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The Visible Hand of European Private Law

- Outline of a Research Design -

A new trend – 'The Economisation/Ökonomisierung' of European private law I consider the 1985 White Paper on the Completion of the Internal Market as the starting point for the ongoing transformation of the European Community into a new supranational polity. The strong market-bias has somewhat superseded 'les grandes idées politiques', which had led to the establishment of the European Economic Community and which guided (and are to some extent still guiding) the project of the 'United States of Europe'. The Internal Market Programme has become the (sole stable and consistent) driving force behind the European integration process. This has been even more the case since the 2004 enlargement and the failure of the European Constitution. The so-called 'new economic approach' (state aid and competition) could be understood as a revival of the Internal Market programme. Private law was and is needed to give shape to the Internal Market. This law shows a double face: it is regulatory in the sense that it is needed to constitute the Internal Market, it is competitive as the philosophy behind the regulatory measures relies heavily on market freedoms and competition.

Tensions The paradigm shift entails long-lasting consequences for the 'economisation' (Internal Market bias)' and the 'politicisation (governance)' of the existing European legal order. The fading away of 'les grandes idées' and the emerging market bias are paving the way for the infiltration of the Anglo-American understanding of the role and function of law, which gradually is replacing continental legal thinking (fairness instead of social (distributive) justice; the spread of economic analysis of law). That is why the European legal order as it stands today resembles much more a common law system than a continental legal order. This piecemeal approach fits in well with common law thinking. Quite the contrary is true for continental legal thinking, which often regards a European Constitution and a European private legal order as a necessary constituent for the feasibility of the Internal Market. It is the irony of European integration that the Anglo-American inspired Internal Market programme was developed under a French president of the European Commission Jacques Delors. Continental legal thinking, however, might be reflected in the development of new modes of governance for the European Community. They can already be found in the German law based new approach on technical standards and regulations, which served as a starter for OMC, co-regulation and the Lamfalussy procedure.

Tensions

Efficiency (competition)	Governance (regulation)
Liberal	Democratic
Market model	Social model
Economic approach - competition law - country of origin	Social approach - regulation - harmonisation
Fairness	Social justice
Common law system	Codified law European Constitution

	New forms of governance - new approach, OMC - co-regulation, Lamfalussy

Effects The Internal Market programme and the new modes of governance are strongly inter-related. The new modes of governance might be regarded as the institutional side of the Internal Market Programme. Both heavily affect the role and function of 'law' in European integration. The 'rise' of European law under the Internal Market programme has led to a new process of law making, to new instruments, to new enforcement mechanisms and it is going to change the substance of the law itself. At the same time, however, European law is in the 'decline', i.e. European law is going to lose its character as 'law' in the proper sense. At least three trends might be identified: legal rules are turned into policy programmes (de-legalisation/Ent-Rechtlichung), law making is no longer subject of political controversy in an open forum (de-politicisation/De-Politisierung) and law enforcement is moving away from courts to public bodies that seek soft solutions (de-judicialisation/Ent-Vergerichtlichung).

The focus of my project proposal is on the tensions between the Internal Market programme and governance as are reflected in the role and function of law in the European Community.

Effects

Rise of European law	Decline of European law
- new process of law making - new instruments - new enforcement mechanisms - 'new' law?	- de-legalisation/de-juridification (Ent-Rechtlichung) - de-politicisation (De-Politisierung) - de-judicialisation (Ent-Vergerichtlichung)

The visible hand of European private law European private law (contract and tort law) ranks high on the agenda.

