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Private Law Relationships and EU Law

DOROTA LECZYKIEWICZ AND
STEPHEN WEATHERILL

I. Introduction

Our objective in this volume is to examine, from different perspectives, the nature and purpose of the involvement of EU law in private law relationships. EU law is here understood as comprising both primary law and secondary legislation, taking account also of the often important and not always predictable interpretative interventions of the Court of Justice of the European Union. The contributors investigate, using different methods and approaches, how individuals become affected by the operation of EU law. The chapters taken together are designed to give the reader an understanding of the substantive scope within which EU law intervenes in private law relationships. The constitutional questions associated with the appropriateness of EU law's involvement in private law relationships are also examined. The authors present different views on the question of whether the involvement of EU law needs to be specially justified or whether the EU can rely on the same justifications which have been used over time within national legal orders. These issues are addressed both at the level of general and specific EU law. At the general level selected chapters analyse the core concepts of EU law, such as the Internal Market and its freedoms, general principles of law, and EU law doctrines aimed at ensuring the effective application of EU secondary law. Other chapters, on the other hand, look at specific sectors of private law and analyse the methods and the consequences of the involvement of EU law on their terrain. They interrogate what values motivate intervention by EU law and what impact such intervention exerts beyond that clearly intended by EU lawmakers. In this way the authors enable us to appreciate the real impact of EU law on the conduct of individuals, their private law rights and obligations, their position vis-à-vis other market participants, and their civil and economic status. The intermediary of national law is often the primary vehicle through which the impact of EU law is effectuated, but what is of primary interest to the contributors to this volume is the ultimate effect on individuals and their legal relationships.

A key element in this investigation is provided by the calculatedly ambiguous character of EU law itself. It is not 'public law' in the orthodox sense(s) understood at national level, nor is it private law. It is both and it is neither. In fact, EU law operates without any such anchor, which makes it fluid and which makes it at the same time unstable. EU law challenges and sometimes transforms orthodox categorisations within national legal orders. This may be virtue, this may be vice—part of the enquiry presented in this volume is directed at the extent to which EU law in its several guises discloses an adequate appreciation of and respect for the place of private autonomy in particular and private law in general.

II. 'Private Law Relationships'

Private law relationships are a sub-category of legal relationships that are traditionally governed by the area of law referred to as 'private law'. While the distinction between private and public law has been questioned both at the conceptual and at the normative level, it does form part of the legal traditions of the Member States (albeit to different degrees) to use the division into private and public law to separate the operation of certain fields of law. On the one hand, we have an area of the law which regulates relationships among individuals or non-public actors, who are conventionally believed to be in a position of equality, and which concerns activities unrelated to the exercise of public power. The negative definition of private law places a lot of emphasis on what is 'public'. Definitions of the 'public' range from those focusing on the status of the actor (institutional) to those looking at the nature of the interest pursued (functional). An institutional understanding regards all law to which organs of the state are subjected as 'public', and most closely relates to the distinction used in EU legal scholarship between vertical and horizontal situations. The functional approach treats as 'public' those areas of law which are motivated solely or significantly by public interest, leaving the remaining legal rules to 'private law'.

This volume is not trying to shy away from the difficulty of defining 'private law'. In fact, some of the contributions in the volume have elected directly or indirectly to question the possibility of making the distinction between 'private' and 'public law'. For example, Monica Claes (Chapter 3) questions the usefulness of the private/public divide and replaces it with another distinction, that between vertical and horizontal relationships, regardless of their nature. On this account, she challenges the necessity to ask the question of what justifies the involvement of EU law into private law relationships, and instead asks about the negative reasons why the EU should not exert such influence. This leads her to conceive EU law's involvement as a question of the role of public authority in general and the more specific question of EU competences. Norbert Reich as well (Chapter 11) inclines to the view that at least as far as EU law is concerned

the distinction between private and public law is misguided. Values traditionally perceived as 'constitutional' should without hindrance penetrate relationships which have traditionally been regarded as 'private', such as those arising from and around consumer, employment and service contracts.

The remaining authors are generally of the view that the distinction between private and public law should be preserved. For Michael Dougan (Chapter 5), the category of 'public law' is particularly important, because a 'public law' dimension to a horizontal case is what justifies the application of the general principles of EU law, which according to him are 'public' in nature. Thus, in order to avoid dissonance, cases in which the effect of the general principles of EU law should be allowed need to possess a public law element found in the public authority's failure to fulfil its obligations under EU law. The fact that at the same time a case also has a 'private law' dimension—for example, because it concerns trade or employment—should not, according to Dougan, prevent the application of the general principles of EU law. However, cases without a public law dimension should be protected from the application of the general principles of EU (public) law.

