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EDITORIAL COMMENTS

Europeanization of Private Law – Part 2

In the last issue of this *Review*, Ole Lando developed a powerful argument in favour of a European Civil Code. For those readers who may have conceived this idea as an endeavour to reach out for the stars,[1] we return to present-day reality: the creeping Europeanization of private law by (mostly consumer-oriented) directives (doorstep selling; consumer credit; timesharing etc). The inherent drawbacks of this approach have been described many times:[2] the piecemeal fashion in which the directives evolve; their lack of homogeneity; the problems that arise for national legal systems concerning the internal consistency of their private law, and the repercussions on non-consumer law. The arguments are well known and will not be repeated here.[3] Instead, we will focus attention on the day-to-day-business of the implementation of directives by national courts and the ECJ alike. An analysis of this suggests that the Europeanization of private law by way of directives – as compared with the establishment of a European Code – has its inherent problems. This may be demonstrated with regard to a recent judgment of the ECJ in the *Dietzinger* case,[4] which any reader unfamiliar with the national background would probably not regard as an exceptional or even important judgment.

The *Dietzinger* judgment concerns the question whether Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises[5] covers a contract of guarantee (a suretyship)[6] that

1. The European Review of Private Law has devoted a whole issue to this subject; cf. vol 5 No. 4 (1997).
2. Cf. Steindorff, *EG-Vertrag und Privatrecht* (1996), p. 51; see also Editorial Comments, 34 CML Rev. (1997), 207, 210.
3. For a positive account, see Micklitz, "Perspektiven eines Europäischen Privatrechts", 6 *Zeitschrift für Europäisches Privatrecht* (1998) 253.
4. Case C-45/96, *Bayerische Hypotheken- und Wechselbank AG* v. *Edgar Dietzinger*, judgment of 17 March 1998, nyr.
5. O.J. 1985, L 372/31.
6. Under German law a contract of guarantee is a contract in which a third party promises the creditor to pay the debt if the debtor fails to perform. The promise has to be in writing (except in commercial matters); it is valid even if it is not in exchange for any consideration of value.

is meant to secure a claim by a financial institution against a third party in respect of a loan, and which is concluded (during a visit by an agent to the consumer's home) between the financial institution and a natural person who is not acting in the course of his/her business or profession, during a visit by a trader to the consumer's home. Article 1(1) of Directive 85/577 seems to give the answer to this question, put to the Court of Justice by the German *Bundesgerichtshof*; it provides that "(t)his Directive shall apply to contracts under which a trader supplies goods or services to a consumer ...": A guarantee (suretyship) established by a person acting outside his trade or profession in favour of a trader does not appear to qualify for a contract under which the trader supplies services to a consumer. However, the case is not that simple. And behind the question referred to the Court, there is a story that has to be (briefly) told.

1. To start with the background: Directive 85/577 was transformed into German law by a statute of 16 January 1986 (Law on the cancellation of "doorstep" transactions and analogous transactions) providing in its §1 sec 1 that it applies to a contract concluded by a consumer (at his home, working place etc) for a consideration with some value. §1 sec 1 may perhaps not be considered as a masterpiece of legislative drafting, but interpretation of this statute seems to lead to a pretty clear result: the contract concluded by the consumer (at his home) has to be a contract concerning the *exchange* of services or goods for a consideration with some economic value (the price to be paid). Accordingly, a guarantee offered by the consumer to the trader does not seem a likely candidate to qualify for the application of the statute.

Now the story: The question whether the German statute of 1986 applies to contracts of guarantee has been a matter of intense dispute (with some socio-emotional background) from the very beginning. The dispute arose with regard to guarantees offered by spouses or grown-up children to financial institutions, securing a credit to be handed out to the husband/father (mostly in deep economic trouble). The issue reached the highest civil court, the *Bundesgerichtshof*, in 1991. In two judgments, the court denied the application of the German statute for the simple reason that a contract of guarantee is not a contract of exchange of goods and services with a consideration of economic value.[7] Council Directive 85/577 was not mentioned at all. Probably it was overlooked by the court, as it had been overlooked by the lower courts and by the bar. This should not be a real surprise for the outside observer: at that time, even the bestselling commentary on the *Bürgerliches Gesetzbuch* had not yet discovered the existence of Council Directive 85/577.[8] It became known to a broader legal community for the first time in the follow-

7. BGHZ 113, 287; BGH (1991), *Zeitschrift für Wirtschaftsrecht (ZIP)*, 786.
8. Palandt (-Putzo), *Bürgerliches Gesetzbuch* (51st ed., 1992), pp. 2430–2436.

ing year, when a regional court, the Landgericht Kleve,[9] made a preliminary reference to the Court of Justice, asking for a ruling on exactly the question whether the directive should apply to contracts of guarantee. At this point, one might have got the impression that Community law may be better known at the lower levels of the judicial hierarchy than the upper ones.