My field of interest What I am interested in are those fields of European private law where the visible hand of the European legislator can be easily identified. These fields lie largely outside the ongoing research on European private law, although they directly affect European private law: network law, private competition law (Kartellprivatrecht), public procurement law, intellectual property rights, insurance law, investor protection law, labour law, product safety and food safety law, consumer law and services. All these fields are at the heart of the Internal Market programme. They have been subject to legal measures introduced by the European Community in their efforts to establish a truly European market, which is embedded in a competitive environment. Law is used to strike down state monopolies or state restrictions (network law – electricity, gas, water, railway transport), to establish and shape sectorial competitive markets (the car market through distribution agreements, public procurement through competitive bidding), to create and strengthen intellectual property rights (licensing contracts), to re-organise the market for financial services (insurance, investment services, credit, securities), to lay down basic standards for labour and consumer protection (health protection and protection of economic interests, non-discrimination) and to establish a European market for services. The focus of all these measures is not on private law-making in a traditional sense, i.e. establishing ground rules for a European civil society of autonomous private parties voluntarily interacting within the economy and society. The visible hand of the EC legislator puts emphasis on realizing particular sector or product/service specific purposes

within the Internal Market programme. Most of the rules are vertical in the sense that they are market or sector related, only consumer protection and worker protection rules pursue a horizontal approach overarching particular markets. Whilst these measures seem bound to merely internal market purposes, they are shaping European private law relations.

Relationship with the Commission project on European private law Seen from a European market based perspective (the economisation of the law), it suffices to adopt the rules which are needed to establish and to guarantee the workability and feasibility of particular markets (via vertical rules) or the Internal Market as such (via horizontal rules). Therefore European private law, the way I understand it, remains largely independent from traditional national private legal orders. It stands side by side with national private law, although European private law and national private laws are mutually interrelated. Insofar there is no need to establish a general European private law (European Civil Code) as initiated by the European Parliament and pushed by the European Commission through various Communications and research programmes. Therefore the European Commission faces no difficulty in turning the political initiative of the European Parliament into a 'mere' academic exercise. All that the European Commission might get out of the project is guidance on how to better shape the rules which govern those fields of private law where input is needed to increase the workability of particular markets or of the Internal Market. Whilst my project is certainly tied to the ongoing work e.g. in the study group and the *acquis* group, the focus is on those rules where the hands of European private law are visible.

'Visible' European private law and national private law The question remains how this existing European private law is interrelated with national private legal orders and vice versa. I start from the premise that the two private laws, the European private law and the national private laws stand largely side by side with European private law as being autonomous in the sense that it produces its own governing principles. The juxtaposition of the two orders allows for an equilibrium between homogenous European private law (as it stands today) and heterogeneous national private legal orders, traditions and cultures to be maintained. This equilibrium is much more at risk as a result of the growing importance of the country of origin principle and maximum harmonisation than through the Commission project on European private law. So far research has focused on the degree to which particular harmonised areas of private law fit in together with the respective national rules or on the so called judicial co-operation between European and national courts. Time seems ripe to initiate a more comprehensive analysis of the mutual relationship between the 'new' European private law and national private laws.

Four levels of research – a draft design The visible hand of European private law in its tensions between market (economisation) and governance (politicisation and de-politicisation) and its interrelationship with national private legal orders can be characterised by the four parameters:

(1) *Substance of visible European private law*: My hypothesis[1] is that European private law is governed by 'principles' which are designed to implement the Internal Market programme, such as the protective instrumental device, the 'merging' of advertising, pre-contractual information and contract conclusion, competitive and contractual transparency, standardised contract making, fairness as market clearance and market access (contrary to social justice), post-contractual cancellation/rescission/termination rights and effective legal redress. These new principles challenge traditions and values (social justice) in national private legal orders, both in the common law and in continental legal thinking. They overstep clear cut boundaries

[1] Penn State International Law Review 23 (2005), 549.

between contract law and unfair commercial practices law, they unite substantive law and procedural law (rights and remedies) and they put the respective fields of private law into one single particular perspective that of being instrumental to the completion of the Internal Market. In so far they clash with principles of national private legal orders (autonomy of parties, facilitative or default rules). I am not only interested in the disintegrative effects of the visible law but also in what might be called 'creative destruction', i.e. the potential to rethink the basics of national private legal orders in a supranational environment.

