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# The Issue of Directives and *Ex Officio* Application of Primary EU Law Through the Prism of the *Ius Commune* Casebook on European Law and Private Law**

## I The *Raison d'Être* of Chapter 6 and 7

This brief paper is dedicated to Chapter 6[1] and Chapter 7[2] of the *Ius Commune* Casebook on European Law and Private Law. They provide an in-depth discussion of both the impact of directives and the effect of *ex officio* application of EU law provisions on national private laws; that is, on private relationships. As the Casebook is prominently devoted to the discussion and assessment of the impact of primary EU law on national private law regimes, the inclusion of these fields is certainly not self-evident, and so the reasons for this editorial decision have to be explained first.

With regard to directives, a main source of secondary EU law, the key question of their application in the Member States is the problem of effectiveness. As for effectiveness, the opportunities of national courts to comply with the directives' provisions – if difficulties may have occurred in the process of implementation they are always handled by the Member States – have a crucial relevance. Needless to say, the various legal techniques developed by national courts in order to handle these deficiencies of implementation have a decisive impact on private legal disputes, as they may enable the parties to invoke provisions of EU law that are contrary to the inappropriate national law implementation of a given directive. From

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** This article is based on my presentations that I gave in the Hague and in Budapest in 2017 on Chapter 6 and 7 of the *Ius Commune* Casebook on European Law and Private Law. [Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon)].

1 Sander van Loock, Ilse Samoy, Jerzy Pisuliński, 'Directives' in Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon) 349–420.

2 Balázs Fekete, Anna Maria Mancaleoni, 'Application of Primary and Secondary EU Law on the National Courts' Own Motion' in Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon) 421–461.

another perspective, deficiencies in the national legislation with respect to the implementation of EU law provisions may be overcome by some judicial techniques to provide a more perfect judicial protection for the citizens of the Union.[3]

On the other hand, the national courts' opportunities to invoke EU law, even if the parties did not refer to them in their claims, may also have a decisive relevance for private law relationships. First, these options may have a key role in the direct effect of EU law being realised, as these judicial techniques may give power to EU law to influence or alter private legal relationships directly, by overriding potentially conflicting national provisions. Second, the *ex officio* application of EU law norms may also lead to the unenforceability or invalidity of private agreements and thus may again seriously affect private contractual relations.[4]

In sum, Chapter 6 and 7 definitely have their role when mapping the impact of EU law in the development of national private laws. Both the judicial techniques of applying directives in the event of deficient implementation and the possibilities of national courts to refer *ex officio* to EU law provisions instead of the parties are to be regarded as two essential channels of EU law that have a direct and perceptible impact on the everyday life of European citizens.

## II The Backbones of Chapter 6 and 7

As a second step, this paper would draft an overview of these chapters, being slightly longer than 100 pages. Chapter 6 was prepared by Sander van Look, and Professor Ilse Samoy, both of whom are members of the Katholieke Universiteit Leuven academic community, and Professor Jerzy Pizuliński, the Dean of the Faculty of Law and Administration at the Jagellonian University in Cracow. The authors of Chapter 7 are from Italy – Anna Maria Mancaleoni, associate professor at the University of Cagiari – and Hungary – Balázs Fekete, research fellow of the Hungarian Academy of Sciences Centre for Social Sciences and senior lecturer at the ELTE Faculty of Law.

In general, as for structure, Chapter 6 is composed of eight subchapters and Chapter 7 has four major subsections. In addition, in line with the general attitude of the *Ius Commune* casebooks, both chapters contain numerous excerpts from primary EU law sources, the case law of European Court of Justice, national judicial decisions, and leading EU law manuals besides the original scholarly contribution of the authors. This alloy of authoritative sources – either of a legal or a scholarly nature – and scholarly discussion helps the reader to gain insight into the various and sometimes divergent views on the issues presented. Overall, these chapters are a good presentation of the discursive and diverse reality of EU law.

[3] Cf. Case C-152/84 *MH Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-00723.

[4] Cf. Case C-8/08 *T-Mobile Netherlands BV, KNP Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529.

