taney held: *"a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence."*[35]

I admit immediately that the reasoning underlying both the Belgian and the US judgments is not based on the real seat doctrine. Nevertheless, I could not refrain from quoting these two historical cases in the context I was discussing. It is perhaps interesting to add that the United States Constitution, unlike the EC Treaty, does not grant a right of inter-state establishment to companies. However, full recognition of companies, irrespective of the state law under which they are incorporated, has been achieved in the United States through the Fourteenth Amendment, that is the application of the principle of equality, and the inter-state commerce clause.[36]

Now let us turn back to the present. It is to be expected that after *Centros* and the forthcoming judgment in *Überseering* more cases will be brought before the Court regarding the possible consequences of the right of establishment of companies for international company law. Apart from the question of recognition, we may expect two sorts of questions to be raised:

(i) To what extent is the host Member State of an establishment of a company from another Member State still allowed to apply its own company law rules or part of those rules to the foreign

company setting up this establishment? Indeed, new preliminary questions have been submitted to the Court with regard to the Dutch Act on pseudo-foreign Companies (C-167/01). We already know from *Centros* that this possibility, albeit not excluded, is subject to strict conditions.

(ii) To what extent is a Member State applying the real seat doctrine allowed to impede a company incorporated in its jurisdiction from transferring its real seat to another Member State? The *Daily Mail* judgment is, perhaps, not entirely conclusive on this question because it concerned a matter of taxation.

Depending on the evolution of the case law, the need for harmonisation may have to be reconsidered. Indeed, were the Court to pursue the line of thinking of *Centros* further, it is not impossible that for the first time the risk of some Delawarisation in Europe could become real. Whether that would in itself be sufficient to trigger a further harmonisation of substantive company law rules, for instance with regard to the private company, remains to be seen. Those Member States seeing their possibilities of intervening against the pseudo-foreign company severely restricted might become more interested in harmonisation. On the other hand, it is by no means certain that Member States which apply the incorporation approach would share that interest. What seems altogether unlikely is that Member States would be able to agree on a full scale harmonisation of rules of conflict. The fate of the 1968 Convention on the mutual recognition of companies (negotiated by only six Member States but not ratified by the Netherlands) is a far from encouraging precedent.

What conclusion is to be drawn from all this as to the need for further harmonisation of company law?

(i) Even after the adoption of the European Company Statute, there are still good arguments for harmonisation to enable and facilitate cross-border mergers and the transfer of a company's seat with retention of its legal personality.

(ii) A further harmonisation of substantive company law does not seem necessary for the time being, pending the evolution of the post-*Centros* case law of the European Court.

(iii) Depending on that evolution, some harmonisation to delimit and clarify possibilities for Member States to enact special rules applying to foreign companies with an establishment on their territory might become necessary. Indeed, leaving that issue entirely to be decided by the European Court on a case by case basis might be undesirable.

We await, of course, with much interest the recommendations of the experts committee chaired by Prof. Winter.[37] In my view, however, prospects for a real Ius Commune for companies, imposed from above by EC harmonisation, are fairly remote.

What may be expected from international law sources other than the European Union for that purpose?

International Law as a Source of a Ius Commune

I can be brief on this. As far as I can see, international law does not yet play a part in fostering common company law in Europe. There are, of course, the soft law initiatives, the codes of conduct of the UN and the OECD, regarding multinational/transnational companies and on Corporate Governance, but these codes have, for the time being, no direct impact on company law.

There is one rather peculiar exception to this: International Accounting Standards (IAS) which the European Commission has proposed in a draft regulation of February this year to incorporate into European Community law through an endorsing mechanism.[38] These standards are elaborated by the International Accounting Standards Committee (IASC), which is a private international organisation set up by national organisations of the accountancy profession in 1973. The European Community only has observer status. The Commission proposes to oblige companies within the EC listed on a regulated market (and companies preparing admission to trading) to draw up their consolidated accounts in conformity with International Accounting Standards, to the extent that these have been endorsed by the EC, as from the financial year 2005. Member States would also be allowed to permit or to impose respect for these Standards, for individual accounts and consolidated accounts of unlisted companies. The aim is to enhance transparency and comparability of financial information in order to improve the functioning of the European capital market.

