

# **The Multinational Legal Environment: A (mostly) EU perspective on an emerging global legal system**

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## **1. THE RULE OF LAW AND DEMOCRACY**

### **1.1 The western world and “universal values”**

With the Western world’s history of “inventing” colonisation, fascism and Marxism, the non-Western world can be forgiven for distrusting the generous motives behind western insistence that the rest of the world adopt democracy, the rule of law, human rights and capitalism, preferably all in one go. Westerners insist that this combination of values is the real basis on which Western domination was built.

Others may point to technology and its optimal use as the real reason for the adoption in large parts of the world of Western (and capitalist) systems. Some Asian countries are quite willing to adopt capitalist approaches but without the democratic paraphernalia.

Only the future will tell whether a “third way” (neither Marxism nor Western democracy) is sustainable in Asia or elsewhere. Europeans should understand that “obvious” rights, like gender equality, separation of church and state and the rule of law, are not obvious at all in other societies. In particular, individualism is at odds with more group-oriented cultures. Non-Westerners should understand that the rule of law, parliamentary democracy and individual rights are seen in the West as essential to economic performance.

Capitalism and democracy come in many shapes and forms. European (and especially continental) capitalism has evolved since the middle of the 19<sup>th</sup> century to a “welfare state”, i.e. a system where a balance is consciously sought between meritocracy and solidarity. It is a core belief in Europe that solidarity, if well organised, contributes to, rather than reduces, economic success. This does not mean that, given globalisation and free trade, the balance must not be re-established from time to time.

If the Human Development Index is taken as a guide, the 15 member states-ranking shows an EU that does extraordinary well, even taking into account a lacklustre economic performance since, say 1992. This performance has improved substantially recently thanks to Central and Eastern Europe ...and Germany.

It is tempting therefore to “prescribe” Western and EU policies to the rest of the world, which was done at times with disastrous consequences. It is a temptation which I would urge Westerners to resist. Although, fairly I think, the EU can claim leadership in respect of human rights and solidarity, both internally and externally, acceptance was, and still is, a gradual process. It cannot be dictated by anyone to anyone.

### **1.2 EU unity**

#### *Basis of EU unity*

From the outside, the EU is a recent creation. However, the EU is based on collective memory and collective myths about European unity, as exemplified by the following quotes:

Europe is a republic divided into States with the same religious foundation and the same principles of public law and politics.

Voltaire (1761)

Europe is Greek in its thought and art, Roman in its laws and Judeo-Christian in its religion(s).

Renan

Other significant influences during Europe's formative years include the Persians, the Jews and the Arabs. (See *Europe, a History*, by Norman Davies.)

*Roman law: the historical example of European unity*

Roman law has a 2000-year history from A.U.C. until 1456. Rome gradually evolved from a city-state to an empire with multi-religious, multi-ethnic citizens, although it adopted Christianity as its state religion during the 4<sup>th</sup> century. It remained **the** historical example of European unity.

*Essentials of European civilisation*

(a) Context

There are many "fault lines" (see schedule), which gives rise to an enormous diversity and "structural" pluralism.

After two major "civil" wars (1914-18 and 1939-45), Europe has become the frontrunner in inter-State political democracy. This multilateralism involves nations' acceptance of limited sovereignty and human rights, and is vested in old traditions and value systems. The one unwritten principle is that never again should there be war in Europe.

Overall, it has been economically successful, very "welfare"-oriented and reasonably egalitarian.

(b) Separation of Church and State

The separation of Church and State is an idea at least as old as Europe's forgotten hero, Marsilio of Padua, the Italian rector of the University of Paris (1270-1342), who wrote *Defensor Pacis*. Marsilio dared to claim that supreme authority should be wielded by a sovereign people controlling a secular state. Perhaps the most surprising fact is that he survived having written this.

In the Christian world there was no separation between Church and State, arguably until the French and other revolutions.

(c) Constitutional democracy

In a constitutional democracy, a citizen has the right to vote, the right to elect and the right to be ruled in accordance with "The Law" by those elected representatives. Most importantly "constitutions" limit the power of the sovereign vis-à-vis his "subjects" who as a consequence become citizens i.e. people carrying "unalienable" rights, i.e. rights not to be violated by other citizens and their sovereign. The ideas are Greek, the rules Roman and much of the reality based on the customs of the Celtic and Germanic tribes. The most egalitarian (open) societies in Europe were not "Romanised" and were only Christianised late.

The success of constitutional democracy has derived from technology, democratic values and, over the last century or so, qualitative systems to support continuity, such as education and health.

Its main weaknesses are its eurocentricism (towards others) and nationalism (towards itself).