Chapter 6 begins with (i) a brief introduction to set the scene and it contains some general remarks on the scope and the terminology used. Then, it analyses in detail the (ii) Member States' obligation to implement directives. This subchapter put an emphasis on the vital question of how to interpret the concept of Member State, which may be a decisive point in a horizontal legal dispute on many occasions. The next (iii) subchapter focuses on the duty of national courts to interpret national law provisions in harmony with the provisions of directives, if necessary, and both the scope of this duty and its inherent limits – with special regard to the prohibition of *contra legem* interpretation – are analysed. As a next step, (iv) subchapter four focuses on those delicate cases when national courts go further than indicated by EU law. These are the special cases when a harmonious interpretation is not imposed by EU law but national courts decide to rely on certain provisions in a directive at their own discretion. Thereafter, (v) subchapter five is about the so-called *ultima ratio* option of national courts if they want to refer to a directive provision: the review of national law provisions against EU law directives. A classic problem of the application of directives is set forth in (vi) subchapter six, as the liability of Member States for the non-implementation of directives is also analysed. Perhaps the most relevant part of this chapter is (vii) subchapter seven, where the authors identify those cases when a directive is implemented more broadly than was originally requested by the EU legislative. Needless to say, the so-called spill-over effect of directives having a considerable impact on a national legal system originates from this phenomenon of voluntary broader implementation. Last, as (viii) a conclusion, the authors emphasise that improperly implemented directives still cannot be invoked in pure horizontal relationships;[5] however, a broad interpretation of the concept of Member State and the duty of harmonious interpretation may be able to bridge, at least partly, this lacuna in the judicial protection of EU citizens.

Compared to Chapter 6 Chapter 7 has a simpler structure. The (i) introduction discusses the issue of national procedural autonomy with respect the general requirements of the EU legal order (the principles of equivalence and effectiveness). The EU law background of *ex officio* application of EU law provisions is presented in the (ii) next subchapter. It drafts the legal basis of EU law with special regard to the so-called Van Schijndel line of case law;[6] to the impact of Article 101 TFEU and its public policy nature, as argued in the famous Manfredi decision;[7] and, finally, to the key role of the consumer contract directive on unfair terms (93/13/EEC). It is widely known that article 6 and 7 of this directive paved the way for national courts to intervene on their own motion and assess contractual clauses in consumer law cases. To illustrate these (iii) the third subchapter is dedicated to the comparative analysis of national case laws and three major patterns by which national courts try to manage the issue of the intervention of certain EU law provisions in the cases at hand are identified. Finally, some (iv)

[5] Van Loock, Samoy, Pisuliński (n 1) 416.

[6] Joined Cases C-430/93–C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.

[7] ECJ Joined Cases C-295/04–C-298/04 *Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al* [2006] ECR I-06619.

conclusive thoughts close the chapter: these argue that direct *ex officio* references to EU law, even though these are only used as illustrative points in the courts' reasoning in many cases, have begun to become an increasingly settled practice in some fields of law in Europe (for instance in the field of consumer protection).

## III The Main Findings

The first main output of Chapter 6 is the analysis of national courts' practice with respect to directives. The rule, as developed by the European Court of Justice, on the prohibition of the horizontal effect of directives, namely that directives cannot have a horizontal effect even though the requirements of effective judicial protection of citizens' interests may legitimately justify setting aside this provision, is still in force. However, the European Court of Justice has a certain set of exceptions, indicating that it has an empathetic view of this vital issue. Due to this, it is easy to argue that this lack of horizontal effect of directives is a key question in the protection of private law relationships, as it prohibits relying on some directive provisions if a directive is either not implemented properly in time or in affairs in which government actors are not involved.

However, there are three potent ways to cope with this problem, at least to a limited extent. The first one is the unusually broad interpretation of the concept of Member State. The European Court of Justice confirmed that the concept of Member State cannot be limited to the body or bodies having public authority, and it can also be invoked if it acts as a public employer.[8] In practice, it means that some purely horizontal private relationships, mostly labour or similar contracts, are transformed into quasi-vertical relationships in a legal sense, and an improperly implemented directive might have some relevance in these cases. Second, certainly the most powerful tool of national courts to apply directive provisions in horizontal disputes is that they are empowered by the European Court of Justice to interpret national law provisions in harmony with the directives' provisions if it is needed due to some deficiencies in implementation. As a result, as early as 1984, a German court submitted that the conventional ways of interpretation, such as a systematic and historic approach, were trumped by this obligation to interpret national law in harmony with the provisions of a directive.[9] Finally and as a last resort, national courts have the opportunity to set aside national law provisions if they conflict with a directive, and, exceptionally, it may even occur in horizontal relationships if legal liability is at stake.