(2) *Process of law making*: The well known process from launching a study to a green paper via a hearing of the first draft is designed to increase the out-put legitimation of the European Commission's activities. The European Commission is trying to organise and to finance a substitute for the absence of a European society by establishing academic networks, by seeking input from European and national lobby groups, from European and national non governmental organisations and by consulting governments at an early stage. My hypothesis is that the process of law making characterised by the symbolic participation of stakeholders and a cacophony of viewpoints, facilitates the European Commission to largely realise its own ideas. Autonomous law making may in theory be challenged by European Parliament and by Member States. In practice, however, neither hardly ever makes use of their powers, e.g. Service Directive. The European Parliament restricts itself to streamlining the Commission's proposal without changing the substance of the proposal and the Member States often use the European law making process as a forum for issues which are deemed to be unsolvable in the national context. Once transferred to the EC level, Member States are deprived of the opportunity to influence the law-making process due to the gap between law making at the EC level and national law making.

(3) *Regulatory instruments* The European Commission has been and still is quite innovative in tailoring particular instruments to different fields of law. The new approach originally designed to regulate technical standards and product safety is to be extended to cover food safety, cosmetics and contracts for services; the OMC is still bound to labour law, self and co-regulation is promoted in contract law and unfair commercial practices, the Lamfalussy procedure is making its way in financial services; and last but not least the CRF is to guide the European private law project. Research if it was not bound to particular fields of European law or the transferability of the new instruments to other areas, is focusing on comitology as a means of constitutionalising the European Community and more closely on the enlarged institutional framework of European private law. I would like to argue that all new regulatory devices are still based on the concept underpinning the new approach. They follow an identical pattern under which hard law is replaced/supplemented by technical standards and/or programme type rules, where the new rules are the result of a de-politicised law-making process in which judicial review is fading away. The role of the European Commission may be strengthened to the detriment of the European Parliament and the Member States may suffer from quasi pre-emptive effects even in areas where they remain competent under the Treaty.

(4) *Law enforcement* The European Community is based on the concept of Vollzugs-Förderalismus with regard to public enforcement and Member States' sole competence with regard to private enforcement. Over time, however, the European Commission and the ECJ have made for this lack of regulatory competence by borrowing it from the subject matter concerned. Still incomplete private and public enforcement mechanisms are partly compensated by European judicial activism (new rights and remedies). The prospective policy model seems guided by decentralised enforcement through national public agencies (even in unfair terms and unfair commercial practices law), new modes of governance (e.g. enforcement co-operation) between the national public agencies, the European Commission as well as to some extent stake holders (network law and consumer law) and private enforcement

through individual and collective redress schemes (competition law and maybe beyond), where Member States are taking the lead. This model is flexible enough to combine hard/soft regulatory instruments with hard/soft enforcement mechanisms. However, there are at least two types of tension which deserve further investigation; the competence shift away from the European/national judiciary to the European/national executive and the communication gap between European courts and national courts. In 'The Politics of Judicial Co-operation' I have developed the thesis that in preliminary reference procedures European courts are striving for a horizontal interpretation of European rules, whereas national courts are seeking vertical advice in order to solve a concrete case. This implies the need to seek new forms of co-operation.

Links to prior research and proposals for implementation. The proposed project is based on previous research in two ways: The starting point is the theory of 'competitive contract law' in which I developed the idea of what should become under a more comprehensive scheme the 'visible hand of European private law'. The communication gap I identified in 'Politics of Judicial Co-Operation' shall help to explain the relationship between European private law and the national private laws beyond law enforcement through judicial co-operation. The first step will be to elaborate on the idea of the visible hand of European private law and which will serve as a basis for verifying or falsifying the hypotheses spelt out over the four levels of research. My interest is to determine to what extent the two different legal orders, the European private legal order and the national private legal orders can be held compatible and whether there is need for new legal forms. The second step is to develop a research methodology which should contain inter alia vertical investigations into particular subject matters over the last three levels of research in fields where little knowledge is available (network law, public procurement, investor protection, standardisation of contracts for services) and horizontal studies covering a whole set of the visible law, but focusing on one particular level of research (law-making, instruments, enforcement). Workshops, seminars and conferences should provide a forum for exchange and discussion. The project implies interdisciplinary co-operation with political scientists, sociologists and economists.