Compartments of Creditor Protection

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Ever since the emergence of legal personality and limited liability these legal devices not only had beneficial effects but were abused as well. Directors and majority shareholders set the mechanics of company law to work for their own profit to the detriment of the company. Abuses within this category have been answered by the regulation of conflicts of interests and the development of classic duties such as the duty to operate with loyalty and with the skill and diligence of a diligent manager or an orderly businessman. Abuses of majority power have been curbed mostly by the courts on the basis of similar generic norms.

These instruments fall short for other forms of abuse of companies of which the unlawful exploitation of limited liability is the most debated. Abuses of this sort follow a different pattern because it is not the company that suffers but its creditors. The company even seems to profit but in most cases it will be the persons behind the company that actually take the profit albeit in the form of not being liable towards the creditors where they would have been without the shield of limited liability. The battle against these practices traditionally has been a national affair and jurisdictions have developed quite differently in this respect. Actually, their ways are still diverging as is illustrated by this issue of European Company Law (ECL). The reader may find Erik Werlauff's article on piercing the corporate veil, a discussion of the UK approach by Jennifer Payne, a contribution by Detlef Kleindiek on combating corporate 'gravedigging' in Germany, followed by country reports on the actual status in several Member States concerning the struggle against abuse of companies.

The EU never harmonized the area of creditor protection as such although company law directives like the Capital Directive and the Accounts Directives certainly were meant to protect creditors. The same can be said of a number of provisions in other directives such as the Merger Directive. The harmonization process, therefore, has denationalized the issue already up to a certain point. With *Centros*, *Überseering* and *Inspire Art*, the European Court of Justice (ECJ) has pushed the way abuse of companies can be counteracted by company law further away from the national level. When confronted with companies incorporated elsewhere in the EU, Member States can no longer use trusted instruments like real seat requirements or impose additional requirements for registration. As this compartment of creditor protection has come under pressure, Member States may find a way out in other areas where creditors might find coverage, notably insolvency law. As Sandra van den Braak explains in this issue of ECL, this tendency is due not only to the right of establishment but also to the freedom Member States enjoy under the European Insolvency Regulation to apply domestic rules to foreign companies. Although this might prolong domestic treatment of creditor protection, the ongoing internationalization of businesses makes inevitable what already was expressed forty years ago by the Preamble of the First Directive: that safeguards for the protection of the interests of inter alia creditors should become equivalent throughout the Community.