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Taking European (Private) Law Seriously

I The Flexible System of Private Law

Normally, we divide our legal systems into *public law* and *private law.* Although the public-private divide as a conceptual framework for law may be held artificial and obsolete, the structural distinction of legal relationships between individuals on the one hand and legal relationships of individuals and public authorities on the other hand is useful from a didactic point of view and also because the relationships of the individual *vis-à-vis* the legislator and administrative bodies are certainly different than those toward other individuals. Conceptualising, as the book does, legal relationships that establish rights and obligations between individuals as 'horizontal relationships', contrasted with 'vertical relationships' between individuals and public authorities avoids the difficulties emerging from the public-private divide. I find the conceptual framework of the book, distinguishing *direct* and *indirect* effects of European law in a horizontal legal relationship, as a crucial and far-reaching one, especially because it allows private law to be approached as a flexible system. As it has been described by *Walter Wilburg,* private law is a system built upon open rules,[1] which leave a wide power to the courts and allow them to establish and use their proper guidelines to adjudicate cases and adapt the practice to changing social circumstances. Private law, as a law in action, is a flexible system in which the courts apply complex criteria in the course of deciding cases. This flexible system of open rules allows the courts to assess the case by weighing the underlying and relevant social values as well. In this model, the judgements of the courts are the result of weighing the relevant evaluation factors. The values that are to be considered under the given circumstances have different weights in each case. The basic evaluation, which is provided normally (but not necessarily) by the legislator, can be overruled by the courts on the basis of other relevant values if they outweigh the basic evaluation. The abstract rules, wide concepts and general clauses of private law make it possible to apply this flexible system while maintaining consistency in the conceptual framework of written law.

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1 Walter Wilburg, *Entwicklung eines beweglichen Systems im Bürgerlichen Recht* (Rede gehalten bei der Inauguration als Rector Magnificus der Karl-Franzens-Universität in Graz am 22 November 1950) (Karl-Franzens-Universität 1950, Graz) and Walter Wilburg, 'Zusammenspiel der Kräfte im Aufbau des Schuldrechts' (1964) 163 AcP 346–379, 364ff.; B. A. Koch, 'Wilburg's Flexible System in a Nutshell' in H. Koziol, B. C. Steininger (eds), *European Tort Law 2001 – Tort and Insurance Law Yearbook* (ECTIL 2002, Wien, 545–548) 545ff.

II Legislation vs Court Practice

Scholarship mostly limits itself to analysing directives and relevant regulations while addressing the effects of European law in private law. Many times, this approach prevents the professional community not only from coming to useful conclusions regarding the impact of European law on private law but also from understanding the nature of private law and the mechanisms that shape it. Such a limited approach also would prevent us from understanding what *European* law is. Understanding the *nature of indirect effects* in horizontal relationship opens the way for mapping such effects, not only over an unusually wide range (covering such general and central elements of private law as abuse of rights or unjust enrichment, and going beyond competition law, contract law and non-discrimination) but it also opens the way for an in-depth analysis as well. Although we normally focus on what the content of law *is*, it is also important what the content isn't. The preparatory phase of the Anti-Trust Damages Directive revealed that introducing *punitive damages* was rejected by the European jurisdictions. Such a measure of enforcement is incompatible with national laws. The Commission White Paper on Damages Actions for Breach of the EC antitrust rules adopted on 2 April 2008[2] explicitly abandoned the idea of introducing multiple damages, which had been suggested in the Commission Green Paper on Damages actions for breach of the EC antitrust rules,[3] as a result of consultation because, under the consultation procedure, most of the respondents suggested that damages should be regarded as a compensatory instrument.[4]

Having regard to the model of the flexible system in private law, the private law of the European law cannot be assessed without analysing the relevant court practice of the CJEU and the national courts. That is why the impacts of the practice of the CJEU can be extremely far-reaching; for example, in Hungary, the liability for damages of the Member State for failure to implement directives, established in the *Francovich* case,[5] is the strongest argument in professional discussions for establishing the liability of the State for damages for improper legislation.[6] From this angle, the practice of the CJEU is an important factor in revisiting state immunity doctrines at national level, pointing at the substance of the rule of law and sovereignty, which is the *raison d'être* for the European Union too. As the result of the in-depth analysis attempted by the editors and the contributors, the book aims to reveal the *impacts* of European legislative measures at the *level of national law* as well. This approach is of fundamental importance as well: if one assumes that European law is the law of the European community, which definitely is how we would like to see it and which implies that Europe *is* a community, European law is not to be contrasted with national laws but national

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2 COM (2008) 165, 2.4.2008.

