Concluding Remarks

by

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We are at the end of a premiere, and I daresay we should be proud. There are several reasons for this. First, of course, this is the first time that our new law review has gone public, apart from publication. It has done so in a fully international way. Our ECFR European Company and Financial Law Review is the first and only joint venture of the leading company law reviews in Europe, and I am not aware of a similar European enterprise in the whole area of private law. Of course, there are many European law journals that deal with European law or, more specifically, with European company or financial law and have foreign co-editors and contributors. But what the Revue des Sociétés, the Rivista delle Società, and the ZGR have done is different and combines two assets. Each of our company law reviews has a very strong home base, not to mention the premier academic position in the field in our respective countries, and we have joined forces to be truly European. We have done so by way of a joint law review in English, and we are in promising negotiations with Belgium and Spain. The first two annual volumes of the ECFR have been well received by the European public, and the first edition of volume three appeared in March 2006. The review presents a platform for all those who deal with European company and financial law, academics as well as practitioners. In my view, this dialogue between practice and academia is very important; we have more of this in Europe than our American friends, and we should maintain this asset. We consider the ECFR as a means also of influencing the discussion, court practice, and legislation both at the level of the EU member states and at the European level. Joining forces in this endeavor is the only way in which, after some time, we in Europe can meet the Americans at eye level, i.e., presenting a European forum that the Americans simply cannot overlook if they are dealing with European company and financial law.

Today was our first public appearance at the first of our annual conferences which we intend to hold each year in a different member state. It was a very fruitful day with stimulating presentations and interesting Q & A sessions.

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We are grateful to our Italian friends at the Università Bocconi for their hospitalityand to the organization committee. We extend our thanks to the speakers who kindly accepted this task on short notice and despite many other commitments. While their contributions will be printed in our review and thus be available for reading and rereading, the best way to thank them is to make some remarks on our general topic which they examined from four different viewpoints, all of them cross-border, namely mergers, takeovers, seat transfer, and negotiated deals.

First *cross-border mergers:* we need more of them, or at least the freedom for European enterprises to engage in them if they think it is beneficial for them. Both the European Court of Justice in the *Sevic* decision and the European legislators in the cross-border merger directive made this point. It is astonishing that they made it at nearly the same time (13.12.2005/26.10.2005). This underlines the well-known argument of the court that the treaty freedoms and harmonization complement but do not replace each other. This is a very important message to be kept in mind for the European future as well. Impediments to cross-border activity of enterprises, mostly indirect ones, have not disappeared. When one of the two actors is slow in taking action, the other may jump in as far as his role allows. At this stage, European company law seems to be stuck under the office of the procrastinator Commissioner McCreevy – apart from the strict one share – one vote principle which he pushes ahead against the advice of economists and lawyers alike. But the latter initiative amounts at best to putting the cart before the horse. To be sure to avoid frequent misunderstandings, the High Level Group refrained from postulating such a principle and concentrated rather on cross-border takeovers. At the Finnish EU presidency's conference in Helsinki, most of us on the podium pleaded for freedom for enterprises to choose their own way of financing and for other means of shareholder and creditor protection. There might be a good chance that the court will help, perhaps at its next opportunity when it decides on the *Volkswagen* case. The *KPN/TPG* decision of 28 September 2006 seems to justify this hope. But the Commission's reaction to the new French law on the privatization of energy in connection with Gaz der France dampened this hope again.

This brings us to *cross-border takeovers*. What a shame! Wherever we look in Europe, we see growing protectionism – euphemistically called patriotism, as Guido Ferrarini said – and this not only in the old member states, but even more so in the new ones. Sometimes one fears that the true European spirit that made Europe great again after World War II has faded away. We know and have heard again today that the 13th directive does not help very much in this respect. As Ron Gilson from Columbia University said at the Helsinki conference, the breakthrough mechanism of Article 11 of the directive would

be a better-targeted alternative to McCreevy's too general one share – one vote principle. Yet only three of the 25 member states have chosen to stick to both Articles 9 and 11 – i.e., the antifrustration and the breakthrough rules – namely Lithuania, Latvia, and Estonia. Germany opted out of both and France, Italy, and even the UK opted out of Article 12, though the latter for other reasons. As to Italy, we heard that a rule similar to Article 12 applies. Even in the Netherlands, the Parliament in the end thought that it should protect its domestic enterprises. In this way, we shall never have a real European market for corporate control. Guido Ferrarini's most interesting finding is that protectionism and takeover restraint legislation do not necessarily go together. I wonder what that means in practice, and I fear that protectionism will have its say in the end as far as takeovers are concerned as well.