According to the endorsing mechanism as proposed by the Commission, the decision to endorse the standards would be delegated to the European Commission with a comitology procedure, which would allow Member States' representatives to intervene and even force the Commission to submit a proposal to the Council instead of deciding itself. The Commission will be advised by an accounting technical committee in preparing its proposals whether or not to endorse an existing IAS.

This proposal does not directly affect national company law. It is not, by the way, based on the Treaty article for company law harmonisation, but on the general legal basis for internal market harmonisation, the former Article 100A, now 95 EC. The proposed regulation, nevertheless, will have an important harmonising impact on at least content and presentation of consolidated accounts. The result would be two levels of comparability of financial information to be produced by companies within the EC: a first level of minimal comparability established by the existing 4th and 7th Directives, and a second level of enhanced comparability for financial statements of companies covered by the Regulation. In other words, this Regulation would, without amending the 4th and 7th Company law Directives, considerably strengthen and at the same time modernise the harmonisation achieved by these Directives.

This is not the right occasion to discuss this interesting proposal in detail. I limit myself to two short comments:

(i) The delegation to the European Commission of the power to endorse the IAS is rather open ended. The conditions for an IAS to be incorporated into Community law are, firstly, that the standard ensures a high degree of transparency and, secondly, that it ensures a high degree of comparability. I wonder whether at least a third condition should not be added: conformity with the provisions of the 4th and 7th Company law Directives.

(ii) Endorsing IAS for the EC would considerably reinforce the authority of the standards. They would become directly applicable European law in all the Member States. Endorsement should therefore not be a matter of rubber-stamping. On the one hand, the EC should try to use the introduction of this mechanism as leverage to organise in one way or another a co-ordinated input in the preparation of new standards or amendments to existing standards in the IASC. On the other hand, the Technical Committee advising the European Commission on these issues should be composed of experts who are independent of the national professional organisations participating in the elaboration of the standards within the IASC.

Ius Commune from below

It is time to conclude. Having considered the efforts to impose a ius commune from above, in the field of company law, either by EC harmonisation and legislation or by other international instruments,

we may conclude that the results achieved until now are fairly modest. This will probably not change in the foreseeable future.

In contrast it is amazing and stimulating at the same time to see how much the discussion on the development of company law in our Member States has opened up from a mostly inward looking exercise to ideas and solutions from other constituencies, has become more European and, on some topics like corporate governance, really international. That is, of course, largely due to the globalisation of the economy, more particularly the integration of the financial markets. A European debate between academics is also emerging. Similarly, as in the field of European Private Law but perhaps less intensively (why?), European networks have been established grouping specialists from various Member States. Interesting proposals have been submitted, for instance with regard to minority and creditors protection in groups of companies[39] and on a European private company.[40] Looking to my own country, the difference from a still recent past is striking. During the ten years when I was a member of the Dutch Company Law Commission (Advisory Commission to the Minister of Justice) I cannot remember that comparative law ever played a prominent role in the discussion. That seems to be different now with regard to the discussion on the reform of the Dutch board structure for the larger companies (at least that is the impression I have). At present, almost no doctoral thesis in the field of company law is published in the Netherlands without a comparative analysis. This internationalisation of the company law debate, also of academic research, might in the long run be more promising for developing a ius commune than a harmonisation from above. Most important for that purpose will be the fact that Law Faculties in Europe also change focus in teaching company law and become more outward looking. The publication of the Volume on Company Law in the Ius Commune series is therefore eagerly awaited.