*Evolution*

The global legal system has evolved, since the end of theocracy (i.e. power based on religious assumptions) in the West, in four ways, but not necessarily in succession:

- domination based mostly on military force applied by one sovereign to another;
- balance of power: shift in sovereign alliances to prevent domination by any one sovereign;
- collective security: sovereigns institutionally allying themselves (more or less permanently) to defend against external threats

- collective welfare: sovereigns integrating (partially but institutionally) and granting (partial) citizen rights to individuals and corporations of associated sovereigns and abandoning (part of) their sovereignty in the process.

The latter stage has been described by some as “post sovereignty”.

### 1.3 Western capitalism

#### *The Assumption: the Davos Principle*

A fair and efficient democratic system and effective law are a condition for a successful capitalist economy. Other economic systems have failed. Therefore, democracy is (also) an economic necessity.

#### *Democracy*

Democracy is essentially government by law, not by people (or only by people in accordance with the law). Therefore, the quality of the legal system is of paramount importance to enterprises and citizens alike, and corporations are nothing more than “corporate citizens”. Hence democracy, human rights and economic success are linked; they prevail together.

#### *The rule of law ... and its failings*

In *The Clash of Civilizations*, Samuel Huntington argues that human rights are not a universal concept. Is he right?

Consider “efficiency” and “fairness” and the absurdity of it all: Kafka, the poverty divide, the “antiglobalisation” movements, the plight of Africa, the Balkans, etc.

Solon, who supposedly “invented” democracy in Athens, already wrote:

“Laws are like spider webs; the big ones fly right through them ... only the small flies are caught.”

Solon (400 B.C.)

However, the UN Human Development Report 2003 found that most nations are better off (except in Africa and “closed” systems like North Korea and Burma) than about 20 years ago. Arguably free trade and openness are more important than democracy. Simultaneity and causality are always hard to distinguish.

Critics of human rights include those promoting “the Asian way” and some Muslim countries.

Yet there is a worldwide human rights drive, e.g. the Treaty of Rome on Genocide and the ICC, and a growing global “feel” (consider such developments as the role of the UN, Kyoto, WTO, UN peacekeeping efforts) and a “budding” global legal system.

I have attached a summary of some positions, especially as they pertain to the growing rift between the US and the EU- please note that while I may agree with some of the criticism it is an attempt to reflect the arguments, not an adoption of them.

### 1.4 Business and corporate law

#### *Law in the EU: sources*

- Basic rules
  - UN conventions
  - Treaties on Human Rights
  - The Rome & Strasbourg Treaties: from economic efficiency to European citizenship (see the attached Charter and the EU website)
  - National Constitutions of the member states
- Member states’ implementation into national law of those rules, with some degree of diversity

- Purely domestic law, on subjects that are not subject to EU law such as matrimonial law. Most “business law” is affected quite extensively by “mandatory EU law” or treaties on particular subjects.

The result is an enormous body of law with different “layers”: EU, national, regional and local rules, and great complexity, which reflects European diversity, as well as a drive for “harmonisation”.

For example, the Davignon working party on corporate governance in respect of worker participation concluded “live with diversity”: there is no hope of achieving “harmonisation” within an acceptable timeframe. The more recent Winter Report (on Governance) reached the same conclusion. The debate continues to rage over whether on certain issues (like corporate law) harmonisation is desirable or, whether, conversely, diversity reflects reality and culture.

#### *Law in the EU: post-Enron*

The collapse of Enron has exploded the following myths:

- “natural convergence of the world to the US model”;
- the superiority of US rules on transparency and accounting;
- the need for unchecked CEO power to ensure efficiency;
- total deregulation;
- unlimited privatisation;
- leaving it all to “market forces”; and
- equating common wealth with the sum of individual greed and deregulation.

This may be the time to analyse what makes a “good” law, other than helping to achieve a “just society”. It is a law that is:

- well drafted;
- well applied;
- transparent;
- affordable;
- timely;
- efficient;
- fair; and
- balanced.

#### *Lawyers*

Lawyers are a most despised profession. Without pursuing an anthropological analysis, the reason is that the practice of law is, to a significant extent, about the exercise of power. The current negative attitude to lawyers is not new. Shakespeare wrote that if you wish to improve the world “First thing you do is kill all lawyers”. Saint-Ives carries as patron saint of lawyers the legend: “Advocatus sed non latro”, and Benjamin Franklin is famous for his statement: “Behold, now and then, a lawyer and an honest man”.

#### *Business law*

Business law is a small part of the law. It is drawn largely from corporate law, which is about power, money and ethics, but also from financial law, tax and labour law, which is a huge body of widely different rules, in the 27 member states and in at least 23 languages.