Much more protective of the independence of private law are Martijn Hesselink, Vanessa Mak and Mark Freedland. Hesselink's approach (Chapter 7) is most strikingly separatist in that he believes not only that private law is a distinct category, but also that it possesses its own principles, now also recognised by the Court of Justice in the form of 'general principles of civil law'. Mak and Freedland offer us a slightly different vision of private law. They seem to be of the opinion that both categories do and should interact. To facilitate the interaction Mak proposes the use of the concept of 'average consumer' as a reference point to which analysis of both public and private standards of protection should be directed (Chapter 15). Freedland, on the other hand, while accepting the conceptual distinction between private and public law, argues that the distinction should not lead to isolation of private law reasoning from social considerations (Chapter 12). One way of ensuring that private law is infused with social considerations is to expand their scope of application to areas of private law where such considerations find their natural habitat, such as employment law.

III. Private Autonomy and EU Law

The explicit and implicit discussion of the private/public law divide in the volume's chapters seems to entail that even for authors who would like to undermine the distinction, the separation of private law does admittedly perform a certain kind of epistemic function. Many contributors have pointed to the fact that what distinguishes 'private law', or what we need to identify in the 'private law relationships', is the role and place of private autonomy. Private autonomy is protected by law through the process of separating out certain spheres of

human activity as 'private' and allowing those involved to structure relationships falling within these spheres independently from state intervention. In the economic context we can describe these spheres as areas ruled by market forces and economic power, rather than a regulatory framework.

Manifestations of private autonomy in law are manifold. The most important are the freedom of contract and the absence of coercion. Freedom of contract can take an individualistic or a collective guise. The former is visible within areas covered by general 'contract law', while the latter manifests itself, for example, in employment law, where collective agreements, although regulatory in nature, are an expression of the participants' autonomy to shape the content of their relationships. The normative justification for the protection of private autonomy probably lies in the fact that individuals whose stance is equal do not need to be looked after. They best know their preferences and are best equipped to determine the ways of protecting their interests. This also applies to situations of conflict. As shown by Simon Whittaker (Chapter 6), different legal systems have different views about the extent to which the court's adjudication of disputes should shape the procedural relationship between private parties. The effect of EU law is on occasion to uproot these traditional roles of the court and to alter the relationship between the parties to litigation where the underlying private law relationship is not based on true or even approximate equality. A common illustration is supplied by consumer transactions, the regulation of which has been a long-standing preoccupation of the EU legislature and which has also generated much attention from the Court of Justice. Equally, even in situations of economic equality in a contractual relationship, there may arise procedural inequality stemming from the national distribution of the burden of proof, the standards of pleading, litigation costs and unevenness in practical implications. This latter issue is discussed by Okeoghene Odudu in Chapter 17. Odudu examines the use and effects of the so-called 'Euro-defence', a claim which attempts to nullify the contract on the basis of its incompatibility with EU competition law. Practical challenges in fighting off the defence make claimants settle unmeritorious claims or discourage them from bringing actions entirely, thereby reducing incentives to perform contracts. Thus, it is not surprising that English judges have taken an active role in resisting the overuse of the Euro-defence, and have employed both substantive and procedural tools to make the Euro-defence less powerful. This process is described by Odudu as 'equilibration'.

If private autonomy and presumed equality of parties is what characterises 'private law relationships', legal regulation of such relationships should in principle be orientated towards addressing restrictions on private autonomy and recreating balance between the parties in situations where the real position of the parties vis-à-vis each other differs from the projected one. This idea seems to explain why it is legitimate for the EU to intervene in private law relationships by means of horizontal applications of Internal Market freedoms, and is eloquently defended by Gareth Davies in his contribution to the volume (Chapter 4). Davies argues that restriction of liberty arising from application of Internal

Market freedoms, in particular the prohibition of nationality discrimination, is justified in three-party situations, where acts of one party interfere with the contractual preferences of another, making it impossible or difficult for them to enter into a cross-border contract. In contrast, there is no reason for Internal Market freedoms to be enforceable against private actors who use discriminatory practices in their own contracts, where opposition to cross-border transactions and support for discriminatory treatment affects only their own contractual preferences.

