SOME REMARKS ON THE (NON-)APPEARANCE OF HETAIREIA
IN BYZANTINE LAW

1. Introduction

In his work *Antike Kapitalvereinigungen. Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft*, Andreas M. Fleckner makes the following remark: 'Die Basiliken verwenden ἐταιρεία für *societas*. Das ist bemerkenswert, denn für eine wortgetreue Übersetzung wäre κοινωνία zu erwarten, der griechische Begriff für eine gemeinsame wirtschaftliche Unternehmung wie die gewinnorientierte *societas*'.

The fragment from the Basilica which prompted Fleckner to make his observation was BT 433/20-21, which corresponds with D 3,4,1pr.:

D. 3,4,1pr.: Not everybody is allowed to form a partnership (*societas*), association or similar corporate body, for this possibility is restrained by statutes, *senatus consulta*, and imperial constitutions (...).

B. 8,2,101 = D. 3,4,1 (BT 433/20-21): Gaïu. Οὐ πᾶσιν ἔφειται ποιεῖν ἐταιρείας ἢ συστήματα ἢ συμματεία, (...).

From Gaius. Not everybody is allowed to form ‘partnerships’ (ἐταιρείαι), or associations (συστήματα) or corporate bodies (συμματεία), (...).

Fleckner states that the Greek translation ἐταιρεία for the Latin *societas* is hard to reconcile with the tendency, traced in other fragments of the Basilica and in literary sources, to translate *societas* with the notion κοινωνία. Moreover, Fleckner emphasizes

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2 D. 3,4,1pr.: Gaius libro tertio ad editum provinciale: Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur: nam et legibus et senatus consultis et principalibus constitutionibus ea res coeretur (...).
3 Also an old scholion pertaining to D. 3,4,1pr. (BS 166/17-167/19 [anonymous]) uses the notion ἐταιρεία. See § 2.1 below. For the old and the new scholia, see H. de Jong, ‘Stephanus on the *condictio de bene depensis* (ὁ ἀπὸ καλοῦ δαπανήματος κοινόκτικος’), TRG 78 (2010), 15-35 (16).
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that according to a fragment of Gaius in the Digest (D. 47,22,4)⁴ the term ἐταιρεία was used to refer to a specific form of partnership, not partnership in general: ‘eine genossenschaftliche Vereinigung ohne eigenen Erwerbszweck, häufig für die Verfolgung politischer Ziele’.

Apart from the fragment just mentioned (BT 433/20-21), there are four texts in the Basilica where the use of the notions ἐταιρεία and κοινωνία raises some doubts.⁵ In one, just as in the fragment above, the notion ἐταιρεία is used, where one would expect the more general notion κοινωνία.⁶ In other texts, where the partnership under discussion is not a profit seeking one, and one would thus expect the notion ἐταιρεία, the word κοινωνία is used.⁷ Fleckner comes up with two possible explanations. In handing down the texts through the centuries, from Gaius to the Basilica, some flaws managed to creep in. However, it is also possible that the compilers of the Basilica had better pre-Justinianic materials at their disposal than those of the Digest had.⁸

In secondary literature, much attention has been paid to the interpretation of the word societas in the fragment of Gaius mentioned above (D. 3,4,1pr).⁹ Also the corresponding text in the Basilica (BT 433/20-21) was dealt with, but the exact meaning of ἐταιρεία was rarely discussed. For want of a better solution, Fleckner abides by the traditional opinion that ἐταιρεία refers to a partnership in the narrow sense of the word, i.e. a professional organisation of publicani and not to a profit seeking partnership of publicani.¹⁰

Fleckner’s investigations, however, did not comprise all relevant fragments in the sources, while those he discussed were not always profoundly analysed. Moreover, in dealing with the (non-)appearance of ἐταιρεία in the Basilica, Fleckner did not pay attention to the meaning of this term in its original historical context (D. 47,22,4). Furthermore, when interpreting legal notions in the Basilica, one should also take into account sixth century teaching of Byzantine law, since the compilers of the Basilica to a

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⁴ D. 47,22,4: Gaius libro quarto ad legem duodem tabularum: Sodales sunt, qui eiusdem collegii sunt: quam Graeci ΥijįțȢıЃįȟ vocant. his autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrupcant. sed haec lex videtur ex lege Solonis tradata esse. (…). See § 2.3 below.
⁵ Fleckner, Antike Kapitalvereinigungen (note 1 above), 401-402.
⁶ B. 11,1,14 = D. 2,14,14; B. 40,1,3,4 = D. 37,1,3,4; B. 26,1,22 = D. 46,1,22 and B. 60,12,31,1 = D. 47,2,31,1 (see Fleckner, Antike Kapitalvereinigungen (note 1 above), 404). See § 3 below.
⁷ B. 11,1,14 = D. 2,14,14 (BT 629/12-13).
⁸ B. 40,1,3,4 = D. 37,1,3,4; B. 26,1,22 = D. 46,1,22 and B. 60,12,31,1 = D. 47,2,31,1.
⁹ Fleckner, Antike Kapitalvereinigungen (note 1 above), 405.
¹⁰ Fleckner, Antike Kapitalvereinigungen (note 1 above), 405 (nt. 307); contra, nt. 308 (see some of these opinions note 22 below).
¹¹ Fleckner, Antike Kapitalvereinigungen (note 1 above), 405-406.
considerable extent were relying on the work of the antecessors. These shortcomings justi-
fy to investigate once again the (non-)appearance of the term ἑταρεία in Byzantine law,
which will enable us, it is hoped, to adopt a better considered viewpoint than previously
defended in secondary literature.