#### *Corporate law*

Corporate law is about how a corporation functions in terms of:

- the exercise of power and decision-making (governance);
- structuring (e.g. how do parents and subsidiaries relate);
- ownership and income.

But corporate law is also a very political subject. Consider the following politically laden concepts:

- equality of shareholders;
- transparency of management compensation;
- privatisation;
- restructuring, mass dismissal and collective bargaining;
- “stakeholders”, “shareholders” and corporate purpose.

Far beyond technicalities, corporate law reaches into the role of business in a broader societal context.

That is why there are enormous variations in the different member states. However, if you compare the body of EU corporate law to the (50) US corporate laws, an EU common ground is (slowly) emerging.

**Public Law:** the part of the law that pertains to the relationship between a sovereign and its citizens (corporations and individuals alike) e.g. the imposition of standards of behaviour (environment, health, consumer protection), taxation, social security, public policy, elections and representation, merger control, antitrust law.

**Private Law:** the part of the law that pertains to the relationship between private parties (corporations and individuals) like contract law, matrimonial law, family law, labour law.

**Public Policy:** pertains to the rules which are mandatory for all concerned, including e.g. for contracts between private parties; contract which violate public policy may be held to be null and void.

**Criminal and civil law:** many rules (including in business law) carry criminal sanctions (e.g. prison, fines, closing, expropriation); other may only carry civil sanctions (like voidability of a contract or the obligation to pay damages). For a list of subjects carrying criminal sanctions see the schedule to “Ethics and the law”.

**Common law and civil law:** this is a reference to the two major Western systems: the system based on English jurisprudence and the rule of the precedents and the continental systems derived from the French Napoleonic Code (i.e. based on statutory law). The reality is that much law in the UK and the US is “statutory” and that jurisprudential precedence also carries great weight in shaping continental EU laws and European law. The legal technicity differs of course but the reality is more similar than the traditionalists advance.

## **1.5 Democracy and Human Rights**

I have learned a great deal from the following “essential” books:

*The Clash of Civilizations*, Samuel P. Huntington

*The Global Paradox*, John Naisbitt

*Europe, A History*, Norman Davies

*The Challenge of Fundamentalism*, Bassam Tibi

*Realizing Human Rights*, various authors

*The Transformation of War* (1991), Van Creveld

*Why do people hate America* (2002), Sardac and Davies

Websites of the Economist, Human Rights Watch, the EU, the UN (especially on “Human Development”)

Much has been written about the “clashes” between the two universalist religious traditions (Christianity and Islam) and about these traditions and “secular” law. Westerners point to the separation between Church and State “provided for” in the Bible but not in the Koran, which is contested by some Islamic teachers. In reality, state religion was a fact in Western societies until the 19th century (in the UK, Her Majesty is still the head of the “State Church”), and intolerance is exemplified by religious warfare (among Christians) from the 4th century through to the 20th century (i.e. as soon as the Church “begot” any power and as long as it had it ... until recently). Many Islamic states such as Egypt, Indonesia, do not need Western lessons on the subject. We should also beware of Christian fundamentalism, especially in the US.

It is a delicate subject and one should tread carefully, but I am convinced that the gradual disentanglement of Western society from theocratic views, as symbolised by the Renaissance and the “Age of Enlightenment”, is the true competitive edge which has unleashed Western energy. Very

arguably, democracy, human rights and the rule of law were achieved not because of biblical tradition but by disempowering religious institutions and rulers availing themselves of religious beliefs (or pretending to) and thus not subject to power limitations. Until the French and US revolutions, Church and State, while at odds occasionally, together constituted sovereignty.

## 2. GLOBALISATION AND GLOBAL HUMAN RIGHTS

### 2.1 Introduction

#### *Meaning of “Globalisation”*

The European perspective: the peaceful reinstatement of a lost privilege, e.g. the right to study, to work and to do business across Europe.

The international perspective: “forced” or “free” adoption by the whole world of Western systems, values and technology because they are, or seem to be, more effective.

The economic perspective: the global market for goods, services and almost everything else “whether good or bad”.

#### *Definition of “Human Rights”*

The notion of human rights embodies the idea that all human beings, whatever their nationality, culture or location, possess inalienable rights, simply because they are humans and not as a result of being citizens of any particular nation state. “Official” political acceptance is universal (except for North Korea, Myanmar and Malaysia), but the practice is erratic.

This marks a major shift in political thinking as human rights limit the right of sovereigns to act (exclusively) in their own interest (the “raison d’état” which is the conceptual basis of Machiavelli or Clausewitz).