To be precise, I am not talking about cross-Atlantic takeovers. As long as hostile takeovers of U.S. corporations may be defeated under the "just-say-no" rule, there are indeed arguments for adopting the reciprocity rule under Article 12(3) as the French did in their transformation act and the German legislators hinted at in the motives of the German act.

Seat transfer across the border: Again, we need it badly, but we heard from Marco Ventoruzzo that many constraints to free choice of law still exist. I am sad to say that my own country has done and continues to do everything to obstruct the freedom of companies to move out. As always, the obstacles are vested interests, in the German case the trade unions, and national egoism, in particular fiscal interests. Here again we would need both a clear European directive and a courageous decision by the European Court of Justice. It is hard to understand why the Commission is taking so long to finalize its draft 14th directive since the compromise formula found in the European company participation of workers directive might serve as a model for similar deadlocks. This formula – which the German government insisted on though it is clearly detrimental to German interests – has been used again in a slightly more liberal way in the cross-border merger directive. It could be used – at least in its spirit – here as well. Mr. Neye, the person in charge in the German Ministry of Justice, told me in Helsinki that he is ready and waiting to negotiate the draft 14th directive. Germany's EU presidency would be a good occasion for this, but up to now Brussels has hesitated. So it would be up to the European Court of Justice to move. It should have the courage to open cross-border movement in two respects. First, it should issue a clear statement that it is doing away with the specter of *Daily Mail*, maybe when it decides the recent Hungarian referral case. After all, moving in and moving out are both part of the free movement of enterprise, not only as mergers are concerned but also concerning seat transfers. This is the underlying logic of the *Sevic* decision. Second, the court should jump at the first chance of stating that

German labor codetermination does not justify barring the exit to German companies and possibly the entry of foreign ones to Germany unless they are ready to accept German codetermination, as the trade unions and some politicians demand. While labor codetermination in the boardroom may be a public good to be protected by the member state, labor codetermination at parity or near to parity it is not necessary in the sense of *Centros*, *Inspire Art*, and *Überseering*. There are other less restrictive means of promoting labor interest, for example also an information model or a deputization of two labor members into the board or a so-called one third party. Yet the predictions as to what the court would do if it had the chance are diametrically split in Germany.

If, apart from cross-border mergers, the train toward Europe still moves slowly, too slowly, *cross-border negotiated deals* may help, at least to a certain degree. As we know and have been aptly shown again this afternoon, there are many ways toward Europe, if only the entrepreneurs and lawyers would join their determination and legal creativity. After all, cross-border M & A is the high school of contract drafting and contract negotiation. There are even ways around German labor codetermination, be it by foundations as in the case of Bosch and Bertelsmann, by foreign companies such as Air Berlin chose, or by partnership forms such as Aldi GmbH & Co OHG or Lidl Stiftung & Co KG. But, of course, these are detours that may be second best and come at a cost, and this is exactly what we Europeans cannot afford in a world of globalized competition, not only with the United States, but soon with the BRIC countries (Brazil, Russia, India, and China). But this is another more fundamental and somewhat frightening topic, and not one for concluding such a wonderful conference.

Let me instead conclude with the hope that the pro-European forces will prevail in our area of cross-border movement of companies as well. As the European Court of Justice reiterated in the *Sevic* decision, free movement need not come at the detriment of the public interest. Protection of minority shareholders, creditors, and labor as well as legitimate fiscal interests and the fairness of competition must not fall by the wayside. But free movement must not be restricted beyond what is necessary.

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