2. The term ἑταρεία in the Basilica

The term ἑταρεία occurs in three Basilica books, i.e. in the text as well as in the scholia.12
These fragments can be found in the titles 8,2 (= D. 3,4), 11,1 (= D. 2,14) and 60,32 (= D.
47,22). None of these has the contract of partnership as its subject. It is, by contrast,
Basilica title 12,1 (Πείρη κοινωνίας καὶ λύσεως αὐτῆς) which deals with this contract. In all
fragments dealing with ἑταρεία, this notion appears to refer to a kind of societas, which
one sooner would expect to be termed as κοινωνία.13 According the Thesaurus Linguae
Graecae, the term ἑταρεία only occurs 16 times in the Basilica, the term κοινωνία 870
times. We will now discuss the fragments in the Basilica.

2.1. B. 8,2,101pr. (= D. 3,4,1pr.)14

The first fragment is B. 8,2,101pr. (BT 433/20-21), which was mentioned above. In this
text ἑταρεία is bracketed together with the terms σύστημα15 and σωματεύον.16 The
corresponding Digest text, D. 3,4,1pr., also mentions three different notions, viz. *societas*, *collegium* and *corpus*. Since σύστημα and σωματείον are apparently translations of *collegium* and *corpus*, we may presume that ἐταιρεία is a translation of *societas*.17 In the manuscript codex Leidensis Vossianus graecus Fol. 19 a remark on this fragment is handed down.18 This is probably an old scholion at D. 3,4,1pr., dating from the sixth century AD, which was later integrated in the Basilica text.19 It cannot be ruled out that the compilers of the Basilica text were guided by this scholion when formulating the Greek equivalent of D. 3,4,1pr. The scholion uses the word ἐταιρεία:

sch. V 3 ad B. 8,2,101 = D. 3,4,1 (BS 166/19-22; anonymous): (...) ὁ Γάιος διδάσκει, τίσιν ἐπιέτεραι ἐταιρείαι ἢ κολλέγια20 ἢ σωματείον συστήσσαθα. Λέγει γὰρ, ὅτι ὧντε ἐταιρείαι, ὧντε κολλέγιαν, ὧντε σύστημα, ὧντε σωματείον ἐφείται τοῖς τυχόνδις χώθην ἢ ὡς ἔτηρε ἔχειν. (...).

(...) Gaius teaches who it is allowed to form a ‘partnership’ (ἐταιρεία), an association (κολλέγιον) or a corporate body (σωματείον). For he says that these persons are not allowed to form as it happens any ‘partnership’ (ἐταιρεία), association (κολλέγιον and σύστημα) or corporate body (σωματείον). (...).

In this scholion, which is actually a Greek translation (index) of the Digest text, its anonymous author deliberately chooses to use the notion of ἐταιρεία,21 and not the term κοινονία. The reason for doing so is, as will appear below, that ἐταιρεία and κοινονία are,

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16 See for the various kinds of organizational forms in Byzantine economy G.C. Maniatis, ‘The Domain of Private Guilds in the Byzantine Economy, Tenth to Fifteenth Centuries’, *DOP* 55 (2001), 339-369. According to Maniatis the occurrence of various organizational forms (ἐταιρεία, σύστημα and σωματείον) in this Digest fragment (D. 3,4,1pr.) does not imply that they are legally and functionally identical (p. 347). Fleckner rejects this view, see note 11.

17 By the way, in western legal scholarship the partnership of D. 3,4,1pr. is termed *societas*. Cf. Gl. neque societatem ad D. 3,4,1pr.: puta negotiatorum vel professorum, qui non simul cohabitant: ut C. iurisd. om. iud. l. fi. (C. 3,13,7) & hoc etiam patet ex definitione societatis: quam dic, ut insti. de socie. in prin. (Inst. 3,25pr.).

18 See RHBR, I, No. 96. The remark can be found at fol. 287 of the manuscript.

19 See note 3 above.

20 The Greek translation of *collegium* is σύστημα, see further down in the same scholion (BS 167/6): (...) τοῦ κολλέγιον ἦτο συστήματος (...). See also L. Burgmann, ‘Das Lexikon άσημο’, *FM* VIII (1990), 249-337 (274) (collegion, K 41).

21 In my discussion of ἐταιρεία I will only deal with the literature on the Byzantine sources. The interpretation of the corresponding Latin notion in classical and Justinianic Roman law is left out. This implies that I do not go into major parts of the literature mentioned by Fleckner (note 11 above).
at least in the view of the anonymous author, by no means synonyms. It is probable that κοινονία is the more general term indicating any kind of partnership, whereas ἐταυρία indicates a more specific form. Since the author of the scholion was aware of the fact that D. 3.4,1pr. dealt with a specific form of partnership — which form will be discussed below — he decided not to use the general term. A clear indication that in classical law the notion societas must have had a more general purport can be found in the Institutes of Gaius, which speak of alius genus societatis. This, however, does not mean that the partners in a specific contract of partnership, such as ἐταυρία, cannot be denoted by the more general term κοινοψ, corresponding with the Latin socii. The anonymous author of the scholion just mentioned had probably noticed that D. 47,22,4 refers to the Greek notion ἐταυρία, when dealing with a specific kind of partnership. A coherence between the linguistic usage in D. 3.4,1pr. and D. 47,22,4 is not unlikely since both texts originated with Gaius.