### 2.2 Globalisation: the “mismatch”

#### *Traditional legal tools do not suffice*

We have only one planet to live on, and we do need global action. Accordingly, traditional legal tools, based on national sovereignty, are becoming increasingly inadequate. Multilateral treaties, such as WTO are slow and too complicated; they apply only to sovereign states, and are hard to adapt. Sovereignty presents territorial limitations which preclude the capture of globalised business (and criminal activity).

“Voluntary codes” provide greater flexibility, e.g. governance, but increasingly lack credibility, e.g. “Chinese walls” for analysts, auditing firms. There is, according to some, a pressing need for global “institutional” action, as the UN is endeavouring to sponsor (albeit, according to many, rather inefficiently). A breakthrough in this respect is the International Criminal Court (which is competent only for genocide). It is the first *permanent* “global” and independent court.

#### *Stress factors increase*

Globalisation creates awareness that others are better off, resulting in immigration and defensive responses against the real or perceived threat to cultural identity and jobs.

Even necessary change creates new stress lines, e.g. political change, modern technology, disparities in education between generations, ethical and religious frictions and above all, seemingly, environmental concerns.

In the *Transformation of War* (1991), Van Creveld argues that warfaring has fundamentally changed over the past century. Wars today are mostly civil wars (95%), more civilians are killed (from 45% in 1945 to 90% today), psycho-war maps (consider WTC terrorism) are replacing territorial battles, rape is being used as an instrument of terror, and there is growing genocidal civil strife.

## 2.3 Human rights

### *Role in today's world*

Human rights are perhaps the most powerful global tool for “global welfare”. The extension from political rights to social and economic rights more than arguably has a direct effect on business.

### *Basic rights*

The basic rights relate to life, liberty and personal security (no torture, no arbitrary arrest), freedom of speech and religion, equality, including gender equality, and adequate living standards. They include political and civil rights, as well as economic and social rights. The precise limits are of course hotly debated and vary in time and place. According to Kofi Annan, human rights operate as a “second citizenship”.

### *Historical framework*

There is a powerful historical legal framework for today's human rights, beginning with e.g. Greek and Roman citizen rights and the Magna Carta (*habeas corpus*). In a more “modern” context, there has been the French Declaration on the Rights of Man (although not of woman) and Citizens, many 19th century constitutions and the US constitutional Bill of Rights. These are all national claims, although they purported to state the “universal truth”.

There are the Geneva Conventions where enforcement depends on sovereign consent. The Nuremberg Trials were held in 1946; although basically justifiable, arguably they were illegal. In 1948, we had the UN Charter and Declaration and more recently the comprehensive European systems (Council of Europe and EU treaties).

There are other regional systems, such as OAS and the African Charter.

The international community demands international accountability for “crimes against humanity and genocide”, which led to the creation of the “special purpose” courts in The Hague and Arusha (by the UN Security Council) and to the International Criminal Court as a “permanent” court.

### *Where does this lead?*

We *can* learn from the past. Consider, for example, what really happened after the French and American Revolutions: apart from progress, terror and Napoleonic wars in Europe and continued slavery and racial discrimination in Europe and the US. The application of Human Rights (outside Europe, which provides direct access to an independent court in Strasbourg against sovereigns to its 800 million citizens) depends on sovereigns, who are by their very nature opposed to limits on their power and the “raison d’état”. Globally, genocide is at law (although not in reality) the exception to sovereignty in all ICC Treaty states.

The gap between theory and reality remains of course enormous.

A point of debate is whether democracy and human rights are unavoidably linked? Does democracy necessarily protect human rights? The tentative answer is that it does not automatically, as a democratic majority can abuse the rights of minorities. However, the democratic record on human rights is without question better than under other systems.

### *The European system*

Two systems, Strasbourg and Luxembourg, are gradually and to some extent merging.

As a condition of membership, the Council of Europe (Strasbourg) requires acceptance and upholding of the European Convention on Human Rights through a European Court accessible to all European citizens. It has 41 European members, including almost all of central and eastern Europe

The EU treaties provide an additional basis for human rights e.g. outlawing discrimination, whether based on nationality, residence or gender, and, perhaps more importantly, reserving (very desirable) membership for countries which are members of the European Council and have implemented a democratic system (consider the Greek “suspension”).

By far the most effective and comprehensive system, the Council of Europe gives 800 million European citizens directly enforceable human rights.

### *The European Constitutional Treaty*

The Treaty had been approved at the European level but, in order to be effective, it had to be ratified by national parliaments and confirmed in some countries by way of referendum, whether voluntary or mandatory.

