Article 345 TFEU states that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. Although the economic policy objectives adopted by the EU favour private over public ownership in the market place, it is not prohibited for the States to own undertakings, which flows from the principle provided by Article 345. However, irrespective of their public or private status and how they are financed, all entities shall be subject to the competition and State aid rules of the Treaty as long as they engage in economic activity. In this respect, Article 106(1) of the Treaty indicates that in case of public undertakings and undertakings having special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary, *interalia*, to the competition and State aid rules. On the other hand, according to Article 106(2) of the Treaty, the undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules, *inter alia*, on competition as far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

The 'services of general economic interest' is one of the key concepts in the EU law, which plays an important role in the provision of public services. This is because they constitute a limit to the application of competition rules, in its broader meaning that includes State aids, provided that other conditions stipulated in Article 106(2) are also fulfilled. Thus, there are two ways in which the application of competition law to the public services can be limited. First, they may be considered as non-economic and held outside the scope of competition rules or secondly, they benefit from the derogation in Article 106(2) TFEU, despite their economic nature. This subject shall be discussed in the second and final part of the presentation.

Cordes S.
Research Assistant at the Chair for
European and Polish Private Law and Comparative Law,
University of Osnabrueck

THE CHALLENGE OF COHERENCY IN THE PROCESS OF IMPLEMENTATION DIRECTIVES INTO NATIONAL LAW SYSTEM

This essay deals with the transposition of EU directives into national law of the Member states. It shows the influence of EU private law on national private law by using the example of the implementation of the Consumer Sales Directive into German law and outlines the occurring problems for the coherency of the German legal system.

Starting from scratch it can be said that EU private law is made by the European commission, the European council and the European parliament [1, 69]. These institutions are only allowed to legislate in areas where they are specifically authorised by the Treaties. There are three main legal instruments to legislate in the EU: regulations, directives and decisions. All of them are laid down in Art. 288 TFEU. Decisions are the means by which the EU adopts certain individual administrative acts [2, 287]. They are not relevant for European private law. Regulations are frequently used in the EU system, both as administrative and legislative instruments [3, 280]. The key elements of a regulation are its general

application, its binding character in all respects and its direct applicability in all Member states [4, 467].

Even though regulations are frequently used, they are not used for private law issues in general very often, but rather for civil procedure, private international law and intellectual property law. Mostly all other European private law is adopted by directives [5, 785-786]. Directives differ from regulations in two important ways. They do not have to be addressed to all Member states and they are only binding to the aim to be achieved while leaving some choice as to form and method open to the Member states [2, 384; 6, 85]. Some are based on minimum harmonisation, meaning that they allow Member states to set higher standards than laid down in the directive. Other directives are based on full harmonisation, allowing no deviation from the standards of the directive [7, 18]. Regardless of whether they are based on minimum or full harmonisation, directives need to be implemented into national law to become enforceable.

There are different methods to implement a directive. Firstly, states can make marginal modifications to already existing pieces of law. Secondly, states can adopt separate special acts following the European guidelines which comes close to a word for word transposition [8, 32]. Thirdly, states can restructure their already existing statutes and can create a new system which fulfils the requirements of the directive. If the standards of a directive are already established by national law, a state does not have to change anything.

However in practical work, the transposition act, whatever method is chosen, is only an attempt to reflect the content of the directive which alone is authoritative [9, 38]. If the interpretation of a directive is unclear and relevant for a judgment in a Member state, the national courts are obliged to stay the proceedings and refer the question of interpretation to the ECJ who is solely entitled to interpret a directive. Hence, whenever the national law after the transposition is not in conformity with the directive, the directive is, under certain conditions, directly applicable (direct effect) or at least indirectly applicable (indirect effect), because the national law must be interpreted in conformity with the directive [10, p. 19, 41, 43].

The Consumer Sales Directive was designed for the harmonisation of consumer sales law within the European Union by setting a certain minimum level of consumer protection in sales law [11, 162]. The preamble to the directive suggests that consumers who are keen to benefit from the large market by purchasing goods in the Member states play a fundamental role in the completion of the internal market. Additionally, it suggests that the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the Community, will strengthen consumer confidence and enable consumers to make the most of the internal market. Hence, it can be concluded that the directive aimed at improving the functioning of the internal market and ensuring a high level of consumer protection [12, 219]. Obviously, the directive was based on minimum harmonisation, allowing the Member states to impose a higher level of consumer protection.

The Consumer Sales Directive entered into force on 7th of July 1999 and had to be transposed by 1st of January 2002. From the latter the directive fully produced its effects and was directly or indirectly applicable [9, 47].

The new law came into force at the 1. January 2002, so within the transposition time.

Already at the time of the law of obligation revision, there was a debate on creating a separate codification for consumer law to better solve problems arising from the implementation of EU law [13, 475].

After the ‘Weber/Putz’-judgment the debate of a separate codification for consumer law became more present in German academia. The Association of German Jurists discussed the topic at their conference 2012 in Munich. They fairly clearly denied a resolution to suggest the legislator to create a separate codification for consumer law. One of the attendants arguing for a separate code mentioned the fact that the European consumer law is constantly changing and that the German legislator is therefore very often obliged to change the consumer law. These constant changes and the system of exceptions and referrals would make it difficult to find the actual law. However, most of the other attendants referred to the general principle of coherency in the Civil Code. The system of exceptions and referrals even is a characteristic of the German Civil Code and therefore not a convincing argument for a separate codification. Furthermore the Civil Code itself would be flexible enough, if the legislator is willing to implement major reforms [14, 15, 98, 113, 118, 123].

A separate codification might be preferable, if the German legislator has no more influence on the area of law. This might be an option for European consumer law in the future when it would be made solely by full harmonised directives or regulations.

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