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The Principle of Non-discrimination in Private Law Relationships as Seen and Presented by the *Ius Commune* Casebook on European Law and Private Law[1]

I On the Outstanding Role of *Ius Commune* Casebooks in General and on Chapter 4 and Chapter 5. II. of the *Ius Commune* Casebook on European Law and Private Law in Particular

Most of the law books and academic works on EU law focus on the evolving case-law of the Court of Justice of the European Union (CJEU) and the interpretation it gives in its preliminary rulings on certain provisions of primary or secondary legislation. Less attention has been given to what happens behind the scenes, at the level of national litigation, where EU law is in fact in action and is applied and interpreted by the national jurisdictions. That is why *Ius Commune* casebooks are peculiar, because they look behind and provide a comparative view of national case-law and this particular volume does it with regard to the interpretation and application of EU provisions influencing private law relationships. This comparative approach gives a new insight into EU law because we have little knowledge of cases where national judges were confident enough to interpret EU law themselves without seeking preliminary ruling and we do not really see either what happens in follow-up cases at national level after the judgment of the CJEU was delivered. National judges are however important actors in the European judicial framework because they are fully-fledged interpreters of EU law: at the level of non-last instance courts, definitely, while at the level of last instance courts, when invoking and applying the CILFIT criteria. The publicity and availability of national court decisions interpreting EU law is however restricted, they seldom cross the country borders, although they could serve as further inspiration for other Member

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[1] Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon).

States' courts, which, instead of seizing the CJEU, would follow them if agreeing with the interpretation provided.[2]

This is why this book is of major importance because it leads us to a partly undiscovered and hidden horizon of EU law, a horizon which however is the closest to us, to our everyday legal dealings at national level.

In order to illustrate that peculiar aspect, of national case law applying EU law in private law relationships, the very first national case reported under Chapter 4 on 'Non-discrimination provisions in the TFEU' could already be raised. The reader might easily be shocked to find out that the Court of First Instance of Brussels in a decision of 1992[3] already ruled that the regulations of the Belgian basketball federation not to allow non-Belgian citizens to participate at national and provincial basketball divisions are against the principle of non-discrimination and this, three years earlier than when the Court delivered its famous judgment in the *Bosman* case,[4] triggering an overwhelming change in the world of sports based on the principle on non-discrimination. It is true that the *Dona* judgment[5] of the CJEU of 20 years earlier already found national quotas in sport federation regulations as non-conform with the Treaty provisions; that decision still left the door open for exceptions with vague and confusing wording referring to non-economic reasons. The Court of First Instance of Brussels was however quite explicit to blame national quotas. It was as explicit as the CJEU some years later.

A question therefore logically arises: was the Brussels court right not to ask the CJEU about the interpretation of the non-discrimination principle in the given case? The answer is debatable. Yes, of course it was right, because it could arrive at a correct and valid interpretation by itself, which was later even confirmed at the level of the CJEU in the *Bosman* judgment and other subsequent cases that fine-tuned the principle. On the other hand, however the reported case demonstrates that interpretations of national courts – even if correct – remain isolated until they are confirmed by the CJEU, the decisions of which are *erga omnes* with binding effect all over the EU. It means that if the Brussels court had referred its questions on the interpretation of the non-discrimination principle with regard to the national quotas to the CJEU, the clarification of the *Dona* judgment could have happened somewhat earlier.

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[2] On the eventual cross-border effects of national judgments see: Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013, Oxford); Sophie Robin-Oliver, 'La référence (non-imposée) à d'autres droits par les juges des États membres de l'Union européenne' in Sophie Robin-Oliver, Daniel Fasquelle (dir.), *Les échanges entre les droits, l'expérience communautaire – une lecture de phénomènes de régionalisation et de mondialisation de droit* (Bruylant 2008, Bruxelles, 141–160); Martin Gelter, Mathias Siems, 'Networks, Dialogue or One-Way Trafic? An Empirical Analysis of Cross Citations between Ten of Europe's Highest Courts' (2012) 8 Utrecht Law Review 88–99.

[3] Court of First Instance of Brussels 14 September 1992 Pas 1992 III 103 C. Markakis v Fédération Royale des Sociétés de Basketball (see p. 237 of the book).

[4] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921.

[5] Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 01333.

