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Introduction

During a symposium at ELTE University in Budapest in June 2017, we celebrated the launch of the Casebook on European Law and Private Law. This book has appeared with Hart Publishing, Oxford (now an imprint of Bloomsbury Publishing). It is a volume in the well-known Series *Ius Commune Casebooks for the common law of Europe,* and that is correct because it is a book on comparative law; however, it differs in some respects from other volumes in the Series.

The book has been written by an international group of some fifteen jurists covering ten legal systems of EU member states, who originate from Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Sweden and the UK. I may say that we have worked quickly: between 2012 and 2015 we had seven plenary meetings of two days and one meeting of a week's length on the chapters to be edited by Carla Sieburgh, Wouter Devroe and me, and the secretary of our Group, Roel van Leuken. The real work, namely the writing of the chapters, occurred between those sessions. It was a most interesting experience, in particular because we had to find our way along paths largely untrodden between the lands of European law and national private law.

The book is about the influence of European Union Law on national private law. It is based on four choices.

I. We have been concerned with the law in force, not with law in the making; with soft law, with principles of European contract law and the like. Studies in those fields are often conducted under the flag of European private law. They are a part of comparative law, based on the comparison of the different systems of private law in force in Europe and they sketch a possible future common private law across Europe. In our endeavour, we were not concerned with that type of European private law. We decided to give preference to European law in force, the law of the European Union, and the ways in which that law interacts with the private law in force in the EU member states.

II. Most private law of European origin is condensed in secondary law, in particular directives. Think of consumer law, of labour law, of company law, of copyright law. Those directives are implemented in national laws in the member States of the Union. After that implementation they may also be called European private law, but in a sense different from

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the previous one, because they are European private law in force. In principle, this Casebook does not deal with directives and implementing national laws, although subject to some features that are interesting precisely because these laws find their origin in EU law. Those interesting features belong to the realm of primary EU law, e.g. harmonious interpretation, references by national Courts to the EU Court of Justice (CJEU) and *Francovich* liability.

III. Now we hit the mark: the third and most basic choice is that this book is concerned with primary EU law and its interactions with national private law. In our view, European private law in force is not only private law governed by sources of European secondary law. Primary law must also be taken into account when studying the impact of EU law on national private law. Restricting ourselves to primary EU law is the most original choice: describing the application of primary European law to private law relationships.

The objective pursued by this book is to show the community of lawyers, especially private lawyers, what they too often omit in their analyses, the application of primary EU law in a horizontal situation. This omission is quite understandable. Primary European law is nearly exclusively public law. Its effects on private law are uncertain and obscure, as they are predominantly laid down in the case law of the CJEU. That case law is often unclear and unsystematic. And there are hardly any systematic books on the subject.

IV. And there is a fourth choice. As I mentioned, the interactions between primary EU law and private law are dealt with in the case law of the EU Court of Justice in judgments that provide answers to questions referred to the CJEU by national courts. After the CJEU has issued its answers, the case continues in the member state from where the preliminary question originated. Strange as it may seem, many of the follow-up cases in the national jurisdictions are not published, at any rate not across the EU in accessible languages, and consequently they are not studied in other member states. And what is true for the follow-up cases is even more true for other national case law, applying EU law without a reference to the CJEU. Frankly speaking, we do not know much about how EU law is applied by national courts across member states. From a recent comparative study with a limited scope – between Dutch and Belgian case law – it became clear that national courts deal with EU law in quite different manners. So the final choice was to concentrate on national case law and study the differences between civil courts applying EU law in EU member states

For that reason we choose the formula of a casebook and we were very happy to find a place in the famous Series of Casebooks on the Common Law of Europe founded by Professor Walter van Gerven, until 2015 the living example of a felicitous combination of EU law and private law scholarship. He passed away while we were making this book ready for the press. So in the end this is a book of comparative law, but not based on a comparison of national private law systems, but (starting from EU primary law as a point of reference) finding out the ways national private law courts deal with EU primary law.

Each chapter starts with a brief description of the actual state of affairs in the case law of the CJEU. Then, in order to find a common approach to deal with the national cases, we proceeded on the basis of a distinction made between a number of ways in which a rule of EU

law may impact on a national private law situation. This distinction is set out in Chapter 1 of the Casebook. We distinguish between direct horizontal effect and various types of indirect horizontal effects. By direct horizontal effect, we mean that a rule of EU law directly impacts on the content of a relationship between individuals, creating, modifying or extinguishing rights or obligations between those individuals. By indirect horizontal effects we mean several distinct types of impact, which should be carefully distinguished, e.g. interpreting concepts or rules of national private law in conformity with EU law or by assessing the compatibility of national legislative rules with rules of EU law, the result of which may affect the relationship between individuals. These concepts of direct and indirect horizontal effect are not cast in stone; everyone may categorise them according to his or her own preferences, but the message here is that there must be some kind of categorisation, otherwise it will be much more difficult to understand how the impact of EU law on private law is structured and which different types of impact exist.

After this introductory first chapter there are six chapters dealing with the major building blocks of which primary EU law is composed (from the perspective of our field of research). These chapters deal with

– competition law (art 101 ff TFEU) (Chapter 2);
– horizontal effects of the fundamental freedoms (Chapter 3);
– the Treaty rules on non-discrimination, in particular art. 18 (nationality) and 157 TFEU (equal pay for men and woman) (Chapter 4);
– the general principles of EU law (effectiveness, legal certainty, proportionality, non-discrimination, abuse of rights, unjust enrichment etc., which – insofar as they cover fundamental rights – must nowadays be viewed in relationship with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and Fundamental Freedoms Rights ECHR) (Chapter 5);
– rules of EU primary law relating to the implementation, interpretation and effects of private law directives (Chapter 6); and
– the *ex officio* interpretation of rules of EU law by national courts (Chapter 7). Here, for systematic reasons, we deal both with primary law (art. 101 TFEU) and directives, in particular the well-known case law of the CJEU on consumer protection directives. We think that, in order to understand the phenomenon of *ex officio* interpretation, it is helpful to consider the connection between primary and secondary EU law.

What this book wants to convey is our view that it is important for private law jurists to familiarise themselves with at least part of primary EU law. That knowledge is important for lawyers working in the practice of the law as well as for judges. Any lawyer and any court dealing with private law cases may come across problems of EU law reaching out well beyond the clearly defined domains of private law directives.

I would like to add that it works also the other way round: EU lawyers would be well advised to become more acquainted with private law. On the one hand, private law arguments can contribute to the development of EU law. On the other, the effectiveness of EU law can be enhanced by using the instruments and remedies of private law.

During the symposium we have tried to elucidate these propositions in three programme parts on fundamental freedoms, competition law and *ex officio* application in relation to the implementation of directives. Each of these parts consisted of an introduction given by a member of our group, followed by a reaction from one or several experts from outside the group.

It is the intention of the editors to continue to follow the developments addressed in this book. Users of the Casebook are invited to get in contact with us, either directly or through the website of the Casebook Project (www.casebooks.eu), to share with us the developments in the case law of their national jurisdictions which might be interesting for a second edition of this book.