It has been adopted by a large majority of the EU members (18 of them), notwithstanding media resistance, especially in the English tabloids.

As a consequence of negative referenda in France and the Netherlands, a reduced treaty is being negotiated... much to the annoyance of some countries who did approve of the whole package.

The EU is neither a “jacobine” state (like France) nor a federation (like the US), nor is it a confederation of states (like Switzerland). It combines features from all three types of governmental systems with some additions. The EU’s “constituency” consists of member states, citizens and regions, which is the true reason for its complexity.

For the states, it is a voluntary union. Any member state can withdraw at any time. A “war of secession”, as initiated by the US confederate states, is not possible. Member states can be suspended or expelled, basically for violations of basic democratic values.

Even non-members (like Norway or Switzerland) can “enjoy” the benefits of the internal market ... if they accept to play by the rules applicable to the members. Some call it “fax democracy”, i.e. applying rules which are decided by the EU. But, of course, non-members may “opt out” totally or partially from “internal market” rules.

Member states are admissible if they accept the “acquis communautaire”, i.e. the body of EU law and regulations, and the European Convention on Human Rights. They may benefit from solidarity funds, which have done a great deal in the past to improve the fortunes of new members. The “géométrie variable” is also typical. For certain matters, such as the euro and defence initiatives, member states can choose not to participate, in which case they also abstain from decision-making.

There are many “urban myths” about the EU including the following:

- the huge size of the EU bureaucracy
- the “ridiculous detail” of its regulations
- its democratic deficit
- a powerless European parliament
- the unchecked power of “unaccountable Mandarins” (at the Commission)
- the elimination of national sovereignty
- the lack of respect for national and regional cultures
- the domination by the French, the Germans and, more recently, the Portuguese (depending on which language the tabloid is commenting in)
- the economic downturn of the EU
- the detrimental effect of the euro

Recognising that these are myths does not mean that all criticism is invalid:

- In matters of defence and foreign policy, Europe *is* a pygmy (hence the recent initiatives in this respect).
- Some attempts at “harmonisation” were overly detailed and did not address the diversity of situations (e.g. in corporate law).
- In certain fields, such as tax, equity financing, immigration, progress has been agonisingly slow and priorities unfocused.

#### *Is the EU a success?*

Overall the EU has been instrumental in bringing prosperity, solidarity and the highest welfare in the world to many hundreds of millions of Europeans. Its development aid is seven times higher than that of the US and is directed to the poorest regions of the world. It supplies a model for gradual integration and cooperation serving citizens of the world. Most importantly it has brought lasting peace, real welfare, and gradually (but not easily) a new sense of diversity.

Its economic performance (since 1993) is less enthralling than that of the US, although recently performance is improving. Both systems have their failings. The US suffers from huge budget and trade balance deficits and excessive reliance on debt, both public and private (the so-called “triple deficit”). Its high growth, high consumption based system is sustainable only with foreign (mostly Chinese and Japanese) financing. Recently it has become apparent that the US has neglected e.g. infrastructure, basic education and health to the extent that a “backlash” is likely.

The EU has overall more moderate growth, especially following the absorption of less performant economies and, it is claimed, different risk reward attitudes and “rigid” labour practices. Its sustainability is threatened by demography, and, according to some, its internal coherence by immigration.

Both systems have been hugely successful. Both will have to reinvent themselves to survive ... but on different counts. Different illnesses rarely require the same treatment.

#### *Limits of the European system*

There is no jurisdiction for immigration, asylum and refugees; only European “citizens” (and their families) are protected. Most national laws give limited rights to non-EU citizen immigrants. Apart from “harmonisation”, the “new frontier” is moving from principles to effective limitations on sovereignty, and from action only in “causes célèbres” to effective administration of justice in all (relevant) individual cases.

#### *The resulting “global mismatches”*

Law is (mostly) national and hierarchical, but the internet, for example, is the opposite. Multinationals, NGOs will claim, escape effective control.

Within the EU, a “multilateral” institutional system addressing the “real world” complexity is being built. Whether one sees the EU as a half-hearted and failed effort to federate or a visionary, courageous, innovating and difficult response to the real complexities of a globalising world is a

matter of judgement. I believe that the EU is the only maturing institutionalised response to global interdependence (albeit on a regional scale). There are no simple solutions for difficult problems. The EU's institutional complexity should be seen as the price for truly addressing the "mismatch". We need new legal and political concepts to capture the new regional and global complexities.