The importance of national cases cannot and should not therefore be underestimated. As the relevant chapters of the book clearly demonstrate, they show the national courts' general attitude in the application of EU law: they might echo CJEU interpretations in a faithful manner, with a confident interpretation, they might advance later decisions of the CJEU and in some cases they broaden or tighten the limits of EU law.

The way the cases are presented in the book helps a lot in discovering this attitude: the targeted summary of the national cases reported is accompanied by the notes of the author, giving a focused analysis on the national courts' reasoning and findings, underlined why the decision influenced the private law relationship at hand. Cross references in the notes showing parallelism or even contradiction between national case-law further contributes to seeing the interrelations and interactions at the level of the Member States' jurisdictions. Each case has a short but very targeted 'nickname' which not only brings the cases closer to the reader but also makes recalling them easier. Reading through the cases is even more interesting, because they embrace several decades, from the late 70s until the most recent judgments delivered in the 2010s.

It is self-evident that the principle of non-discrimination – being one of the major guiding principles of EU law – has an important role in the structure of the Book. It is analysed in two different chapters, both written by Professor Carla Sieburgh. Chapter 4 is devoted entirely to the application of the explicit non-discrimination principles enshrined in the Treaty, in Article 18 TFEU (the general prohibition clause on any discrimination based on nationality) and Article 157 TFEU (on equal pay for men and women). While part II of Chapter 5 deals with the non-discrimination as a general principle of EU law and as a provision of the Charter of Fundamental Rights.

This deliberate choice of the author, of treating the different incarnations of the principle in distinct places helps a lot in understanding the real nature and complexity of non-discrimination as it appears under EU law and will be of great help to university lecturers when teaching about the principle.

II The Structure, Approach and Conclusions of Chapter 4

Right at the very beginning of Chapter 4, the author makes it clear what the chapter is about and what it does not cover, and why the non-discrimination principle matters in private law relationships. This very lucid and targeted approach of the author is of great help to the reader in understanding the logic of the different non-discrimination provisions and in following the national cases, which are split into four categories depending on the mechanism used by the national judge concerning the given horizontal relationship.[6] The national decisions

[6] The first category embraces those cases where the direct effect of the given EU provision was invoked; the second category covers those cases in which the national judge interpreted the national rules in conformity with the non-discrimination provision; to the third category belong decisions imposing positive obligations on Member States while the fourth group include all other miscellaneous cases (*Frankovich* type liability cases included).

analysed in the chapter are cases where the non-discrimination principle had a considerable influence on private law relationships but without the support of any other EU law provision, whether on a free movement provision or a directive. In order to understand the real nature of the TFEU articles concerned, the Chapter starts with a focused presentation of Article 18 TFEU, Article 157 TEFU (and, to the extent necessary, Article 19 TFEU) by citing the relevant legal literature and outlining the CJEU case-law.

The different legal effect of the non-discrimination provisions is underlined throughout the chapters. While Article 18 and 157 TFEU do have a horizontal direct effect, i.e. they can have a direct impact on private law relationships between individuals, the principle of non-discrimination, as a general principle of EU law, does not have such an effect but in no way it does mean that it cannot have an impact on private law relationships: if national law is found in conflict with the principle and is disapplied by the national court then it may alter horizontal relationships too: contractual clauses can be set aside, injunctions can be ordered, damages might be awarded or employment contracts of a fixed period should be turned into contracts of indefinite period and employees must be allowed to continue working.

In fact, the analysis of national case-law very much focuses on the different types of consequences resulting from the application of the non-discrimination principle in a private law context. That is because it is at the level of legal consequences where national case-law really matters, as the sanctions to be imposed or the remedies to be applied in the event of violating the non-discrimination principle are always in the hands of national courts. The CJEU provides an interpretation and it is the national judge who is in charge of giving full effect to the norm as interpreted by the CJEU within the limits of its own legal system. The question of whether the consequences and remedies are adequate and effective from an EU law perspective and whether they pass the filter of EU law can be the subject of subsequent appeals at national level or even of new preliminary references.