IV. Social Goals and Private Autonomy

States have probably never strictly observed the imperative that private law is private in the sense of being made by individuals for themselves, and that regulatory intervention should take place only where private autonomy is endangered. States intervene because markets fail, but also because they want to realise social goals or, on another view, promote an enriched version of individual liberty, which includes not only protection from coercion and freedom of choice but also access to opportunities. Equality before the law is not real equality of power, so sometimes law is used with a view to correcting social imbalances—although its capacity to do so effectively (or even at all) is by no means taken for granted. The EU has arguably always been seen as a type of public regulator, whose intervention is justifiable on the same grounds as state intervention. This aspect of EU private law is discussed in this volume by Norbert Reich, Daniela Caruso, Mark Freedland and Hugh Collins, who explore both equality-focused rationales and broader distributional claims of social justice. However, their views as to the relationship between the objectives of social justice and the protection of private autonomy are not uniform. Reich's analysis presupposes that there is an inherent conflict between private autonomy and the promotion of equality (Chapter 11), while Collins gives the example of employment relationship, where EU law's intervention executed in the name of social-dumping prevention leads to a displacement of standards of protection arrived at through negotiations between employers and employees and laid down in collective agreements (Chapter 10). Collins' argument is particularly powerful when he shows that the use of soft law and collective bargaining would allow EU law to reconcile not only social justice concerns with private autonomy, but potentially also the former with the need to ensure competitiveness. Caruso (Chapter 12), on the other hand, focuses on EU consumer law, in particular on the regulatory instrument of black lists. She explains that on a perfunctory view the effect of black lists is to restrict contractual freedom, but in the long run their effect is likely to be the reverse—namely, an expansion of private autonomy. Caruso substantiates her argument by comparing black lists in EU consumer law with 'hardcore restrictions' in EU

law governing anti-competitive vertical agreements, and explains how arguably excessive regulation may unleash deregulatory forces.

While social goals are now explicitly among the goals of the EU, they continue to be non-exclusive to the EU in the sense that they are also shared with the Member States. The same cannot be said about private autonomy, the protection of which is not an explicit goal of EU law as set out in the Treaties. While, as Reich reminds us in his contribution, in *Société thermale d'Eugénie-les-Bains*¹ the Court of Justice held that 'the contracting parties are at liberty—subject to the mandatory rules of public policy—to define the terms of their legal relationships', it is also the case, as argued by Stephen Weatherill (Chapter 2), that neither the Treaty nor the Court of Justice provide a 'principled understanding of the legitimate claims of private parties to autonomy'. This led some academic commentators to conclude that EU private law is purely regulatory. It has not been founded on the idea of protecting private autonomy. Weatherill's detailed analysis of different ways in which private law relationships become affected by EU law shows that there are inconsistencies in the Court's approaches, such as the unequal binding force of different Internal Market freedoms on private parties and incompatible propositions about the horizontal effectiveness of Directives. These inconsistencies point strongly to the conclusion that the place of private autonomy in EU law is elusive, in particular where the principle of legal certainty, as employed by the Court, does not seem to guard it particularly effectively.

The doctrine of EU law which bears the primary responsibility for undermining the force of private autonomy claims in EU law is that of 'effectiveness'. Weatherill's contribution explains how its application tends to make EU law spread into both contractual and non-contractual relationships in a largely incoherent manner and without an overarching justificatory foundation. This phenomenon is also explored by Peter Rott (Chapter 8). His contribution explains that the judicial use of the principle of effectiveness leads to a retrospective change in the position of private parties, and for this reason its use requires a particularly powerful justification. This can be effectively provided only by a narrow doctrine of abuse of (national) rights. If, however, as advocated by Rott, we restrict our analysis to the unexpected effects of the principle of effectiveness on liabilities and remedies, then the justification may be provided by the normative underpinning of the substantive obligations imposed by EU law on private parties.

