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## Book Review

### **Keus, L.A.D.: *Europees privaatrecht* (Deventer: Kluwer, 2010, ISBN 978-90-13-07346-1, 121 pp.)**

GERARD DE VRIES<sup>1</sup>

Judging by the title of this monograph on ‘European private law’, which is written in the Dutch language, it might be expected to deal not only with the law of the European Union, but also with other laws of European origin, notably the European Treaty on Human Rights, but it does not; its subject-matter is restricted to the law of the European Union. It is further, quite understandably, mainly restricted to the effects the law of the European Union exerts on national private law; the law of the European Union is only partially treated as such. It is mainly the present effects of this law that are dealt with; only the concluding Chapters of this monograph examine recent initiatives on the part of academia, such as the Draft Common Frame of Reference, and initiatives coming from the European Union itself, such as the expected Common Frame of Reference, possibly in a role as Optional Instrument, and the proposal for a Directive on consumer rights (COM(2008) 614 final).

The variety of ways the law of the European Union exerts its influence on national private law has determined the structure of this monograph; the effects of this law have been subdivided into the following 4 categories:

- 1) ‘unitary’ private law, ie those provisions of the law of the European Union concerning private law-relations between the European Union as a legal person on one hand and other persons – legal or natural ones – on the other hand;
- 2) ‘uniform’ European private law, ie those parts of law of the European Union applying directly in the Member-States and superseding any deviating national private law;
- 3) ‘harmonized’ European private law, ie private law that according to formal standards is national law, but the content of which has been determined by European law, notably by Directives;
- 4) the so-called ‘indirect’ influence of the law of the European Union on national private law that deals with the requirements of ‘equality’ and ‘effectiveness’ which the law of the European Union has since the ECJ-judgment

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of 16 December 1976, nr 33–76 (*Rewe*), set for national private law insofar as the latter functions as a vehicle to realize the law of the European Union and with their consequences for national law.

This approach is a systematic one in that the effects of the law of the European Union have been subdivided only by the way they influence private national law and in that the ‘source’ of these effects is not used as an additional (or even overriding) criterion to sub-divide them. Such a ‘source’-oriented approach would typically lead to treatment of the effects of primary EU-law, notably the TFEU, first, only after which the effects of secondary EU-law, Regulations and Directives, may then take their turn. In the effect-oriented approach chosen in this monograph the TFEU and Regulations are dealt with under the same heading of ‘uniform’ European private law, since both have in common that they apply directly and supersede deviating national law, whereas Directives have been relegated to another category, namely ‘harmonized’ European private law.

One may wonder, however, what has moved the author not to deal with the so-called ‘indirect’ influence of the law of the European Union on national private law right after ‘uniform’ European private law with its direct effects and to treat ‘harmonized’ European private law in-between: the influence of the requirements of ‘equality’ and ‘effectiveness’ may be ‘indirect’ in that they exert their influence only by way of national private law and are therefore logically in need of this law in order to be effective, but this does not take away the fact that these requirements do have effects on national law, whereas ‘harmonized’ European private law is by the author’s own definition national law and therefore rather the result of an effect.

Let me give a very brief and incomplete summary of what these categories of effects of European private law are about.

- 1) ‘Unitary’ private law is dealt with shortly, since it hinges in fact on just one provision in the TFEU, Article 340, on the contractual and non-contractual liability of the European Union in cases where it operates as a legal person on the same footing as other persons, legal or natural.
- 2) Under the heading of ‘uniform’ European private law diverse subjects are dealt with or at least mentioned:
  - a) the effects of provisions of the TFEU are expounded prohibiting agreements between undertakings which have as their object or effect the prevention, restriction or distortion of the internal market (Article 101) and abuse by an undertaking of a dominant position within that market (Article 102), the effects of the so-called ‘four freedoms’ on vertical relationships and – what is more important in private law – on horizontal ones as well as the effects on these relationships of provisions of the TFEU pro-

tecting discrimination on certain grounds, such as nationality (Article 18) and sex (Article 157);

- b) many Regulations are listed that exert their influence on various fields of law: for instance on business law (eg Regulation 2157/2001 on the *Societas Europaea*), competition law (eg Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (corresponding with the present Article 107 TFEU) prohibiting aid granted by Member States, on private international law (eg Regulation 593/2008 on the law applicable to contractual obligations (Rome I)) and on procedural private law (eg Regulation 805/2004 creating a European enforcement order for uncontested claims);
- c) judgments by the ECJ that serve as a source of ‘uniform’ European private law are treated, notably the ones in which this Court has developed the several so-called ‘principles of law’, such as transparency, but also principles of private law.

Ad 3) ‘Harmonised’ European private law – ie private law that according to formal standards is national law, but the content of which has been determined by European law – is, at least in horizontal relationships, synonymous with the diverse Directives. Since this monograph, as has been mentioned above, hardly treats European law as such, but mainly its effects on national private law, the author does not really deal with the content of Directives, even when they relate to private law – with the exception of a brief summary of those Directives the Commission contemplates as the so-called ‘consumer acquis’ (cfr COM(2004) 651 def) –, but it does deal with their effects on national private law; these are put in the following hierarchical order: direct effect of Directives on national private law comes first, but only if feasible – *quod non* in horizontal relationships that are so dominant in private law –, the obligation of national judges to interpret their own national law in harmony with Directives comes second, their obligation flowing from rather recent ECJ-case law to apply certain Directives aiming at protection of consumers (cfr the judgments of the ECJ of 4 June 2009, case 243/08 (*Pannon*) and 6 October 2009, nr case 40/08 (*Asturcom*) with respect to the Directive 93/13 on Unfair terms in consumer contracts, its judgment of 4 October 2007, nr case 429/05 (*Rampion*) with respect to the Directive 87/102 on Directive on Consumer credits and its judgment of 17 December 2009, case 227/08 (*Martin Martin/EDP Editores*) with respect to Directive 85/577 on Contracts negotiated away from business premises) *ex officio* is mentioned only in third place, since it only enhances the effect of the before-mentioned obligation of national judges to interpret their own national law in harmony with Directives.