The analysis and evaluation of the legal consequences applied by national courts is without any doubt the most unique and exciting aspect of the chapter. The author approaches these sanctions, remedies and consequences from this specific perspective. The mere non-application of contractual terms or collective agreements violating EU law does not always amount to appropriate remedies at the level of individuals. In certain cases they are not effective. When analysing a decision of 2007 by the *Cour de cassation,*[7] which found that denying male workers who were in a similar situation as single women raising a child from taking up permanent employment was against EU law, the author herself questions whether disapplying the rule should be seen as an effective remedy in the absence of a vacancy for posts that a male employee could fill. In such cases, awarding damages should be seen as an effective complementary remedy at the level of individuals.[8]

[7] French Court of Cassation 18 December 2007 no 06-45132 Bulletin 2007 V no 215 Société Région autonome des transports parisiens (RATP) v M Somazzi (see p. 262 of the book).

[8] Hartkamp, Sieburgh, Devroe (n 1) 264.

Another interesting example of this kind outlined in the chapter is the follow-up of the *Angonese* case.[9] Who would have thought that the decision of the CJEU had been followed by two appeals bringing the case up to the *Corte di Cassazione* in Italy and these appeals were about the adequate consequences? In the original case, the CJEU stated that proof of the linguistic skills required for a job should also be accepted by other means than a certificate from a specific language centre and thus the recruitment requirement of an Italian bank that accepted only certificates from a single centre had to be assessed in the light of this judgment. In the follow-up cases reported in the book, the issue was the appropriateness of the legal consequences of CJEU's judgment. Should the employer's recruitment term on the specific language diploma be declared null and void and should at the same time Mr. Angonese be awarded damages for the loss of opportunity and, if yes, how much? The *Corte di Cassazione* of Italy upheld both remedies[10] seeing nullity as a logical consequence of non-conformity with absolute effect and awarding damages – even if the amount was mitigated compared to what had been decided by the first instance court – as an effective remedy for losses resulting from the infringement of EU law at the level of the individual concerned, that is Mr. Angonese. Without awarding damages, the remedies would not have been fully effective.[11]

The national case law presented is classified in the chapter into four different categories, depending on the mechanism used by the judge to give effect to EU rules.

The first category embraces cases where the direct effect of the Treaty provision was invoked. Four cases are reported concerning Article 18 TFEU. The number is somewhat higher (six) with regard to Article 157 TFEU, where most cases reported concern unlawful discrimination against men and unjustified benefits for women.

The second category is broader than the first one: it identifies cases where conformity with EU law was achieved through interpretation, either by the harmonious interpretation of national law or by the review (often accompanied by non-application) of the national rule in conflict with EU legislation.

The author of course refers to the limits and difficulties of harmonious interpretation in the case of non-conform provisions, underlining that they can in no way lead to a *contra legem* interpretation of the national provision concerned. A positive example is a decision of 2007 of the Court of Appeal of Antwerp,[12] in which it excluded from the concept of 'foreigners' – from whom a surety for legal costs in judicial proceedings could be required – any EU citizen or company.

Where the limit of *contra legem* interpretation is reached, other techniques are to be used. The counterpart of the above Belgian case is a judgment by the German *Verfassungsgerichtshof,*

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9 Case 281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*. ECR [2000] I-04139.

10 Cass it 11 October 2004 no 20116 Roman Angonese v Cassa di Risparimio di Bolzano SpA. (see p. 255 of the book).

11 Hartkamp, Sieburgh, Devroe (n 1) 258.

12 Court of Appeal of Antwerp 5 March 2007 Eur Vervoerr 2007 vol 6., 739 Scarade NV v Bonyad Shipping Line Europe Ltd and BV/BA Van Doosselaere & Achen (see p. 244 of the book).

where protection granted to 'domestic' legal persons should have to be extended to any legal person domiciled in other Member State. As the scope of the term 'domestic' could not be altered by harmonious interpretation in the strict sense of the word, the German Constitutional Court referred to the positive obligation of the Member State to comply with EU law under the principle of sincere cooperation and extended the scope of the provision.[13] The author sees this kind of case as belonging to the third category of cases.

The parallelism drawn between the two cases is remarkable, because it shows how different Member States' courts could arrive, in very similar cases, at an EU-conform interpretation using somewhat different techniques in order not to pass the borders of *contra legem* interpretation.

And finally, reading cases in which already existing or pre-existing national provisions were interpreted in line with EU law and seeing the ease with which the British courts had already invoked the supremacy of EU law to reinterpret their Equal Pay Act to give effect to Article 157 TFEU in the 70s[14] we cannot but realise again and again how much we will miss the UK and its courts from the Union.