3 COM (2005) 672, 19.12.2005.

4 Commission Staff Working Paper SEC (2008) 404, 2.4.2008 nr. 182.

5 Case C-6 and 9/90 *Francovich and Bonifaci v Italian Republic* [1991] ECR I-5357.

6 Fülöp Györgyi, 'Az állam kártérítési felelőssége a közösségi jog megsértése esetén' (2003) 5 (5) Polgári Jogi Kodifikáció 18–23.

law and community laws are to be seen as constituting European law. In other words, national law is not outside European law but is part of it. From the internal logic of European law, it would even follow that national laws create European law.

III The Limits of Harmonisation

Harmonisation with legislative measures certainly has its limits, as is clearly presented in company law. The Company Law Directives attempt to harmonise company law without providing a normative concept of company, which results in fragmented regulation on the national level, as different rules are to apply to public limited companies (or companies limited by shares) and private limited companies (or limited liability companies), even on aspects where the differences are not justified by the legal nature of these types of company. Such inconsistency could be avoided at national level, simply by extending the harmonised rules to other company forms, too. The *Rabobank* case also shed a light upon the relationship between national court practice and European legislation. One of the primary aims of the First Company Law Directive was to adopt the German model of unrestricted power of representation of the members of the board (in Art. 9.) by making a distinction between third party relationships and the internal regime. The First Directive did not provide European regulation for the existence of the power of representation but gave protection to third parties. The Directive could not, however, cover abuse of the power of representation or similar concepts under national laws if the third party was aware of the violation of a standard applicable to the company and acted against the interest of the company. In the *Rabobank* case, the CJEU accepted that member states may provide exceptions for cases on conflicts of interest and believed that there is a lacuna concerning those situations where the third party knew or should have known of the conflict of interest (e.g. violation of an internal standard or prohibition).[7]

IV The Role of Indirect Convergence – a Method for Harmonisation?

I think that it is a very important insight that while it is basically the *CJEU that shapes private law* at European level, it however also depends on how we conceptualise 'European Law'. If we do it as a bundle of legislative instruments produced by the regulatory bodies of the European Union, including the Treaties, this is correct. However, if we take the *phenomenon of indirect convergence* into account as well, the landscape is much more complex. National courts as well as national legislators follow the answers given to the same problem in other jurisdictions in Europe and try to adjust themselves to the mainstream. A good example could be the

[7] Case C-104/96 *Coöperatieve Rabobank "Vecht en Plassengebied" BA v Erik Aarnoud Minderhoud* [1997] ECR I-7211.

change of the Hungarian court practice on *wrongful life* claims: the claims of the handicapped child vis-à-vis the doctors for failure to reveal the genetic or teratological harm were accepted in Hungary, but when the Supreme Court realised that such claims, especially after the *Loi Perruche* in France, are rejected in almost all European jurisdictions, it declared that it revised its practice and such claims are no longer accepted in Hungary.[8] Another example could be the liability for 'wrongful trading' in company law and bankruptcy law. While lifting the corporate veil referring to the general clause of prohibition of abuse of rights, the Hungarian Supreme Court explicitly pointed to the relevant practice of German courts and the German doctrine of *Durchgriffshaftung*.[9] By introducing the liability of *de facto* or 'shadow' directors for the debts of an insolvent company, the Hungarian legislator followed the European models.[10]

Sometimes it is rather difficult to establish *if results in national law are the impacts of European law or the situation is the reverse.* The content of most of the directives addressing private law is the result of compromises on the ground of solutions already established in national laws. *Harmonisation is not about innovation but it is about looking for a common denominator in the European legal systems.* The 13/1993 EEC Directive on Unfair Terms in Consumer Contracts has been adopted after the *AGB-Gesetz* in Germany (1976), the *Unfair Contract Terms Act* (1977) in the UK, the *'Scrivener' Act* in France (1978) introduced protection against abusive contract terms in the main national legal systems of the European Community. The approach of the German, the French and the British legislator were not the same: there were significant differences on whether protection was limited to consumers contracts or not, protection was extended to contract terms that were individually negotiated or restricted to standard contract terms and if the main test of unenforceability was unreasonableness or non-compliance with the principle of good faith and fair dealing *(Treu und Glauben).* The intersection of these legislations was the Unfair Contract Terms Directive (1993), except the choice of adopting the German test of good faith and fair dealing instead of the reasonableness test of the British solution. Although the reasonableness test could be seen as considerably different to that of the German 'good faith and fair dealing' one, strong arguments were formulated that this would not have brought significant changes in practice.[11]

[8] Supreme Court, Unificatory Resolution no. 1/2008, 12 March 2008.