2.2.  B. 11,1,14 (= D. 2,14,14)

The second fragment is B. 11,1,14 (= D. 2,14,14), which is handed down in only a few manuscripts. Only two give the full text of B. 11,1,14. The oldest manuscript, codex Coislinianus graecus 152 (Ca), dating from the second half of the twelfth century, displays the text of B. 11,1,14 without using the word ἐταυρία. In the later one, codex Parisinus

22 M. Cohn, Zum römischen Vereinsrecht. Abhandlungen aus der Rechtsgeschichte, Berlin 1873, 176: ‘Ich entnehme aus dieser Wiedergabe, dass ihnen das Wort societas im Gajanischen Fragment eine völlig andere Bedeutung zu haben schien, als die einer Erwerbsgesellschaft, der griechischen κοινονία; denn die ἐταυρία bezeichnet eine Vereinigung von Genossen zu geselligen Zwecken und als criminalistischer Begriff zu factiösen Zwecken’. Cohn also refers to the existence of an inscription which displays a collegium salinariorum and a collegium aurariarium. According to Cohn we can thus also use the term collegia publicanorum (see idem, 182ff.). A collegium publicanorum can also be profit seeking (D. 47,22,4) (see idem, 176 nt. 67). It is striking, however, that Cohn within the context of the various terms used for partnerships in D. 3.4,1pr. (= B. 8,2,101) does not deal with other Basilea fragments which mention ἐταυρία. Cf. also O. von Gierke, Das deutsche Genossenschaftsrecht, III, Graz 1954, 42-43 nt. 22. Contra E. del Chiaro, Le contrat de société en droit privé sous la République et au temps des jurisconsultes classiques, Paris 1928, 222/223 nt. 1: Del Chiaro rejects the idea that the term collegium can be used for certain contracts of partnership or that the texts of Gaius refer to collegia: ‘Le texte de Gaius vise donc le cas de sociétés et non de collegia. Les societas publicanorum peuvent avoir sous les conditions posées par la loi un corpus, ce qui se comprend étant donné le fait qu’elles intéressaient l’ordre public’. Cf. also M.R. Cimma, Richerche sulle società di pubblicani, Milano 1981, 186-190.

23 Gaius 3,154 a-b: Est autem alius genus societatis proprium ciuium Romanorum. (…). Cf. also D. 17,2,5pr.

24 Cf. Fleckner, Antike Kapitalvereinigungen (note 1 above), 402. See also Cohn, Zum römischen Vereinsrecht (note 22 above), 177 nt. 68. Cf. also M. Kaser, Das römische Privatrecht, II, München 1975², 409.
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graecus 1352 (P), dating from the beginning of the thirteenth century, however, we do find the word ēταιρεία:25

D. 2,14,14: Likewise, a pact can surely benefit and prejudice the manager of partnerships.26

B. 11,1,14 = D. 2,14,14 (BT 629/12-13): Ulpi. Τὸ σύμφωνον τῶν μαγίστρων [τῶν ēταιρείων (P)] καὶ ὡφελεὶ καὶ βλάπτει,

From Ulpianus. The pact benefits and prejudices the managers [of partnerships (P)].

It has to be noticed that the corresponding Digest fragment uses the word societas and not terms like collegium or corpus. By contrast, these terms do appear in the Digest fragment we discussed above (D. 3,4,1pr.) and the one we will discuss below (D. 47,22,4).27 From an anonymous remark at D. 2,14,14, one receives the impression that the author considers societas and ēταιρεία as synonyms.28 The term κοινονία is specifically equated with ēταιρεία by ἦτοι. Below I will discuss the choice for ēταιρεία.

Sch. Ca 1 ad B. 11,1,14 = D. 2,14,14 (BS 226/9-21 (passim); anonymous): Ὅσπερ ὁ γενικός προκουμένων πακτεύουν καὶ ὡφελεὶ καὶ βλάπτει τὸν προστάτιουν, οὕτω καὶ ὁ μάγιστρος ἦτοι ὁ σύνδικος τῶν κοινονίων ἦτοι ἑταιρείων. (…). Μὴ νόμιζε δὲ, ὅτι πάσιν ὥρεται, σύστημα ἡ ἑταιρείαν ἡ κολλέσιον ἔχειν. Τὰ γὰρ περὶ τούτων μανθάνεις ἐν τῷ ἔξης βιβ. ἐν τοῖς ὑποκειμένοις ἐν τῷ τίτ. –, διγ. –.

Just as the general procurator through his agreement both benefits and prejudices the principal, so does the magister, i.e. ὁ σύνδικος, of the societates, i.e. ἑταιρείων. (…). You should not think that it is allowed for all people to form an association (σύστημα) or a


26 D. 2,14,14: Ulpianus libro quarto ad edictum: Item magistri societatum pactum et prodesse et obesse constat.

27 See also the Digest fragments without the expected ēταιρεία in § 3 (with the notes 52-54) below.

28 Cyrillus uses the same words, viz. ὁ σύνδικος τῶν κοινονίων (sch. Ca 2 ad B. 11,1,14 = D. 2,14,14 (BS 226/22-23; Cyrillus). It is striking that Cyrillus uses the words τῶν κοινονίων (sociorum) in stead of τῶν κοινονίων (societatum). Probably, this has to do with the wrong genitive societatum (in stead of societatum) in the Digest text.

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‘partnership’ (ἐταιρεία) or an association (κολλήτων). For about these things, you learn in the next book in the texts in the title —, fragment —.