4) The ‘indirect’ influence of the law of the European Union on national private law deals notably with the requirements of ‘equality’ and ‘effective-

ness' the law of the European Union has since the ECJ-judgment of 16 December 1976, nr 33–76 (*Rewe*) set for national private law insofar as the latter law functions as a vehicle to realize the law of the European Union and with their consequences for provisions of national law, for instance those on periods for appeal and limitation periods.

The systematic approach that has been chosen in this monograph, the in-depth knowledge of its author, who is experienced in the field as Advocate-General to the Hoge Raad, as author (see notably: *Europees privaatrecht. Een bonte lap-pendeken* (preadvies voor de Vereniging voor Burgerlijk Recht en de Nederlandse Vereniging voor Europees Recht), Lelystad: Koninklijke Vermande, 1993) and as editor (*De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer: Kluwer, 2007) provide for many sharp distinctions between the effects of the law of the European Union on national private law and for interesting insights; two examples may illustrate this proposition:

- When the author answers the question whether the provisions of the TFEU on the free movement of goods (Article 28–31 and 34–37) have any effect on horizontal relationships, a matter of so-called 'uniform' European private law, he distinguishes carefully between their effect on these relationships, which he does not detect in the ECJ-case law, and those ECJ-judgments in which in reality their effect on national law (cfr ECJ 31 October 1974, nr 15/74 (*Centrafarm*)) or on national case law (cfr ECJ 13 October 1993, nr case 9392 (*CMC Motorradcenter*)) was at stake and rightly so: in these latter judgments it is judicial review of national provisions of private law or of national case law that is at stake, which entails consequences for national law that are quite different, certainly from a private law-point of view, from those of a judgment by the ECJ to the effect that a certain contract between private persons – the prime example of a horizontal relationship – conflicts with one of the freedoms and is therefore (for instance) void;
- The complex matter of the so-called 'indirect' influence of the law of the European Union on national private law is dealt with in just 9 pages where, as has been mentioned above, the consequences of the *Rewe*-criteria – 'equality' and 'effectiveness' – for all kinds of provisions of national law functioning as a vehicle to realize the law of the European Union are expounded, notably for provisions of national private law; the judgments of the ECJ on the question whether national judges are entitled or even obliged to apply *ex officio* the law of the European Union at large, notably its judgment of 7 June 2007, nrs cases 222–225/05 (*Van der Weerd*) – a subject matter carefully to be distinguished from the above-mentioned obligation of national judges to apply provisions in certain Directives aimed at protection of consumers *ex officio* –, are also treated by the author in this context, that is not as a subject on itself, but just as another example of the application of the before-mentioned *Rewe*-criteria.

I am, however, not so impressed by the treatment by the author of judgments by the ECJ as a source of ‘uniform’ European private law, notably of the several so-called ‘principles of law’ this Court has gradually developed, included principles of private law.

I missed here a reference to the general and basic principle developed by the ECJ that full effect must be given to the law of the European Union, which has, among many other things, also functioned as a motor for the development by this Court of principles of law, including those of private law. The principle that full effect must be given to the law of the European Union has for instance been an important argument for the judgment of the Court that Member States failing to implement Directives in time are liable for damages resulting thereof (cfr ECJ 19 November 1991, case 6/90 and case 9/90 (*Francoovich*)), a liability that, since the ECJ has broadened its grounds so as to include many other acts and omissions of Member States vis-à-vis the law of the European Union (cfr ECJ case 46–48/93 (*Brasserie du Pêcheur and Factortame*), case 224/01 (*Köbler*), case 129/00 (*Commission/Italy*) and case 173/03 (*Traghetti*)), has according to the author (and many other authors) in turn become a principle itself.

I also missed reference here to the above-mentioned requirements of ‘equality’ and ‘effectiveness’ which the law of the European Union has since the ECJ-judgment of 16 December 1976, nr 33–76 (*Rewe*) set for national private law insofar as the latter law functions as a vehicle to realize the law of the European Union. These requirements are broad enough to serve as principles themselves and actually do so with respect to provisions of national law. The reason they are not mentioned in this context is probably the sharp – in my opinion too sharp (see *supra*) – dividing line the author draws between the so-called ‘indirect’ influence of the law of the European Union on national private law and the ‘uniform’ European private law that is at stake here.

It struck me furthermore as an infringement by the author of his own systematic approach of the effects of the law of the European Union on national private law that, whereas he has heralded the principles of (private) law in question developed by the ECJ as examples of ‘uniform’ European private law and deals with them under this heading, he sometimes illustrates these principles with ECJ-judgments where in fact ‘unitary’ private law is at stake: the principle of unjustified enrichment for instance is illustrated with the ECJ-judgment of 16 December 2008, 47/07 (*Masdar*), which, however, deals with the non-contractual liability of the European Union when it operates as a legal person on the same footing as other persons, so that this judgment belongs in fact to the category of ‘unitary’ private law.

This monograph – the second one in Dutch on the effects European law exerts on national private law after the one by Arthur Hartkamp (*Vermogensrecht algemeen, Europees recht en het Nederlands vermogensrecht*) – provides for

many sharp distinctions between the effects of the law of the European Union on national private law and for interesting insights, whilst the clear succinct style of writing of the author makes it, so to speak, even an 'easy read'.