Obviously, an evolution to a Ius Commune will be a lengthy process. Walter van Gerven, in a recent paper on codifying European Private Law, gave the advice, rather uncharacteristically for him, to approach this process with an attitude of *Festina Lente*. For company law, the advice need not necessarily be different.

Thank you for your attention.

Notes

1. Only minor editing amendments have been made to the original spoken text (Leuven, 14 December 2001). Subsequent developments have not been taken into account but are, where relevant, referred to in the footnotes.

2. Walter van Gerven, Jeremy Lever, Pierre Larouche, Cases, Materials and Text on National, Supranational and International Tort Law, Ius Commune Casebooks for the Common Law of Europe, Oxford 2000, p. V.

3. Christiaan Timmermans, Methods and Tools for Integration, in Buxbaum, Hertig, Hirsch, Hopt (Eds), European Business Law, Legal and Economic Analyses on Integration and Harmonization, Berlin 1991, p. 129.

4. The Winter Committee is the High Level Group of Company Law Experts, set up by the European Commission and chaired by the Dutch company law specialist Professor Jaap Winter. This group was mandated, first of all to submit suggestions for a new proposal for a Directive on take-over bids (13th Company Law Directive), but, secondly, also to provide the Commission with recommendations for a modern regulatory European company law framework.

5. First Council Directive (EEC) 68/15 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L 065/8.
Fourth Council Directive (EEC) 78/660 on the annual accounts of certain types of companies [1978] OJ L 222/11; Seventh Council Directive (EEC) 83/349 on consolidated accounts [1983] OJ L 193/1; see also the amending Directives: Council Directive 90/605/EEC [1990] OJ L 317; Council Directive 94/8/EC [1994] OJ L 82 and Council Directive 1999/60/EC [1999] OJ L 162; see finally Eleventh Council Directive (EEC) 89/666 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State [1989] OJ L 395/36.

6. Second Council Directive (EEC) 77/91 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and alteration of their capital, with a view to making such safeguards equivalent [1976] OJ L 026/1.

7. Third Council Directive (EEC) 78/855 concerning mergers of public limited liability companies [1978] OJ L 295/36; Sixth Council Directive (EEC) 82/891 concerning the division of public limited liability companies [1982], OJ L 378/47; Twelfth Council Directive (EEC) 89/667 on single-member private limited liability companies [1989] OJ L 395/40.

8. Proposal for a Fifth Directive (structure, powers and obligations of the organs of the public company) [1972] OJ C 131; amended proposal [1983] OJ C 240, further amended [1991] OJ C 7 and C 321.

9. Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001 amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions, [2001] OJ L 283.

10. See Acts of the Conference on Company Law and the Single Market, 15 and 16 December 1997, European Commission 1998.

11. Infra note 38.

12. See COM (99) 624 Final Communication from the Commission, The Strategy for Europe's Internal Market, 18.

13. See for further references: V. Edwards, EC Company Law (Oxford 1999); K.J. Hopt, Company Law in the European Union: Harmonization and/or Subsidiarity? [1999] International and Comparative Corporate Law Journal, 41; J. Wouters, European Company Law: Quo Vadis? [2000] Common Market Law Review 257.

14. See S. Rammeloo, Corporations in Private International Law, A European Perspective, Oxford 2001.

15. Wet Formeel Buitenlandse Vennootschappen, 1997, Staatsblad 1997, 697.

16. E.g. Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [1990] OJ L 225.

17. E.g. Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, [1971] OJ L 149.

18. Council regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] OJ L 294.

19. Proposal for a Tenth Directive of the Council based on Article 54 (3) (g) of the Treaty concerning Cross-Border Mergers of Public Limited Companies, [1985] OJ C 23/11.

20. Articles 38 to 50 of the Statute.

21. Article 38 of the Statute.

22. Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294/22.