This remark refers to a fragment in the next Digest book, which we already discussed above (D. 3,4,1pr.). Because of this specific reference to the Digest, this scholion has to be an old scholion.29

The next remark at the same D. 2,14,14 is remarkable in the sense that it connects all the fragments mentioned in this paragraph (§ 2.1-2.3). Moreover, it discusses the words τῶν ἐταιρείων, which are missing in the Basilica text in manuscript Ca. This remark has been located as the third scholion at the word μαγήστρων from de Basilica text in Ca.:30

sch. Ca 4 ad B. 11,1,14 = D. 2,14,14 (BS 226/28-30; anonymous): Πρόσκειται εἰς τὸν Ἀνόνυμον τῶν ἐταιρείων· πρὸς δὲ παραγραφόμενος φησιν’ τίνες δύνανται ποιην ἐταιρείας, ἐχεις βιβ. γ’ τιτ. δ’ καὶ βιβ. μ’ τιτ. κβ’ (sc. Dig.). (…).

It is placed in Anonymus: τῶν ἐταιρείων; at which he says in a remark: you can find who can form ἐταιρεία in book 3, title 4 and book 47, title 22, (…).

Two questions arise. The first question is what this remark relates to. Does this remark refer to the words τῶν ἐταιρείων in the above mentioned anonymous scholion BS 226/9-21? Or does the author of BS 226/28-30 refer to another manuscript with a work composed by Anonymous? By studying all scholia which begin with the words πρόσκειται εἰς,31 we can conclude the latter option has to be the case.32 The anonymous author of BS 226/28-30 seems to compare the Basilica text and a text by Anonymus. In the Anonymus text, the author apparently finds the words τῶν μαγήστρων with τῶν ἐταιρείων in stead of τῶν μαγήστρων (without τῶν ἐταιρείων) in the Basilica text. In this comparison, the words τῶν ἐταιρείων are an ‘addition’ (‘πρόσ’κειται). In fact, these words are lacking in the Basilica text.

29 See note 3 above.
31 In the Basilica the combination πρόσκειται εἰς occurs 90 times: Πρόσκειται εἰς τὸ κατὰ πόδας (63), πρόσκειται εἰς τὸ Πλάτας (16), πρόσκειται εἰς τὸν Κύριλλον (5), πρόσκειται εἰς τὸν Ἀνόνυμον (3), πρόσκειται εἰς τῶν Ἰνδικά (3).
32 See for other examples sch. 2 ad B. 38,3,32 = C. 5,51,7 (BS 2217/18; Thalelaeus) and sch. 2 ad B. 41,1,96 = C. 6,50,2 (BS 2443/20; Thalelaeus). In a few cases the words occur not only in the mentioned text, but also in the Basilica text; cf. e.g. sch. 5 ad B. 60,51,8 = D. 48,19,8 (BS 3881/11-12).

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The second question is why the word ἐταρεία is used, and not κοινωνία. The solution has to be found in the magister. This magister only occurs in a not profit seeking partnership, as in D. 3,4,1,14 and D. 37,1,3,4, but not in D. 17,2 (pro socio).

Striking is also the interlinear (new) scholion (from Ca), which is placed in the Scheltema edition at fragment 15, but in fact belongs to fragment 14. This scholion is actually situated between the fragments 14 and 15:

sch. Ca I § ad B. 11,1,15 = D. 2,14,15 (BS 227/2; anonymous): Zήτει βῆβ. ζ’ τίτ. β’ περὶ τῶν ἐταρειῶν. (…).

Seek book 7, title 2 about the ἐταρεία. (…)

In the manuscript itself, one can – with difficulty – also read ζ’ instead of ζ. This would mean that the former reference could correspond with Digest title 47,22 which reads de collegiis et corporibus. In this case, title ζ’ has to be read as λζ’.

The question remains whether in Ca the word ἐταρεία is left out, or whether this word simply does not appear in the Basilica text. This latter option seems to be the case. As a result of the above remarks concerning BS 226/9-21 and BS 226/28-30 in (the older manuscript) Ca, it is by all means possible that the word ἐταρεία was inserted in the Basilica text of P. The addition, which is brought up in Ca, can actually be found twice in P. The first time, ἐταρεία occurs in the Basilica text we discussed above, viz. B. 11,1,14 = D. 2,14,14 (BT 629/12-13). The second time, we find ἐταρεία in the scholion at B. 11,1,14. The latter scholion is almost identical to a scholion in Ca, viz. sch. Ca 3 (BS 226/24-27). However, in P the word ἐταρειῶν, lacking in Ca, is added to the word μάγαστροι. Thus, unlike the other Basilica fragments with ἐταρεία, B. 11,1,14 (= D.

34 See § 2.1 above.
35 See § 3 below.
37 Cod. Cosil. gr. 152 fol. 13v (see note 25 above).
38 Probably, one can also think of the Digest reference βῆβ. ζ’ τίτ. β’. This reference corresponds with D. 17,2 (pro socio). If this is correct, it is striking the author of the new scholion refers to a Digest fragment, and not to a Basilica fragment, as he does at the end with κορ. and θεμ.
39 See for the similarities between Ca and P for example also H. de Jong, ‘The actio utilis institoria and its variants in Byzantine law’, FM XII, § 3.3 (forthcoming).
40 Sch. P 1 ad B. 11,1,14 = D. 2,14,14 (BS 344/24-27; anonymous).
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2,14,14) causes obscurity as regards the question whether the word ἑταρεῖα was originally used in the Basilica.

