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Editorial and Acknowledgements

I.

Half a decade ago, the European Review of Private Law dedicated a special issue[1] to the discussion of what was then the most important legislative step in the creation of a European private law, namely, the Directive on unfair terms in consumer contracts of 5th April 1993.[2] Today, one might (and indeed should!) repeat this exercise; we are once again witnessing the transposition of a new directive,[3] which can safely be called the most important legislative contribution to the Europeanisation process. Yet, with this repeat exercise, one must also reflect upon the experience of the past years. The course of the Europeanisation process is, it seems, becoming ever more paradoxical. Whereas the production of academic contributions, which identify and explore the ever new and theoretically fascinating aspects of the Europeanisation process, continues to grow at an exponential rate, the visible practical impact of European legislation, as well as that of European primary law, on national systems seems to remain marginal; similarly, the potential for the codification of Europe's private law must be called modest at best.

Are we following an academic *fata morgana*, attributable maybe to those few exceptional jurisprudential highlights which attract such wide attention that we are wrongly induced to believe in the irresistible strength of Euroeanisation? Hardly so. Even though the five years of the 'implementation history' of the Directive on unfair terms have not yet led to one single ECJ judgment; even though that Court's jurisprudence has rarely touched directly upon what we conceive of as the 'core areas' of private law; even though the immediate impact of European law remains controversial in theory and difficult to trace in practice - the integration process has deeply affected the realm of private ordering, the social functions of private law and its adjacent disciplines. Affects of this type, however, concern a deeper layer of our legal systems; they can only be revealed indirectly and can only partially be documented with reference to changes in the wordings of statutes. The broadening and deepening of academic efforts to understand the impact of European integration on private law is, accordingly, an adequate and even realistic response to the complexity of that process – and the proceedings documented in this special issue of the European Review of Private Law should be understood as a further contribution to this new realism.

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[1] *ERPL* 3:2 (1995) 173-381.

[2] OJ L 95/1993, 29.

[3] Directive 1999/44/EC 'on certain aspects of the sale of consumer goods and associated guarantees', OJ L 171/1999, 12.

II.

The title of this issue is programmatic in two respects – and maybe representative in both. The first concerns the political structures of the EU; its reference to analyses of the EU as a 'multi-level system of governance' does not simply pay tribute to a term current in a neighbouring discipline but reflects what we lawyers have ourselves learned. The EU is not a unitary legal system and is highly unlikely to become one in the foreseeable future. We, as European citizens and students of private law, will have to live with many masters of a series of relative, albeit never absolute, sovereignties. Functionally interdependent topics will continue to be exposed to legislative, political jurisprudential activities, which originate from different sources and are rarely fully co-ordinated in advance. Our second concern is with the complexity of legal changes and their impact on law and society. Legislation will, in all likelihood, continue to proceed in a problem-oriented rather than systematic and comprehensive manner; this is so because governmental as well as non-governmental actors know about the limits to their knowledge and thus tend to adopt openly experimentalist rather than normatively closed attitudes. We, as academics, must therefore conceive of the legal order, less as a fixed system of rules and doctrines, and more as an open system, the normative quality of which depends upon its capability to learn from new experiences.

The various sections of this issues should be seen in these perspectives. The Workshop on 'Interactive Private Law Adjudication in the European Multi-level System', organised by the undersigned and Professor Marie-Jeanne Campana, with the assistance of Dr. Leone Niglia in October 1998 at the European University Institute, tried to accomplish the shedding of new light on the Europeanisation process through the re-interpretation of some widely discussed issues - and impasses.

It will hardly come as a surprise that the first section, comprising the organisers' contributions, is a direct response to the general concerns just sketched out. If the European systems lacks a hierarchical structure, if legislative competences are dispersed, Europe cannot be integrated by a hierarchical power, and can only be consolidated through deliberation; and if legislative acts can only ever be incomplete answers to the problems they are meant to resolve, the key legal actor in the Europeanisation process must be the European judiciary – European *and* national courts. Any reader of the first section will realise, at least when looking into the comments, how heroic are the assumptions upon which the authors from the EUI rely: judicial interaction and co-operation in the shadow of supremacy! 'Un langage juridique commun' and not mere 'Euro-speak'! The comments on these suggestions by Sonja Feiden, David Geary and Nikolaus Urban reveal some scepticism.