Once Council Directive 85/577 had been discovered by the legal community, it began to play an overwhelming role in the interpretation of the German statute of 1986: Courts that (rightly or wrongly) disliked the restrictive language of the statute excluding the contract of guarantee from its scope of application now turned to Council Directive 85/577 for help, applying the notion that national law should be interpreted as far as possible in the light of the wording and purpose of the Directive.

Directive 85/577, in fact, is not at all clear on the decisive point, but here the story takes another turn. Whereas the German statute demands a contract with a consideration of some economic value, the language of the directive does not contain such a requirement. Moreover, in its German (and French) version the directive is – compared to the English version – framed in somewhat wider terms: it shall apply to "Verträge, die zwischen einem Gewerbetreibenden, der Waren liefert oder Dienstleistungen erbringt, und einem Verbraucher geschlossen werden" ("contrats conclus entre un commerçant fournissant des biens ou des services et un consommateur"). As Advocate General Jacobs points out, in his Opinion in *Dietzinger*: on a literal reading of those versions, it is not necessary that goods or services are supplied under the contract at issue in order for the Directive to apply. To back up this point, German courts turned to the first recital in the preamble referring to a "unilateral undertaking" ("engagement unilatéral"; "einseitige Verpflichtungserklärung"), interpreting this term not as a binding offer, which is what it appears to mean at first sight, but as a contractual obligation (without consideration), the contract of guarantee being a prime example. The lead was now taken by the *Bundesgerichtshof*, followed by a number of appellate courts.[10] The Directive was held to apply to guarantees offered by consumers, even if the credit agreement that the guarantee was meant to secure was concluded between a financial institution (the "trader") and a businessman. One can only speculate on the number of judgments that have been handed down on the basis of this interpretation of the Directive. Finally, in 1996 a different chamber (Senat) of the *Bundesgerichtshof*, not being convinced of this prevailing interpretation, asked the Court of Justice for a preliminary ruling.[11]

9. (1993) ZIP, 258; the case was removed from the docket of the ECJ in 1994.
10. BGH (1993) ZIP, 585; OLG Köln (1994) *Zeitschrift für Europäisches Wirtschafts- und Steuerrecht*, 443; KG (1996) NJW, 1480.
11. BGH (1996) ZIP, 375: the *Dietzinger* case.

At this point in the story, a comment seems appropriate. In 1996, ten years after the Directive was published, the discussion on its interpretation was in full bloom (it appears only in Germany), but this blossoming discussion reveals that the Europeanization of private law is still more in the books than in the hearts of the legal profession. In discussing the *interpretation* of the Directive, the courts looked only at the *German* version; obviously, no judge and no law firm advising the financial institutions regarded it as necessary or even helpful to consult the Directive in its other language versions in order to shed light into the darkness of its scope. Even a short glance at the English version might have shown that the interpretation of the Directive is far from clear.[12] To make the point: in its day-to-day business, the legal profession does not yet seem to be well adjusted to the exigencies that follow from the Europeanization of private law.

2. After Advocate General Jacobs had delivered his Opinion in *Dietzinger* (on 20 March 1997), it still took the Court a whole year to come to grips with the interpretation of the Directive (the judgment was on 17 March 1998). One may wonder why it took such a long time for the Court to clarify a relatively simple issue of interpretation. The judgment reads as if it were the result of a (wise?) compromise between two differing philosophies. Whereas the Advocate General Jacobs, in his straightforward Opinion, squarely denied the application of the Directive to a contract of guarantee, the Court took another route: application yes, but only if the guarantee (undertaken by a consumer) secures a credit agreement (i.e. a contract under which a trader supplies a service) concluded with another consumer, both contracts to be concluded in the context of "doorstep selling". On the basis of this (somewhat surprising) interpretation probably all the German cases were wrongly decided.