2.3. B. 60,32,4 (= D. 47,22,4)

The third fragment is B. 60,32,4, which concerns a discussion about the Law of the Twelve Tables (8,27) by Gaius. 41 This fragment occurs in the codex Parisinus graecus 1350 (Pe) which dates from the twelfth century: 42

D. 47,22,4: Comrades are those who belong to the same association, what the Greeks call an ἑταρεῖα. (...). 43

B. 60,32,4 = D. 47,22,4 (BT 2938/3-4): Gaius. Ταῖς θεμιταῖς ἑταρείας θεμιτὰ συμφονεῖν ἔχοντι.

By Gaius. With permitted ἑταρεῖα it is allowed to make permitted agreements.

The proper translation of ἑταρεῖα occurs as a remark at B. 60,32,3, 44 which scholion Fleckner did not notice:

sch. Pe 1 ad B. 60,32,3 = D. 47,22,3 (BS 3620/12; anonymous): (...). Ταῦτα δὲ τὰ συνέδρια καλοῦσιν "Ἐλληνικά ἑταρείαις. (...).

(...). These councils, the Greeks call ἑταρεῖαι. (...).

In this scholion, ἑταρεῖα is characterized as συνεδρία, 45 and not described in such terms as κοινωνία (or σύστημα), which one might have expected. 46

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41 Brunt is of the opinion that the reason for the appearance of ἑταρεῖα in this fragment is the ignorance of the law to which Gaius refers: cf. P.A. Brunt, ‘Publicans in the Principate’, in: Id., Roman imperial Themes, Oxford 1990, 354-432 (368 nt. 53). This assumption is enfeebled in § 4 below.
42 See RHBR, I, No. 163, fol. 154r.
43 D. 47,22,4: Gaius libro quarto ad legem duodecim tabularum: Sodales sunt, qui eiusdem collegii sunt: quam Graeci ἑταρεῖα vocant. (...). It is remarkable that Accursius explicitly equates this fragment with societas: Gl. sodales vocant ad D. 47,22,4: id est, societatem.
44 A remark at B. 60,32,4, viz. sch. 1 (BS 3620/27-3621/4) uses the same word ἑταρεῖα, but this remark probably refers to one of the previous fragments.
45 The word συνεδρία also occurs in the meaning of ‘assembly’ (coetus, conventus); see the remarks at D. 48,4,1,1: συνεδρία equated with συναγωγή (sch. 6 ad B. 60,36,1 = D. 48,4,1 (BS 3670/25-26; anonymous) and sch. 10* ad B. 60,36,1 = D. 48,4,1 (BS 3671/3-21; anonymous)). It also (rather)
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It is striking that our third fragment (B. 60,32,4) is adopted in a new scholion at B. 12,1,55 (= D. 17,2,57), 47 albeit that the word ἐταιρείας is replaced by the term συμφονίας. 48 At the beginning of this new scholion, the word ἐταιρεία is nevertheless used but, referring to B. 60,32,3, it has a similar meaning to σύστημα. 49

3. The unexpected κοινωνία

In his article, after discussing the Basilica fragment 8,2,101 with the corresponding remark, Fleckner refers to the ambiguous Basilica fragments already mentioned in the introduction. 50 In fragments where, according to Fleckner, one would expect ἐταιρεία, it occurs with the meaning of ‘council’ (consilium): see for example sch. 7 ad B. 8,1,26 = C. 2,7,11 pr. (BS 78/1-3; anonymous). See also Burgmann, ‘Das Lexikon ύποθ‘ (note 20 above), 311 (K 16): consilium κοινωνίαν βοηθήματος, συνέδριαν, and L. Burgmann, ‘Das Lexikon άδετ - ein Theophilologussaur‘, FM VI (1984), 19-61 (K 7); consilium κοινωνίαν βοηθήματος, συνέδριαν ἐκ φανερών άνδρων. Cf. ἐταιρικά συστήματα (B. 60,32rubr. and 60,32,1; BT 2937/3 and 6) for collegia sodalicia (D. 47,22,1 pr.) and συνόρια ἐταιρείας in the remark at this (sch. 1 ad B. 60,32,1 = D. 47,22,1; BS 3619/5). Cf. PWRE, s.v. σύστημα col. 1834.

46 The word συνέδρια is used, though rarely, as a translation for collegium, viz. in a remark at D. 27,1,17,3: sch. 2 ad B. 38,1,17 = D. 27,1,17 (BS 2172/23-28; anonymous). D. 27,1,17,3: Callistratus libro quarto de cognitionibus: Non omnia tamen corpora vel collegia vacationem tutelarum habent, quamvis muneribus municipalibus obstricta non sint, nisi nominatim id privilegium eis indultum sit. Cf. the corresponding Basilica text: B. 38,1,17 = D. 27,1,17 (BT 1688/2-5). See also συνόρια in sch. 2 ad B. 60,32,3 = D. 47,22,3 (BS 3620/18-22; anonymous).

47 Sch. Ca 1 ad B. 12,1,55 = D. 17,2,57 (BS 493/13-17; anonymous).


49 Sch. Ca 1 ad B. 12,1,55 = D. 17,2,57 (BS 493/14-17; anonymous): (…) ἀλλά οὐδὲ ἑταίρεια ἦγον σύστημα παρόνων συνόρια, ἐς κεφ. γ‘ τοῦ λ‘ τιτ. τοῦ ζ‘ βιβ. ἀλλὰ καὶ τὰς θεματικὰς συμφωνίας θεματικά συμφωνίαν ἔχοντα, ἐς κεφ. δ‘ τοῦ αὐτοῦ βιβ. καὶ ττ. See also BT 2938 app. crit. ad l. 3 ἑταίρειας: ‘Περί δε, διδύμων ΠΣ, συμφωνίας BS‘. For the fragmentary ΠΣ, cf. H.J. Scheltema/D. Holwerda/N. van der Wal, [edd.], Basilicorum Libri LX, Series A Volumen VIII: Textus libri LX, Groningen 1988, vi-xv. Cf. σύστημα and other organizational forms in Maniatis, ‘Τhe Domain of Private Guilds‘ (note 16 above), passim. See also σύστημα and ἑταίρεια in another (negative) meaning Ecl.B. 9,1,16 (= D. 49,1,16) in § 4 below.