Europeanisation is too difficult and to important too be left to the European legislature – this is, in a somewhat simplified version, the message of the second section which deals with non-governmental initiatives and academic projects. Ole Lando who presents the work of the Lando-Commission as a second-best solution

would hardly subscribe to this message[4] as unequivocally as his commentator Kristina Riedl. The proponent of the Trento 'Common Core Project', Mauro Bussani, and Pierre Larouche, the proponent of the 'Casebook Project', are both implicitly pursuing a non-legislative agenda; the insights which their comparatist projects produce are valuable in their own right[5] – Europeanisation may, however, remain dependent on legislative support. This is certainly the case whenever a 'state monopoly' over the exercise of power is involved. Section four touches upon these issues. The contributions to that section by Andreas Schwartze and Dieter Hoffmann should not just be read as a confirmation of the indispensability of legislation. The relevant initiatives can, with equally good reason, be interpreted as a 'spill-over' effect of the emergence of transnational legal structures.

Not just the 'non-governmental' Europeanisation initiatives, but equally European primary law may be characterised as an alternative to legislative codification. As Arthur Hartkamp points out, this alternative is of truly 'constitutional' importance; not only may the European 'market citizen' invoke the famous European freedoms against his national sovereign - they have been interpreted as inalienable rights, even in the private sphere, and because of this (potential) function have re-invigorated national debates – but the confirmation of such universal (European) private rights may also form the basis for the legal supervision of private governance structures. Kara Preedy's comment points to the parallels between the European issues and the German '*Drittwirkungs*' doctrine; and she stresses that an attribution of direct (horizontal) effect to European rights will create new tensions of constitutional dimensions within the legal system of the EU.

The issues taken up in section five most directly mirror the non-hierarchical nature of the European multi-level system of governance. The concept of 'diagonal conflict', as explained by Christoph Schmid, is *the* paradigmatic constellation of a system in which functionally interdependent subject-matters are dealt with in a fragmented way at different levels. 'Diagonal conflicts' were first observable in the tension between European competition law on the one hand, and national mandatory contract law on the other. Martina Deckert rephrases this tension in a different terminology; the substance of her analysis, as well as her suggested solutions, however, are indicative of very similar concerns. As Irene Klauer's analyses of the Directive on unfair contract terms confirms, the 'multi-level approach' aids us in our attempts to understand implementation problems and their institutional implications.

Hugh Collins, as well as his commentator, address yet another dimension of the Europeanisation debate. Assuming that Europe's private law has to respond to the

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[4]Suffice it to point to his recent contribution in this Review: O. LANDO. 'Why Codify the European Law of Contracts', (1997) 5 ERPL 525; it seems noteworthy, however, that M. J. BONELL, 'The need and possibilities of a Codified European Contract law' (1997) 5 ERPL 505, drawing on his experience with UNIDROIT, advocates positions which are very close to those of K. RIEDL.

[5]The issues dealt with in this section stimulated many follow-up discussions at the EUI and prompted researchers to edit an accompanying working paper: S. Feiden & Chr. U Schmid (eds), 'Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU,' EUI Working Paper in Law, San Domenico di Fiesole, No. 7/99, [http://www.iue.it.PUB].

exigencies of market building, what kind of law will provide adequate answers? According to widely held views, 'formal rationality' and 'economic efficiency' should become the *leitmotivs* of Europe's future private law; 'not really', Collins argues. If and because private law should do justice to business expectations, its responses must be more open-textured, flexible, even ready to accept a pluralism of regulatory styles. Collins' analyses and suggestions touch upon a series of fundamental issues; one is the century-old effort to understand the interrelationship between formal legal rationality and capitalist market economies; a further one is the mutual perception (and misperception, as Anthony Chamboredon argues in his comment) of common law and civil ('codified') law; and last but not least, the issue of the emergence of transnational legal structures which remain diverse but do not differentiate along territorial boundaries but rather by functional and sectored differences.

III.

Many of the topics dealt with in the contributions to this issue were related to the contents of seminars at the EUI. The proceedings of the October 1998 workshop stimulated new interests among a group of EUI researchers who met regularly to renew the discussion of the contributions – and took the initiative to prepare its publication. The readiness of the Editorial Board of this Review to examine the results, and its patience with the somewhat cumbersome production process, deserves many thanks. Multi-lingual and multi-cultural co-operation is as demanding as it is fascinating. I would like to thank Chris Engert and Diamond Ashiagbor who managed painstakingly to transform the continental-speak of most of our conference contributions into proper English. Anthony Chamboredon helped with the editing of contributions in French and the production of *resumés*. Kristina Riedl undertook the Sisyphus-like task of harmonising 19 different modes of citation according to the guidelines of this Journal. Nothing, however, would have been accomplished without the continuous help provided by Marlies Becker throughout the whole process. And I should not forget to express my thanks to the contributors to this volume who were exposed to sometimes unforeseeable new demands and a long cycle of presenting, discussing and revising their articles.

Florence, November 1999
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