[9] Supreme Court, Legf. Bír. Gfv. II. 31.962/1998. sz., EBH 1999. 118.

[10] On the ground of § 33/A subs. (1)–(2) of the Bankruptcy Act, persons who actually influenced the resolutions of the company may be held liable for the company's debts towards the creditors in the event of insolvency.

[11] Elizabeth Macdonald, 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' [1994] Journal of Business Law 441–462.

V Deep Impacts of European Private Law

I agree that a *shortage of knowledge* concerning European law can be an obstacle to implementing and enforcing it. A good example could be *product liability,* where national courts are obviously reluctant to draw the consequences of the *maximum harmonisation* established by the CJEU.[12] According to the CJEU, if the claim falls under the scope of product liability, the national court is prevented from applying parallel regimes of national law, even if the alternative could be more beneficial for the victim. If one takes the conclusion of the judgements handed down by the CJEU seriously, this certainly overwrites the liability regimes of all of the European jurisdictions, even if such far-reaching consequences would presumably go beyond the aims of the European legislator. Such impacts are hardly recognisable in European jurisdictions.

Another important *deep impact* on national law was the CJEU judgement in the landmark *Courage v Crehan* case.[13] The CJEU in this case established that *enforcement of European competition law* has a priority over a doctrine preventing the party from giving voluntary consent to a contract that violated *public policy.* European courts normally maintain doctrines that prevent the party from referring to the invalidity of the contract if the party was aware of the ground of invalidity at time of contracting. As it has been formulated in the famous sentence of Lord Chief Justice Wilmot in a beautiful way, 'all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice' (*Collins v Blantern,* 1767). The CJEU, in *Courage v Crehan,* clearly established that this doctrine is called *in pari delicto* in English contract law but such doctrines are inherent parts of most European jurisdictions under the scope of application of the general clause of *'good faith and fair dealing'.* Overruling national public policy with Community public policy, the CJEU clearly established that English courts (and, consequently, the courts of other Member States) are prevented from referring to this doctrine. If the consequences of the CJEU judgement in *Courage v Crehan* were drawn consistently in Europe, it certainly would have resulted in a fundamental change to an important pillar of contract law in national laws. This did not happen and I don't think that the reason for the reluctance of national courts to implement the consequences of *Courage v Crehan* is simply a lack of awareness of the community of legal professionals. I think that the basic question here is whether the European Union *does have the authority* to introduce such fundamental changes in private law or to destroy the consistency of private law by creating *ad hoc* exceptions to fundamental doctrines of private law. That is, the boundaries of legitimacy of CJEU judgements influencing private law are unclear. The same question of legitimacy concerning compensable non-pecuniary loss was at stake in the *Leitner* case[14] but

[12] Case C-183/00 *Maria Victoria González Sánchez v Medicina Asturiana SA* [2002] ECR I-3901; Case C-52/00 *EC Commission v French Republic* [2002] ECR I-3827; and Case C-154/00 *EC Commission v Hellenic Republic* [2002] ECR I-3879.

[13] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

[14] Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-2631.

the consequences of accepting *lost holiday experiences as a compensable non-pecuniary loss* were much more limited and presumably less important.

For me, one of the most important messages of the approach presented in *the book is the importance of interpretation*. I believe that *interpreting* the norm cannot be distinguished from *making* it. Interpretation is about *establishing the content* of the norm, which is the same as creating it. That is, the requirement of *interpretation* of national law in conformity with a directive can also be seen as a *direct application* and a direct effect. The *specific role of open norms* of national law in this respect, addressed by the contributors as well, is a complex issue and still open for further analyses.

If the norms of European law are of a *mandatory nature,* is a difficult issue and drives us back to the 'opening', i.e., *European law is not private law but public law.* Norms of public law are mandatory in nature. They are not default rules. *If provisions defining default rules* in national law are, however, unclear from this point of view, the internal logic does not help**,** because default rules are also created by the same legislative power as for mandatory rules. For instance, according to the relevant rule of the Hungarian Civil Code, the parties are free to establish rights and obligations in their contract within the limits of mandatory rules of contract law. We also think that a rule establishing rights and obligations between the parties is of a mandatory nature only if the law provides so. The European legislator does not provide such qualifications. That is, it is the task of the national legislator to make sure that European rules would not be interpreted as default rules but as mandatory norms.