50 See also Von Gierke, Das deutsche Genossenschaftsrecht (note 22 above), 43 nt. 22: ‘Wie dem aber auch sein mag: im Corpus juris civilis werden unzweideutig gewisse als ‘corpora‘ anerkannte Vereinigungen mit dem Namen ‘societas‘ belegt (l. 1 pr. D. 3,4, l. 3 § 4 D. 37,1, l. 22 D. 46,1, l. 31 § 1 D. 47,2) (…)‘ and CIMMA, Richerche sulle società di publicani (note 22 above), 190ff. Del Chiaro, Le contrat de société (note 22 above), 222-223 nt. 1: ‘D’ailleurs la preuve tirée des Basiliques n’a par elle-même aucune valeur, il faudrait admettre la substitution dans plusieurs textes: D. 37,1,3,4; 46,1,22; 47,2,31,1‘.
κοινονία appears instead.\textsuperscript{51} It concerns the fragments B. 40,1,3,4 (= D. 37,1,3,4),\textsuperscript{52} B. 26,1,22 (= D. 46,1,22)\textsuperscript{53} and B. 60,12,31,1 (= D. 47,2,31,1).\textsuperscript{54} Based on the following argument, this expectation of Fleckner – ἔταρχεῖα instead of κοινονία – is not plausible. The rare use of the term ἔταρχεῖα should be originally sought in the teachings of a sixth century antecessor. This hypothesis can explain the non-appearance of ἔταρχεῖα. If the origin of the Digest fragments (D. 37,1,3,4; D. 46,1,22 and D. 47,2,31,1) corresponding with the Basilica fragments above-mentioned (without ἔταρχεῖα) is studied, it has to be concluded that all these books belong to the private study of a sixth century law student. These books are the so-called τὰ ἐξτραπόδων βιβλία.\textsuperscript{55} In their teachings, the antecessores did not deal with these books. The quite literal Greek translation by Dorotheus was probably used for studying these books.\textsuperscript{56} Apparently, Dorotheus translated the term societas into κοινονία, and not into ἔταρχεῖα.\textsuperscript{57} In the lexicons, societas – though not as a lemma – only occurs as κοινονία.\textsuperscript{58} In the next paragraph, it will be clearly expounded that the translation of societas into κοινονία in Byzantine law is the only correct one.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{51} Fleckner also mentions D. 2,14,14 as obscure fragment (Fleckner, \textit{Antike Kapitalvereinigungen} (note 1 above), 404). In this fragment ἔταρχεῖα appears instead of κοινονία (see § 2.2 above). Except Brunt (Brunt, ‘Publicans in the Principate’ (note 41 above), 368 nt. 53), none of the other authors (see note 550 above) mentions this fragment in the enumeration as parallel to D. 3,4,1pr. and D. 47,22,4. This is not surprising, because a statement of corpus or collegium is lacking. See also Malmendier, \textit{Societas publicanorum} (note 33 above), 252-253.
\item \textsuperscript{52} BT 1784/17-18; sch. 5 and 6 ad B. 40,1,3 = D. 37,1,3 (BS 2355/6-10, anonymous; BS 2355/11-13, anonymous). D. 37,1,3,4: Ulpianus libro trigesimo nono ad edictum: A municipibus et societatibus et decuris et corporibus honorum possessor adgnosci potest. (...) Cf. Gl. municipibus ad D. 37,1,3,4: & corporibus et decuriorum. Et est differentia: quia societas est, quando non simul cohabitant: Collegium, quo sit: Corpus est genus.
\item \textsuperscript{53} BT 1245/24 (the scholia at this fragment fail). D. 46,1,22: Florentinus libro octavo institutionum: Mortuo reo promittendi et ante aditam hereditatem fideiussor accipi potest, quia hereditas personae vice fungitur, sicuti municipium et decuria et societas.
\item \textsuperscript{54} BT 2828/12 (τινὸς συντιμίτως); sch. 1 ad B. 60,12,31 = D. 47,2,31 (BS 3371/15; anonymous). D. 47,2,31,1: Ulpianus libro quadragesimo primo ad Sabinum: Si quis tabulas instrumentorum rei publicae municipii alicuius aut subripuerit aut interleverit, Labeo ait furti eum teneri: idemque scribit et de ceteris rebus publicis deque societatis.
\item \textsuperscript{55} Van der Wal/Lokin, \textit{Delineatio}, 38ff.
\item \textsuperscript{56} See for general characteristics F. Brandsma, \textit{Dorotheus and his Digest Translation}, Groningen 1996, 278-293.
\item \textsuperscript{57} See for example sch. 1 ad B. 60,12,31 = D. 47,2,31 (BS 3371/15; anonymous).
\item \textsuperscript{59} That sixth century remarks may have ended up in the Basilica text is not a new thought. Cf. for example J.L. Barton, ‘The lex Aquilia and decretal actions’, in: A. Watson, (ed.), \textit{Daube noster. Essays in legal history for David Daube}, Edinburgh 1974, 15-25 (22ff.). In this article, a remark by
\end{itemize}
Meaning of the term ētāρɵεía in D. 47,22,4