V. EU Law and National Private Law

If it is the case that private autonomy is a gaping black hole in the conceptual structure of EU law, while it is recognised and protected in one form or another

¹ Case C-277/05 *Société thermale d'Eugénie-les-Bains* [2007] ECR I-6415, para 28.

by national law, it comes as no surprise that arguments against the intervention of EU law into national private laws are really arguments for the protection of private autonomy. This idea seems to underlie some of the observations made by Hesselink, who sees 'general principles of civil law' originating in national systems of private law as mechanisms for protecting private interest, presumably by protecting contractual freedom. Collins, on the other hand, argues for renationalisation of employment law to guarantee greater scope for private regulation. Another approach is to include the perspective of private autonomy in EU law itself. Dorota Leczykiewicz (Chapter 9) looks at the role of private autonomy in guiding the construction of liability rules affecting a private party in EU law. She links the protection against coercion by public power with certain constitutional values, such as the principle of legality, separation of powers and the principle of conferral, and explains why there is a particular danger of their violation in the context of the EU law of private party liability, which is most likely to develop judicially rather than legislatively. Appropriate conditions of liability could arguably safeguard the legality of the coercive interference of EU law, but tension would still exist with the other constitutional principles under investigation in Leczykiewicz's contribution. The question, which remains relates to the appropriateness of the judicial creation of remedial rules, a concern which is mentioned also by Weatherill and Claes in terms of EU law's more general involvement in private law relationships.

Protection of private autonomy is still waiting to become an openly articulated goal of EU law. For the time being its locus continues to be national law. Yet, the EU does not merely take over the goals of the Member States in order to pursue them at the pan-European level. The EU has goals of its own which are specific to it, such as the creation of the Internal Market. Davies' contribution has shown that this goal, when linked with promoting contractual freedom, could easily serve as a justification for EU law's involvement. Removing obstacles to free movement, seen independently, is a powerful objective that cuts across areas of (national) law which are often motivated by different rationales. This is one arena in which EU law seems oblivious to carefully nurtured divisions between public and private law at the national level. Christian Twigg-Flesner (Chapter 14) examines the establishment and functioning of the Internal Market as a justification for EU law's regulation of consumer transactions. He sees much persuasive force in the view that the Internal Market rationale does not justify the EU to regulate all consumer transactions, both cross-border and domestic. To justify the involvement of EU law in purely domestic transactions another rationale would have to be provided, such as consumer protection. Yet, the EU's authority to regulate in the name of consumer protection is harder to justify given the constraints imposed by the principle of subsidiarity and the need to advance evidence that consumers are not adequately protected by the laws of the Member States. In consequence, Twigg-Flesner argues that EU consumer law should be rolled back and that it should apply primarily to transactions concluded online or at a distance.

VI. Beyond the Scope of EU Law

The EU undoubtedly faces problems of legitimacy where it deliberately interferes with private law relationships. This remonstrance applies to the rules of the Treaty and to the provisions of secondary legislation—and to the bold interpretative choices made by the Court too. Yet the impact of EU law may be felt beyond the area over which EU law itself claims authority; its doctrines may be used beyond the scope of intended situations. Angus Johnston and Okeoghene Odudu explore such situations. As mentioned above, Odudu focuses on situations in which private parties exploit rules of EU law to achieve changes in their contractual obligations which go beyond those explicitly envisaged by EU law. The effect of EU law is exerted because of economic reality, the fact that litigation is costly, standards of pleading flexible and judicial assessments unpredictable. The involvement of EU law in such situations, as Odudu shows, undermines incentives for contract performance—a result which clearly conflicts with EU law's objective to ensure the proper functioning of the market. The method employed by the English judiciary to curb such excesses serves the ends not only of national but also of EU law.

Johnston focuses on a different type of consequence of EU law—one that is not the deliberate product of EU institutions (Chapter 16). This concerns situations where EU law interacts with national structures and 'spills over' into areas falling beyond its scope. Johnston very carefully maps these spillover effects of EU law, and distinguishes them from other types of EU law's involvement, which are perhaps indirect and less premeditated, but should still be seen as 'intended' consequences of EU law. Johnston also points out that on the whole it is incorrect to view spillover effects as illegitimate and conceptualise them as instances of competence creep. Such effects are often demanded by national constitutional principles, such as that of equal treatment or coherence in the application of policies, and for this reason derive their legitimacy from national law.

What emerges from the discussion offered in the individual contributions of this volume is that EU law's tendency to operate as a restriction of private autonomy is as yet unsystematic and the policy objectives which are apt to legitimise the EU's involvement both coincide and diverge from those traditionally used by states to justify such interference. As long as individual freedom remains the main idea behind areas governed by 'private law'—and even this is far from uncontested—the EU will have to explain not only why it, rather than the Member States, should act, but also why the issue requires intervention at all. The same arguments which EU law has used to undo national regulatory constraints should bind and guide EU institutions.