This is not the place to comment on the substantial implications of the judgment. From a "consumerist" point of view, the judgment may be a disappointment: does it really make sense to differentiate the protection of the consumer (in "doorstep selling") according to whether the credit agreement to which the guarantee is linked is also a consumer contract (and moreover, also concluded in a "doorstep selling" situation)?[13] Given this outcome, would it not have been wiser to follow the learned Advocate General and leave the whole matter to the Member States, who had all pleaded that the Directive is not meant to apply to contracts of guarantee? If there is a point to be made for consumer protection, should not the Court leave it to Council and Parliament to take the initiative and develop a consistent policy?

12. Cf. Roth, "Bürgschaftsverträge und EG-Richtlinie über Haustürgeschäfte", (1996) ZIP, 1285. Indeed, in his Opinion in *Dietzinger*, A.G. Jacobs offered an interpretation of the Directive which was completely different from the mainstream interpretation in Germany.

13. Cf. the critical analysis by Pfeiffer, "Die Bürgschaft unter dem Einfluss des deutschen und europäischen Verbraucherrechts", (1998) ZIP, 1129.

A more general point has to be raised instead. By extending the application of the Directive to contracts of guarantee without explicit command by the Directive, the private law of the Member States is unnecessarily impinged upon in two ways. First, as the Member States will have to extend their "doorstep selling" regulations to contracts of guarantee, they will come under pressure to go beyond what Directive 577/85 (supposedly) requires. In the national legal context it will not be very convincing to differentiate in a doorstep selling situation between contracts of guarantee that are to secure a loan agreement concluded with a consumer and those with a person acting in his commercial role. Thus, the interpretation of the scope of the Directive by the Court will unnecessarily lead to a greater degree of harmonization than is actually called for by the Directive. Second, by extending the scope of the Directive to "ancillary" contracts[14] and contracts with a "close link"[15] to the main consumer contract, the Court introduces a new concept that is not defined by the Directive and that is likely to carry over to other fields of law (i.e. the Directive on consumer credit[16]).

The Court has been asked more than once to take notice of the repercussions of its adjudication in the legal systems of the Member States.[17] It should take those admonitions seriously, especially under circumstances where the *legal basis* for Community action is as weak as it is with regard to Directive 577/85. The Directive is based on Article 100 EC. The second recital of the preamble states that the differences between the legal rules in the Member States can affect the functioning of the Common Market. This statement, of course, begs the question (and can hardly be considered to fulfil the requirement to state reasons under Article 190 EC): neither access to the market nor distortion of competition seems to be a relevant problem with regard to "doorstep selling". But even if it were, any interpretation of a Community legal instrument by the Court should refer to the legal basis of the instrument, and explain why and how the given interpretation relates to it. Does the (possibly) varying treatment of the contract of guarantee in the law of the Member States affect the functioning of the single market in any relevant manner? If not, the Court should refrain from giving a directive an unnecessarily broad scope.

3. Our discussion of the somewhat stony road leading to the *Dietzinger* judgment is intended to shed some light on the process of Europeanization of private law. On the one hand, the legal profession still has its problems with the Community dimension when it affects the field of private law. On the other hand, national courts may (mis-) use Community law in order to correct

14. para 18 of the judgment in *Dietzinger*.
15. Ibid. para 20.
16. Cf. the reference to the ECJ by Landgericht Potsdam, (1998) ZIP, 1147.
17. Steindorff, *EG-Vertrag und Privatrecht* (1996), p. 52.

or evade national law. The Community legislative organs should take such consequences into account when judging on the need (and the cost) of harmonization measures in the field of private law. Still more important: when it comes to the interpretation of a directive, the Court should have regard to its legal basis when deciding on an expansive or restrictive interpretation.

A final point has to be added. The *principle of subsidiarity* under Article 3b(2) EC is not only relevant for legislation enacted by the Communtiy, but also for its interpretation. The Court should base its interpretation of a Community legislative instrument on the presumption that the legislator intended to comply with the principle of subsidiarity. It would not make sense to submit the legislator to subsidiarity, but to neglect this principle when the task is to interpret the very same act. From this it follows that the Court should always relate its interpretation as to the scope of Community legislation and the alternatives that are open for discussion, to the principle of subsidiarity and ask whether the Member States are (not) able to do the job, and in what respect and with regard to what alternative the Community is in a better position to take action. True, Directive 577/85 was issued in 1985, when Article 3b(2) EC was not yet in force. But if one accepts the proposition that subsidiarity has to play its role in the interpretation of Community secondary law, this approach should be extended to all legislation irrespective of its date of issuance.[18]

18. The Court in its role as interpreter of Community law is inescapably acting as legislator, and is insofar bound by the principle of subsidiarity – and, it is suggested, under the duty to give reasons as well.