However, the "poverty divide" is growing in many places and there is an increase in genocidal conflicts. One day perhaps, our grandchildren will think about the way in which we deal with third world poverty in the same way as we think about child labour in our 19th century industry. The following quote sums it up, quite ironically:

"The Law, in its majestic equality, forbids the rich as well as the poor ... from sleeping under bridges, begging in the streets and stealing bread."

Anatol France

In the end, it is not the law that counts, but the way in which we deal with the real problems of real citizens.

### **3. GLOBAL PRIVATE PLAYERS: THE MULTINATIONAL CORPORATIONS AND NON-GOVERNMENTAL ORGANISATIONS**

#### **3.1 The Multinational Corporation (MNC)**

Historically the multinational corporation referred to large corporations, but now very small corporations are multinational.

They are heavily criticised for national governments' inability to regulate them and for the suspicion of human rights abuse. As MNCs are increasingly vilified, the internet and the media "sanction" alleged abuse and the PR effects can be devastating.

There is an increasing number of MNCs with international capitalisation.

Outsourcing is replacing structural links with contractual links. MNCs have an increasing responsibility for subcontractors, and we are witnessing the development of the "Network Economy". MNCs come and go and close shop without satisfying local law. Arguably this is unavoidable because, for example, worker consultation rules and securities laws often contradict each other.

Voluntary measures have evolved as a stopgap measure; they include codes on governance and auditing by NGOs.

Recent accounting scandals have greatly affected the credibility of "voluntary law", i.e. self-imposed regulation by e.g. industry groups or professions. The consequence is "reregulation".

Increasingly, as discussed in my other note, there is a belief that whatever the failings or inadequacies of local law there is a "natural obligation" for corporations to at least reach above a minimum standard of behaviour.

#### **3.2 Non-governmental organisations (NGOs)**

The NGO is a new, some say the only effective, "global" force opposing MNCs and "sovereigns" alike.

The media is the NGO's real tool (in addition to redress through the courts).

NGOs exist both locally and globally. There are highly respected organisations, such as Amnesty International, but "fundamentalist" movements also exist.

The accountability of NGOs is an increasingly debated topic: it is all very good for NGO's to save us from MNC abuse but how can we be sure that NGO leadership is accountable or even plain honest?

Is it a good idea to have NGOs audit MNCs or is this a bribe?

NGO's claim that they are the "true" enforcers of values and norms in the global field.

## **4. CHALLENGES; NEW FAULT LINES; THE ROAD AHEAD**

### **4.1. Introduction**

A very summary survey of the EU scene would I believe show the following.

The move is towards an "ever closer union" and common standards. Free movement of capital has been almost fully achieved, the current barriers being more of a psychological nature. For the free movement of labour, there is still a lot to be done, especially on pension rights.

The customs union has been achieved; now there are new WTO talks on the access of the Least Developed Countries (LDCs) to the EU. The reality in this respect is ethically and economically unacceptable (in the US and the EU alike). Progress is gradually being made on non-discrimination on the basis of nationality.

Tax harmonisation is a slow but difficult subject.

"Subsidiarity" is jargon for the EU approach that rulemaking should rest with the lowest level of adequate competence. This is a good principle but it has often been ignored and sometimes it serves as an "escape" if no common ground can be found.

On paper we are coming close to eliminating "national franchises", but in reality we have a long way to go; the cultural and language barriers (the implicit "agency cost" of cross-border business) are still high.

There are, and should be, growing concerns over whether the recent widening of the EU will result in overextension (seen by the historian Paul Kennedy as the main cause for the demise of empires). Others worry that "deepening" the union will become even more difficult with so many new members with ever more differing historical (and religious) traditions. This explains, apart from prejudice, the hesitations about Turkey and some Balkan states.

The media analysis and public debate in respect of the EU is mostly about its democratic deficit, its real or perceived weakness as compared to America, and more recently China, its bureaucracy, its impotence in military and foreign policy matters, not to mention G.W. Bush's characterisation of Nordic Europe and France as "old Europe".

While of course part of that criticism is valid, I would submit that it is the very nature of Europe which is changing, as addressed below. This is not to deny that we have to fix some of our problems or modify our attitude towards those problems which we cannot solve. However, when plotting our course we should first map the new fault lines.

### **4.2. Fault lines: old and new**

Since the threat of Islam was matched and then removed, European foreign policy was basically based on dominating fellow Europeans. Even colonisation was a way of ensuring domination within Europe. With the removal of the Soviet threat, "war was transformed". The threats are internal or non-territorial. Terrorism is not about territory, it is about dominating minds.