Other cases presented in the Chapter demonstrate the flexible interpretation of the principle at national level. As is emphasised by the author, Article 18 TFEU progressively became a self-standing provision, independent from the articles on free movement, not only at the level of CJEU but even at national level. Of course, it can only be applied if the subject-matter concerned falls within the scope of EU law. Some of the judgements strictly scrutinise these preconditions (e.g. judgment of the *Cour de Cassation* of 2008).[15] However, national case law demonstrates in certain cases a sort of spill-over effect of Article 18 TFEU: courts are in general willing to apply Article 18, even if in situations where it is difficult to see why they believe that EU law can come into the picture. The same can witnessed in the case of non-discrimination as a general principle of EU law, as presented later in Chapter 5: in a 2012 decision, the *Tribunale di Roma* invoked the principle of equality in a situation lacking any cross-border element.[16]

Another interesting aspect of the analysis is how national courts handled cases of reverse discrimination, i.e. cases where national legislation resulted in treating non-nationals in a more favourable manner than nationals. Here the problem is that EU law evidently does not provide protection against reverse discrimination and therefore national courts must either accept and confirm this lack of protection – as did the Supreme Court of the Netherlands[17] – or find a hint in their own legislation or constitution in order to have a way-

[13] Federal Constitutional Court of Germany 19 July 2011 NZG 2011, 1262 SL v MX. (see p. 248 of the book).

[14] Shields v E Coomes Holdings Ltd [1978] 1 WLR 1408.

[15] French Court of Cassation 17 April 2008 Bulletin 2008 V no 95 Wattecamps v Sté European Synchrotron (see p. 241 of the book).

[16] Court of First Instance of Rome 12 June 2012 Foro it 2013 I 1674 FIOM and CGIL Nazionale v Fabbrica Italiana Pomigliano Spa. (see p. 300 of the book).

[17] HR 11 May 2001 NJ 2002, 55 ECLI:NL:HR:2001:AB1558 Vredestein Fietsbanden BV v Stichting Ring 65. (246).

out.[18] It is stated that in some cases these interpretations by national courts result in erroneous decisions.[19]

It is worth noting that, from the judgments analysed in Chapter 4, the majority (10 out of 17) were taken by national supreme courts (six by the French *Cour de Cassation,* two by the Dutch *Hoge Raad,* one by the Italian *Corte di Cassazione* and one by the German *Bundesverfassungsgerichtshof*) without demonstrating the need for a preliminary reference and sometimes even without invoking the exceptions from the obligation to refer. We can only second guess whether the CJEU's approach would have been different if the questions had been referred to it, at least in some of these cases. It is for instance not beyond doubt that the CJEU would have found similarly in the *Zamolo* case,[20] in which a French citizen invoked in France the provisions of a collective agreement favouring German citizens falling within the scope of EU law.

III Non-discrimination as a General Principle of EU Law as Analysed Under Chapter 5

Chapter 5 is devoted to the general principles of EU law. They are grouped – according to their nature – into four subchapters: general principles of public law nature, the principle of non-discrimination, abuse of rights and the principle of unjust enrichment. Non-discrimination is thus examined in second place in subchapter II. Again, at the very beginning of the subchapter the reader is well instructed by the author on how to conceive the principle of equality as enshrined in EU law and why it behaves differently in an EU context than at national level. The specific nature of general principles in EU law also matters: their main purpose is to fill in the existing gaps in national legislation and their meaning is determined on the basis of the Charter.[21]

Although non-discrimination as a general principle cannot be invoked directly in horizontal relationships, it played a major role in the recent case-law of the CJEU in the leading *Mangold*[22] and *Kücükdeveci*[23] cases, where the Court ruled that national legislation in conflict with the principle must be disapplied or, as in the judgment *Test-Achats*[24] where an EU directive was annulled by the Court for being in breach of the principle of non-discrimination.

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[18] The author makes reference to some recent constitutional, legislative or jurisprudential changes in Italy, Belgium or Austria [Hartkamp, Sieburgh, Devroe (n 1) 277.].

[19] Hartkamp, Sieburgh, Devroe (n 1) 247.

[20] French Court of Cassation 10 December 2002, Bulletin 2002 V no 373, 368 Goethe Institut Association for the Promotion of the German Language Abroad and Cultural Exchanges v Bataille Zamolo (see p. 238 of the book).

[21] Hartkamp, Sieburgh, Devroe (n 1) 289.