To understand why the term ētāρɵεía for societas as a juridical term rarely occurs – and is even incorrect – it is necessary to investigate the use and the meaning of the term ētāρɵεía in D. 47,22,4.60 In D. 47,22,4, the term ētāρɵεía, by analogy with sodalis, has to be equated with sodalitas,61 a term which, for that matter, is never used in the Digest.62 In view of the context of the text (the Law of the Twelve Tables (451 BC)), this is not striking. It seems to be an old (archaic) term, not used anymore in Justinianic law. Sodalitas is, as it turns out at the end of the fragment, a legitimate club, usually social and religious.63

Concerning the context, the – old – term ētāρɵεία was a social, religious or political community before Justinianic law. The term has nothing to do with the legal concept of societas (κοινωνία) in Justinianic law. Since ētāρɵεία rarely occurs in Byzantine law, the hypothesis for the appearance of ētāρɵεία in the Basilica must be that, as a result of the Digest text 47,22,4, a sixth century antecessor had breathed new life into ētāρɵεία as juridical term for societas by using the term at D. 3,4,1pr. In doing so, this antecessor emphasized the special sort of partnership, not a profit seeking one.64 Finally, the term ētāρɵεία arrived in the Basilica text (B. 11,1,14 = D. 2,14,14).

To prove that the meaning of ētāρɵεία in D. 47,22,4 is archaic, it is necessary to investigate other Byzantine sources. The – as far as I can examine – only fragment with ētāρɵεία in a not yet mentioned Byzantine law source confirms my hypothesis.65

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60 In doing so, I do not give a thorough and detailed explanation of the historical development of the term ētāρɵεία in the entire classical literature.

61 See § 2.3 above.

62 Ciulei refers to the historical development of sodalitates. These sodalitates were originally (official) religious communities, which could be entrusted by the state to gentes. The members were connected to each other by profession or neighbourliness. Sometimes Roman citizenship was sufficient. Together with the disappearance of the old political system of the Romans, the interest in these religious communities fade away. Only political communities acquiring the term sodalitates were created. They were equated with collegia sodalicia and became general in nature. These collegia were called ētωπιον, as Plinius mentions (see note 13 above). Ciulei states that by sodalitas Gaius meant each collegium; G. Ciulei, ‘D. 47.22.4’, SZ 84 (1967), 371-375 (373-374). Cf. PWRE, s.v. Sodalitas col. 785-786.

63 See for example Cic. Planc. 15,37. Cf. also Plu. Moraalia 787 E (note 13 above). For the eldest use of ētωπεία see PWRE, s.v. 'Ētωπεία col. 1373.

64 See note 49 above.

65 See for another use by the Greek historian Dio Cassius, Stolte, ‘The Lexicon Μοραλία’ (note 58 above), 377 (Γ 46).
loga Basilicorum, an extensively commentated synopsis of the first ten books of the Basilica compiled most likely in Constantinople in 1142,\(^{66}\) the term ἑταρεία occurs once in a scholion at 9,1,16, which corresponds with D. 49,1,16.\(^{67}\) In this fragment, various persons who are qualified for direct punishment are mentioned separately:

Ecl.B. 9,1,16: (…) ei γάρ τινες κατηγορηθείσαι ὡς λῃσταί καὶ ἑλεγχθῶσιν ἢ ὡς ἐρεθίζοντες (…) ἢ ὡς συνιστώντες φατρίας ἦτοι ἑταρείας καὶ ἁσανεὶ συστήματα χάριν τοῦ κλήτειν (…).

(…); for when some people should be accused, such as robbers, and are condemned, or such as agitators (…) or such as they who form a φατρία i.e. an ἑταρεία as it were a σύστημα to steal (…).

The gathering gang is equated with ἑταρεία and σύστημα.\(^{68}\) In addition, it is stated that this has to do with stealing. Apparently, σύστημα (and ἑταρεία) also had a positive connotation and the negative connotation had to be explained explicitly. We also find the same words – now συνιστών φατρίας (factionem habent) – without the term ἑταρεία in B. 60,51,11,2\(^{69}\) (= D. 48,19,11,2).\(^{70}\) In this case too, it concerns a gang which commits a crime.\(^{71}\) In these fragments, ἑταρεία is not associated with the legal concept of societas (κοινονία).

There is another argument for the hypothesis that ἑταρεία is not commonly used for a specific societas in Byzantine law, and that this term must have originated from a sixth

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\(^{67}\) D. 49,1,16: Modestinus libro sexto differentiarum: Constitutiones, quae de recipiendis nec non appellationibus loquantur, ut nihil novi fiat, locum non habent in eorum persona, quos damnatos statim puniri publice interest: ut sunt insignes latrones vel seditionum concitatores vel duces factionum.


\(^{69}\) BT 3074/19-20.

\(^{70}\) D. 48,19,11,2: Marcianus libro secundo de publicis iudiciis: Delinquitur autem aut proposito aut impetu aut casu. proposito delinquant latrones, qui factionem habent: impetu autem, cum per ebrietatem ad manus aut ad ferrum venitur: casu vero, cum in venando telum in feram missum hominem interficit.

\(^{71}\) Cf. note 22 above.
century antecessor. From D. 3,4,1pr. – and indirectly from the speech Pro Sextio by Cicero (106-43 BC)\textsuperscript{72} –, it can be deduced that societas vectigalium\textsuperscript{73} in classical Roman law should be entitled to ἔταρεια (or even was?)\textsuperscript{74}.