I referred in my introduction to the "fault lines" which have shaped Europe: the limits of romanisation, the limits of Islam, the partition of 843 shaping a Germanic and a Latin Europe, colonisation, Slavonic Europe as opposed to Germanic and Latin Europe. These fault lines are, to a large extent, a matter of the past. France and Germany have become staunch allies. The Slavic Poles and Czechs will shape the Europe of tomorrow as much as the original six member countries. Ireland, after centuries of war famine and poverty, has in about 15 years become an economic front runner. Spain and Portugal have become staunch and progressive democracies.

Imperial regret or perhaps more importantly persisting imperial illusion continues to shape common wisdom. It is difficult for the French to accept that France must bury its universalist cultural ambition. Germany is not the scientific and economic powerhouse it used to be. And the English must abandon their traditional diplomatic strategy "to keep the continentals in a suitable state of disarray".

Within an organisation like the EU, the size of member states matters less. In fact size may even be counter-productive. To the extent that there is a common economic and defence area (NATO), that territorial wars have lost much of their significance, that there is a common currency, smaller nations with a strong sense of commonwealth and better manageability thrive. The most successful nations in the world are communities between 250,000 (e.g. Luxembourg) and about 15 million. Those include countries like Canada and Australia which are in many ways European. One author commented that the large European countries are too big to serve their citizens efficiently and too small to be effective internationally.

Looking at the new fault lines, first on my list would be the changing meaning of “diversity” in Europe. Traditionally European diversity was experienced by crossing a regional or national border. Just take your car and drive 15 kilometres to the Dutch border above Gent. Within a few hundred meters the landscape changes; it is ordered, pleasantly so, manicured, housing is concentrated rather than spread out along the roads. You are driving into Zeeuws Vlaanderen. People speak the same dialect, they are catholic just like in Flanders and yet the landscape differs.

European expectations in respect of homogenous regions will have to change. The diversity in each of those regions will be substantially greater than is the case today. This is an enormous revolution and it is not surprising that especially regions or nations which have only recently achieved a measure of political recognition or economic success have a hard time coping with changes. Just when they thought that they had regained freedom, like the Poles or the Czechs, they have to risk it all again in a new constellation. This is also true for the many EU minorities: the Catalans, the Basque, the Flemish, etc.

It is very easy for the elite to see the promises of a united Europe. The European elite has always been exactly that: European. We have done little to educate ordinary voters into appreciating and accepting the new commonwealth.

The new fault lines of Europe are no longer shaped by external threats or the limits of conquest. The fault lines are within ourselves: clinging to proud successes of the past and failing to address the challenges of a common future.

This challenge is, I think, most essential in respect of our large Islamic minorities. European prejudice against Islam is real. Arabic and Turkish Islam have threatened the very existence of Europe. The very foundation of Europe is the gradual acceptance of religious diversity and, as a consequence, the relegation of religiosity to the personal sphere. European political constitutions, democracy, gender equality of male and female have been won by weakening and then eliminating the churches as a political force. It is anathema for Europeans that religious leadership should have political aims.

The most visible fault line today is how to find the balance between the normal desire of Islamic immigrants to be faithful to their religious and social roots (the issue of individual and collective rights) and the demands of the societies which are hosting them. The question is rendered more acute by the fact that those societies are the most developed welfare oriented communities in the world. They provide free health care, free education of the highest quality in the world, unemployment and other social security benefits. They are highly sophisticated and therefore highly vulnerable to abuse. They are therefore also right to be demanding in terms of responsible behaviour.

A second fault line is how ordinary voters will accept a large measure of solidarity with new EU members and new immigrants especially respect Turkey. How are we going to strike a balance between solidarity and responsibility, both collective and individual?

The third fault line is the growing rift between the EU and the US. Until the demise of the Soviet Union, the US was a most staunch promoter of European unity. US policy was that a strong Western Europe was the best defence against Marxism and the Soviet Union. Recently, and it is not just the effect of Bush or the war on Iraq, Europe is seen increasingly in the US as an economic and political competitor and there is a growing suspicion that e.g. the support of the US for Turkey's EU membership is motivated by a strategy of weakening the EU from the inside. EU criticism is seen as disloyal and ungrateful. US unilateralism is totally at odds with the ingrained multilateralism of the European Union. Europe is quite simply the product of voluntary cooperation between sovereigns, the very essence of multilateralism.

The power models of the EU and the US are fundamentally different. The US elect a president whose powers (including those to veto legislation and to conduct war) are to be compared with the coalition governments in the EU and the delicate allocation of powers purporting to curb abuse. When balancing vulnerability to abuse against efficiency, the US will promote efficiency, the EU will sacrifice efficiency.