[22] Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

[23] Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG.* [2010] ECR I-00365.

[24] Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-007733.

The national cases are grouped into the same four categories as is found in Chapter 4, although the first category this time remains unfilled due to the absence of the principle's horizontal direct effect. The author underlines however that, in Chapter 5 she gives a rather broad meaning to the second category of cases, where the technique of harmonious interpretation is used by involving all those national decisions in which the open norms of private law (such as fairness, reasonableness, generally accepted conduct etc.) have been reconstrued through the prism of the general principle of non-discrimination.[25]

The cases analysed under this subchapter are mainly hybrid cases of *Mangold* and *Kücükdeveci* and emanate primarily from German courts. What do these follow-up cases tell us? The systematic presentation of the cases, as carried out in this book, actually tells us a lot. It must be underlined that both *Mangold* and *Kücükdeveci* concerned labour law and employment or termination terms not respecting the non-discrimination principle based on age. On the one hand, they demonstrate that a new, pioneer interpretation of the CJEU in sensitive areas such as labour law will trigger subsequent new cases at national level that might be seen as subcategories of an already decided case (whether the interpretation also applies to agreements entered into prior to the judgment of the CJEU[26] or how the interpretation should be applied in certain sensitive sectors where age discrimination is in principle justified by the nature of the work, as in the case of flight attendants and pilots[27]). National courts are able to cope with some of these new aspects but are not always completely sure and convinced. If they are not, they refer further questions to the CJEU. On the other hand, pioneer judgments might bring those who do not agree with them to their national constitutional court, asking it to scrutinise the eventual *ultra vires* effect of the pioneer CJEU judgment. Such an effect was denied by the German Constitutional Court performing the *ultra vires* test in a European-friendly and cooperative way,[28] but it cannot be ruled out that it would be recognised by some others, as was shown in the Czech Constitutional Court finding the ruling of the Court in the *Landtova* case to be *ultra vires.*[29]

The conclusions of the subchapter confirm the thesis that non-discrimination as a general principle might indeed have a considerable impact on private law relationships. This is clearly demonstrated by the various legal consequences national courts applied in different contexts. The author identifies eight different categories of these consequences,[30] based on the case-law analysed but these are of course not exclusive and there could be other specific cases where the horizontal relationship is altered in a different way. All in all, the main conclusion of the author is that national courts were able to find suitable remedies in cases of infringement of EU law, sometimes even using inventive and creative ways.[31]

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[25] Hartkamp, Sieburgh, Devroe (n 1) 291.
[26] German Federal Labour Court 26 April NZA 2006, 1162 X v Y (see p. 305 of the book).
[27] Federal Labour Court of Appeal of Germany NZA 2012, 866 Z v X (see p. 315 of the book).
[28] Federal Constitutional Court of Germany 6 July 2010 *NJW* 2010, 3422, *Honeywell v X* (see p. 302 of the book).
[29] Czech Constitutional Court 31 January 2012 PI. ÚS 5/12. *Holubec.*
[30] Hartkamp, Sieburgh, Devroe (n 1) 323.
[31] Hartkamp, Sieburgh, Devroe (n 1) 323.

IV On the Importance of the Casebook Again

Reading through the two chapters, it can be clearly stated that the rich national case-law analysed by them brings us to the very heart of EU law, to the national level, which is not covered in the literature unless thorough research of this kind is conducted. The cases, summarised in a very precise and focused manner and accompanied by short but entirely relevant notes, are not only of great value for academics and scholars but can and should be integrated into the teaching material in order to illustrate how EU law can be interpreted in a uniform but still legal system-specific way throughout the Union and how classical horizontal private law relationships are altered by national judges as a consequence of applying EU norms or principles.

Moreover, as the author of the Chapters herself underlines, the description of national cases in areas where there is insufficient case-law available yet – such as the invocation of non-discrimination as a general principle in private law relationships – may assist students, scholars, judges and lawyers in structuring their arguments in future cases.[32] The book is therefore not only informative but at the same time inspiring.

I also hope that the invitation of Prof. Sieburgh, addressed to the readers to report national cases where the principle of non-discrimination was applied, will find echoes, and that this extraordinary work of collecting national cases will continue and will progressively extend to other Member States' jurisprudence as well.

[32] Hartkamp, Sieburgh, Devroe (n 1) 288.