D. 3,4,1pr.: (…). Corporate bodies of this sort are permitted in only a few cases. For example, partners in tax farming,\textsuperscript{75} gold mines, silver mines, and saltworks are allowed to form corporations. (…).\textsuperscript{76}

This fragment with an example of a permitted societas, a societas vectigalium, is translated into Greek by [κοινονία] ἔπι δημοσίων τελών.\textsuperscript{77} And when the remaining – all

\textsuperscript{72} Cic. Sest. 14,32: Erat igitur in luctu senatus, squalebat civitas publico consilio veste mutata, nullum erat Italiae municipium, nulla colonia, nulla praefectura, nulla Romae societas vectigalium, nullum collegium aut concilium aut omnino aliquod commune consilium quod tum non honorificentissime de mea salute decrevisset: cum subito edicunt duo consules ut ad suum vestitum senatores redirent. (…).

\textsuperscript{73} In literature of classical Roman law, the concept of societas vectigalium always denotes societas publicanorum which do not appear in the Digest. See for example M. Kaser, Das römische Privatrecht, I, München 1971\textsuperscript{2}, 308: ‘(…); schwächer in den Vereinen der Unterbeamten (decuriae apparitorum), in den Gesellschaften der Steuer- und Zollpächter (societates publicanorum), in den gleichfalls sehr alten Berufsverbänden (Zünften) der Handwerker, Kaufleute, Reeder usw.; schließlich in den Begräbnis- und Kultvereinen, zu denen unter dem Prinzipat noch die christlichen Kongregationen treten.’, and also R. Zimmermann, The Law of Obligations. Roman Foundations of the Civilian Tradition, Oxford 1996, 468: ‘Furthermore, there was the interesting phenomenon of the societates publicanorum (or vectigalium), financial companies in which the farmers of public revenue organized themselves. Despite their name, they were corporate entities of public law rather than private partnerships’. See also M.R. Cimma, Ricerche sulle società di publicani, Milano 1981; Malmendier, Societas publicanorum (note 33 above) and F.-S. Meissel, Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages, Frankfurt/Main 2004, especially 205-217.

\textsuperscript{74} Cf. Fleckner, Antike Kapitalvereinigungen (note 1 above), 401/402 nt. 287.

\textsuperscript{75} See D. 50,16,17.1. The word publica is related to the Roman people (D. 50,16,16), to which ἔταρεια – originally – refers.

\textsuperscript{76} D. 3,4,1pr.: Gaius libro tertio ad edictum provinciale; (…). paucis admodum in causis concessa sunt huiusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere vel aurifodinarum vel argentifodinarum et salinarum. (…).

\textsuperscript{77} B. 8,2,101 = D. 3,4,1 (BT 433/20-23). It should be noticed that this combination in the Basilica rarely explicitly occurs; cf. sch. Ca 23 ad B. 12,1,61 = D. 17,2,63 (BS 506/2; Cyriillus); sch. Ca 24 ad B. 12,1,61 = D. 17,2,63 (BS 506/7; Stephanus) and sch. Ca 47 ad B. 13,1,5 = D. 13,6,5 (BS 613/29-30; Anonymus). In a remark at D. 2,14,14, κοινονία is equated with ἔταρεια and τέλος. Further investigation is called for in this. The question is in what way the classical Roman and Justinianic
to be taught by the antecessor – Digest fragments from D. 17,2 (pro socio) with (explicitly) societas vectigalium are studied,78 the Greek words mentioned are always used. These words are never combined with the – expected – ἑταύρεια.

One can conclude that the term ἑταύρεια in Byzantine law for a societas (vectigalium) was not common and incorrect. The appearance of the term ἑταύρεια – in a context different from D. 47,22,4 – was based on a comprehensible mistake. As a result of this mistake the term assumed a life of its own.

5. Conclusion

In literature the (non-)appearance of ἑταύρεια in the Basilica is obscure. On the one hand, ἑταύρεια arises unexpectedly for societas, on the other hand the term κοινονία in the same context is inexplicably used. The reason for this disproportion has to be found in the misunderstanding of the historical development of the meaning of ἑταύρεια and its tradition. It appears to concern a term which has been taken out of its own – old and archaic – context of D. 47,22,4. This gave ἑταύρεια a different – incorrect – meaning. The term could indicate a religious, social or political community, or even a gang. It certainly does not fit in with the ordinary meaning of the legal concept of societas (κοινονία). Since ἑταύρεια only occurs – with the exception of D. 47,22,4, in which the term is explicitly mentioned – in Basilica fragments corresponding with Digest books which were taught by the sixth century antecessores in their teachings, it has to be assumed that the (mis)use of the term, to emphasize the special sort of partnership, also originated from that time. The term ἑταύρεια with its specific archaic meaning from D. 47,22 (de collegiis et corporibus), because of its place in this title, was probably taken as a general organizational form. Consequently, with this – incorrect – meaning, the term is used in the discussion of two other Digest fragments. Owing to lack of understanding, the archaic ἑταύρεια finally got mixed up in the Basilica text.

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78 D. 17,2,5pr. (= B. 12,1,5; BT 677/5); D. 17,2,59pr. (= B. 12,1,57pr.; BT 688/2-3); D. 17,2,63,8 (= B. 12,1,61,8; BT 689/18-19); D. 17,2,65,15 (= B. 12,1,63,15; BT 692/3). The same holds for the remarks at these fragments. See for example sch. Ca 2 ad B. 12,1,5 = D. 17,2,5 (BS 454/16-17; Stephanus) and sch. Ca 1 ad B. 12,1,57 = D. 17,2,59 (BS 496/5-14; anonymous).