The authors of the Treaty of Rome, the foundation of the European Union, described it as a process (“an ever closer union”) rather than an iron clad system. One cannot but admire the incredible continuity and permanence of the US constitution which has basically remained unchanged since its adoption by the American founding partners. This is a luxury that the EU does not have. A European constitution is simply a different piece of work. It provides for a union which is freely adhered to by sovereigns and can be left alone by those sovereigns, and for “géométrie variable”, permitting some states to integrate more than others. It does not make for simplicity but it does allow for gradual and incremental progress. Is there any other way? Is this not the model which can perhaps be adopted elsewhere?

### **4.3. But change is in the air**

Much has been written about Europe lagging behind America in economic growth since about 1992. Clearly, EU averages are greatly affected by taking in weaker economies. US statistics would look different if e.g. Mexico were to become part of a North American union. In addition, various articles in *The Economist* and other authors have greatly discounted US claims about employment (many millions of Americans are simply excluded from the figures) or even growth differentials.

It is not, scientists claim, the welfare state which is it at stake. In fact long-term economic development has been shown to be promoted by welfare orientation. The so-called new economy is based on a high level of education and in this respect Europe is a front runner.

But compared to America Europe is less able to translate its investment in its best and brightest into economic success. Much was made recently about “the rational choice of Europeans for leisure”. It is not that Europeans are less productive than Americans, it is simply that they want to enjoy life more. It was reckoned that Europeans in their lifetime work about 40% less hours than Americans, in order to earn in real term about 10% less. Who is better off?

What is at stake is whether all this is sustainable in the wake of increased US but especially Asian competition. What is at stake is whether European demography and the ageing of its population will permit the same policies to be continued. In short, is Europe’s present outlook sustainable?

Quite certainly certain things will have to give. We cannot expect to retire at age say 56 and live happily well off ever after.

Of the many things which will have to change to make the system sustainable, let me pick one.

At Davos, at the World Economic Forum, an American scientist spoke of his worry about the future of the US. He claimed that 80% of all scientists working in the US are not US-born. Half of those are Europeans, the other half are Asians. An optimist would see this as the result of the incredible attraction that the US has for the best and brightest scientists all over the world. This is not only about earning more money but about being given the means and conditions to pursue research in optimal conditions. A European view would be that all the basic investment for 25 or 26 years has been made by European (and Asian) societies, and when it is time for “dividends”, they flow to America.

Although that trend is now being reversed, not least because the expectation of easy riches has been squashed by the dotcom and high-tech bust, why don’t we stop putting EU money into agriculture, which causes enormous distress in the third world, and put our young scientists to good use.

It is true of course that the European Union is militarily unimportant and in terms of foreign policy a dwarf. It is not so difficult to change that if we are willing. I believe that will can gradually be shaped as imperial regret will fade before today’s reality.

That is, I believe, not to say that there will be a new EU empire challenging the US or other empires. The political set-up of Europe, its decisional structure based on collegial decision-making, its ingrained multilateralism make that very unlikely. There cannot be an empire without imperial ambition.

Finally, the fates of the EU and the US remain intertwined and they are very effective if they are on the same side. The EU and the US are each other's main foreign markets and (still) each other's preferred destination in terms of F.D.I. If the EU "grows" a common foreign policy and a more dynamic economy, it will be in a position to voice another Western view, which is profoundly multilateral and multicultural.

An American friend once told me that Europe will be on its feet again once it has stopped comparing itself to the US and starts believing in its own separate model with, as in all models, its own strengths and weaknesses. Perhaps, just perhaps, some of that is beginning to happen right now.

Most importantly Central and Eastern Europe have revived "the gene pool"... and Germany is back in the economic and political leadership role where it belongs. If now France's Sarkozy, delivers one quarter of his election promises....there is a rosy future, at least in the midlong term.

This may be exemplified by the recent McKinsey report ordered by Bloomberg, the mayor of N.Y, who worried about London overtaking N.Y. as the world's financial capital. In short, the reasons are multiple; the larger size of the EU's economy, the UK's more liberal immigration policy, the diversity coming with the EU's freedom of establishment... but also MIFID, the new regulatory environment for banking and finance promising a more integrated EU environment (and economics of scale) arguably then that in the US. Another paradox perhaps.

**SCHEDULE A:**

**A (PARTIAL) LIST OF INTERNATIONAL LEGAL BUSINESS TOPICS**

- Trade issues
- Investments issues
- Financial flows
- Intellectual property
- Taxation
- Movement of labour
- Delivery of services
- Conflict of laws
- International settlement of disputes
- International corporate structures
- Home regulation of multinational firms
- International securities regulation
- Currency regulation
- Collective bargaining
- International transportation