23. The proposal has indeed been withdrawn.

24. Article 7 of the Statute.

25. Cp. the General Programme for the abolition of restrictions on freedom of establishment [1962] OJ 36/62.

26. Article 8, paragraph 14 of the Statute.

27. A take-over attempt in the UK by the French state owned bank Crédit Lyonnais was blocked by the Secretary of Trade, foreign state ownership being considered contrary to market principles (nationalisation by the back door) and therefore contrary to the public interest. Cp. also the judgments of the EC Court of Justice of 4 June 2002 in the "golden share" cases C-367/98, C-483/99 and C-503/99.

28. See for this discussion H. Halbhuber, National Doctrinal Structures and European Company Law, [2001] Common Market Law Review, 1385. For a more general, recent analysis see Rammeloo op.cit. fn. 13.

29. 81/87 [1988] ECR 5483.

30. C-212/97 [1999] ECRI-1459.

31. See Halbhuber op.cit. fn.27.

32. See my annotation of the Daily Mail judgment in [1991] SEW 72.

33. Case C-208/00.

34. Pasicrisie 1849.1.221.

35. 38 US (13 Pet.) 519, 588.

36. See Conard, Federal Protection of Free Movement of Corporations, in 2 Courts and Free Markets, Eds. Terrance, Sandalow, Stein, Oxford 1982, p. 365.

37. Supra note 3.

38. Proposal for a Regulation of the European Parliament and of the Council on the application of International Accounting Standards, [2001] OJ C 154E.

39. These proposals were prepared by a group of experts on the law of groups of companies ("Konzernrecht") assembled in the "Forum Europaeum Konzernrecht", see for the text of these proposals "Zeitschrift für Unternehmens- und Gesellschaftsrecht" [1998/4] (ZGR) 672.

40. See het Themanummer: De Europese BV, [2001] Ondernemingsrecht, 317.

LEUVEN CCLE

Katholieke Universiteit Leuven
Faculty of Law
Leuven Centre for a Common Law of Europe
Collegium Falconis
Tiensestraat 41, 3000 Leuven, Belgium
Phone: + 32 16 325 543
Fax: + 32 16 325 314
ccle@law.kuleuven.ac.be
http://www.law.kuleuven.ac.be/ccle

Management Committee

Prof. Dr. Wouter DEVROE (director), Dimitri DROSHOUT (deputy director), Mr. Hans GILLIAMS, Prof. Dr. Sophie STIJNS, Prof. Dr. Jules STUYCK (chair), and Prof. Dr. Jan WOUTERS

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Mission Statement

The objective of the Leuven Centre for a Common Law of Europe (Leuven CCLE) is to focus research efforts of the Faculty of Law of the Katholieke Universiteit Leuven (K.U.Leuven) on legal developments that are common to the whole of Europe. A tradition of forty years of research in the field of comparative and European Community law serves as an excellent starting point for the activities of Leuven CCLE.

The area's of interest are (i) the law of the European Union and developments in European human rights and humanitarian law (ECHR law), (ii) the national legal systems of the European countries in a comparative context and in their interaction with European Union law and (iii) the interplay of European (Union) law with international law.

The Leuven CCLE research method consists in bridging the classical dividing lines between legal disciplines and in engaging in comparative an cross-disciplinary legal research, while at the same time embedding legal scholarship in broader social, economic, cultural and political contexts. Studies will not only focus on private law, but also on public law and areas of the law situated at the boundaries of its classical branches.

The first and foremost goal of Leuven CCLE is to promote fundamental legal research on the interaction between the aforementioned different fields and methods, thereby thoroughly analysing bottom-up as well as top-down movements. This approach is necessary in order to determine to what extent the building bricks of national, European and international law can be used to promote a common legal construction for Europe.

Leuven CCLE approaches the law not as a rule set in stone, but as a living and dynamic process. The core of the process is the interaction between different legal orders in Europe: between Community and national law, between separate national legal systems and between European and international law. As the composite of legal rules grows ever more complex, the question of legitimacy of legal rules is perceived as a major subject of research.