Another important channel where directives may have an impact on national private laws is if they are intentionally applied outside their scope to other – non-harmonised – areas of law. This is the so-called spill-over effect of directives, and the extent of this impact on national private laws cannot be underestimated. This effect may occur through a voluntary broader

[8] Van Loock, Samoy, Pisuliński (n 1) 357–360.
[9] Arbeitsgericht Hamm 6 September 1984, ZIP 1984, 1525 *Von Colson and Kamann v Land Nordrhein-Westfalen*.

implementation by the legislator, and this form of spontaneous harmonisation might be regarded as typical in Germany. For instance, the doorstep selling directive's provisions were implemented with a broader scope, as the implementing German law was also applicable to types of contracts that were not made in a doorstep situation but this kind of situation played a role in making the agreement. This practice was also reinforced by the case-law of German courts. One may be fairly sure that similar developments have occurred in many other Member States – as for instance, when the new Hungarian Civil Code was drafted – too. As such, directives may have had a certain impact on areas of law that were not strictly under their scope. This so-called spill-over effect may also have a key role in the formation of a real *ius commune europaeum,* which may take a final shape in the very near future.

As for *ex officio* application of EU law provisions by the national courts, one must point out that several, sometimes even divergent, solutions exist for the national courts to do so, even when a national procedural provision may impede this in general. In this way the veil of national civil procedural regimes is definitely pierced by EU law and so exhaustive national procedural autonomy is nothing more than a simple illusion in Europe (although the approximation of civil procedures has not been in the focus of the legal harmonisation activities of the European Union thus far). However, the degree of this supranational intervention varies from an area of law to another one, as for instance when consumer contracts – that is, the protection of consumers in a broader sense – are at stake, the Member States' national procedural autonomy is remarkably limited. This is due to the attitude of the European Court of Justice, which puts the principle of effectiveness in first place when assessing provisions of national civil procedure that may impede the application of EU consumer protection rules, with special regard to the unfair terms clause. Furthermore, the principle of equivalence is also applied to override those national procedural provisions that are part of other procedures, as for instance with the enforcement of arbitration awards or appeal procedures.[10] Moreover, if an EU law provision is interpreted by the European Court of Justice as having a public policy character, as is the case in Article 101 TFEU, this also establishes a strong constraint on national procedural regimes. In sum, national procedural autonomy has been considerably eroded in general by the developments in the field of *ex-officio* application of certain EU law provisions.

Finally, one may conclude – based on Arthur Hartkamp's summary – that six general grounds can be identified when an EU law provision has to be applied by the national courts, irrespective of whether or not the parties invoked them in their submissions.

– If there is an express legal provision that requires the national courts to apply a given EU law norm – either in EU law or in national law.

– If the European Court of Justice interprets that an EU law provision must be applied automatically.

– If an article from EU law is interpreted by the European Court of Justice as having a public policy character.

[10] Fekete, Mancaleoni (n 2) 426–433.

– If the application of the principle of effectiveness requires it when assessing a national law provision.
– If the application of the principle of equivalence requires it when assessing a national law provision.
– And the so-called 'may is must' rule also applies, if national courts may apply a rule of national law on their own motion, they must apply on their own motion the corresponding rule of EU law, too.[11]

As is obvious from this extensive list, both the European Court of Justice and national courts are to be regarded as key actors when shaping – or, from another angle, when narrowing – the borders of national procedural autonomy. And, undoubtedly, national procedural autonomy is under a heavy siege in those areas of law where the EU has a great bulk of substantive rules, as for instance with consumer protection or competition law.

## IV Future Perspectives

As for directives, Chapter 6 seems to be perfect and exhaustive. However, there is one issue really worthy of an even more detailed study. This is the spill-over effect of the directives. I would add here that a more extended study would be needed with special regard to the post-transitory private law legislation of the Central European EU Member States. It should not be forgotten that these countries had to reconstruct their private laws almost completely following the political transition in 1989, and I'm deeply convinced that they used up and relied on many EU law patterns when doing so, even 'long' before their accession to the European Union. This may be a very exciting comparative law exercise with respect to the problem of legal transplants and transfers,[12] on the one hand, and it may also be able to reveal a lot on the integration of EU law provisions into legal cultures with a partly divergent socio-historical and cultural background.[13]

Secondly, as for the *ex officio* application of EU law provisions, the perspective of the discussion on national procedural autonomy should be reversed. It would also be an interesting topic for a scholarly analysis of those ways and solutions whereby national courts and legislators try to preserve certain segments of national procedural autonomy – as it is a logical effort in order to preserve some specificities of national legal orders. Future research in this field should therefore also be interested in the 'self-defence' of national procedural regimes that may stem from either the acts of the legislature or the actions of the judiciary.

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11 Fekete, Mancaleoni (n 2) 459.
12 Cf. Mathias Siems, *Comparative Law* (Cambridge University Press 2014, Cambridge) 191–221.
13 Cf. Balázs Fekete, 'Public Sentiments in Central European Constitutionalism' (2016) 57 Jahrbuch für Ostrecht 243–255.