The Leuven CCLE approach to scholarship and research is rooted in the firm conviction, indicated by forty years of comparative analysis, that it will become more and more apparent that legal systems which *prima facie* may look very different are built around common principles that in Europe constitute a *ius commune* or a common law of Europe.

Development

Leuven CCLE was founded in late 1999 by a number of individual Institutes within the Faculty of Law of the Katholieke Universiteit Leuven (K.U.Leuven). Initially, these were the institutes of the Economic Law Department (the Institute for European Economic Law, the Institute for Commercial Law and Insurance Law, the Institute for Tax Law and the European Tax College, the Jan Ronse Institute for Company Law) and the Institutes for European Law and for International Law. In the mean time, the Private Law Department as such and the Institute for the Study of the Foundations of the Law have joined Leuven CCLE.

Two considerations in particular warranted this foundation. The founding entities felt a need to co-ordinate and promote further their already well-established activities in the European and International field. The Faculty of Law of the K.U.Leuven has earned a reputation for promoting European Union and international law, counting among its faculty distinguished representatives of the European Court of Justice and other European institutions, welcoming over 300 foreign students each year, and contributing to internationally renowned publications in various fields. Many staff members also participate in one or several of the research projects flourishing throughout Europe, which are devoted to subjects largely going beyond EU competencies. The time had come to streamline further the efforts made by individual researchers or individual research institutes, thereby involving alumni that left the university to become practitioners in European law. Furthermore, and perhaps more importantly, it was felt that the study of European, comparative and international law is rapidly outgrowing traditional concepts and methods. The creation of a research centre where the faculty pools its knowledge was considered an appropriate measure to develop an advanced and interdisciplinary research method, meeting the requirements of today's progressive legal research.

Leuven CCLE has started out by concentrating upon areas of comparative law, European and international economic law, contract and tort law. The need for common legal concepts is very real indeed in these fields, and may generate sufficient force to guarantee that research results find their way to legal practice, thus maximising research value.

Leuven CCLE also accommodates the research efforts made by the faculty members for the Ius Commune Casebook Project, which, from its beginning in 1994, reflects the working methods now applied by Leuven CCLE. The concept of these casebooks, edited by Professor Walter van Gerven is still quite unique in Europe. It consists in starting out from common situations which have led to court cases under different legal orders and compares the reasoning and the outcome of those cases. The project focuses mainly, yet not exclusively, on the three major European legal systems (French, German and English law) and their interaction with EU and ECHR law. Casebooks on tort law and contract law have already been published. A number of new casebooks are currently under preparation. Additional information is available at www.law.kuleuven.ac.be/casebook.

Furthermore, Leuven CCLE has already developed a whole range of activities to promote the thinking about what a common law for Europe could look like and how it could be achieved. During the first period of operations, Leuven CCLE *inter alia* organised:

- a series of lunch seminars on recent developments in European economic law (the thirteenth Directive: a European level playing field for take-over bids; the Directive on the reorganisation and winding-up of credit institutions; harmful tax competition; highlights in European insurance law);
- the "Leuven CCLE 2001 Competition Law Conference" on the modernisation of the application and enforcement of European competition law;
- a two day conference on "the Communication from the Commission on European contract law (Harmonisation, Code, Optional Code)" in co-operation with the European Society on Contract Law (Secola);
- a one day conference on "the Regulation and the Directive of October 8, 2001 on the Statute for a European Company (SE)";
- the first "Walter van Gerven Lecture" to be held annually by a prominent European or international scholar, and delivered in 2001 by Judge Timmermans of the European Court of Justice;
- a week long "Advanced training course on EU banking and financial law of the European Union" in Luxembourg;
- a seminar on the "Implementation of the EC Directive on consumer sales in national law";
- the "Leuven CCLE 2002 Competition Law Conference" on the modernisation of enforcement and of merger control in European competition law.