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FULL AND MINIMUM HARMONISATION AND THE DIFFICULTIES THE LEGISLATURE FACE WHEN IMPLAMENTING DIRECTIVES INTO OWN CODIFICATION

In this article I want to explain how the harmonisation of law throughout Europe is trying to be accomplished with the use of directives from the European Union. In the Beginning, my aim is to explain how the level of harmonisation influences what is going to be accomplished with the implementation of the directives in national legislation and also what problems arise for the national legislations. Full harmonisation and minimum harmonisation do not have the same cause and not the same effect on the general harmonisation of the national laws of the member states of the EU. Therefore they also have different advantages and disadvantages. Even though I will illuminate all of them my focus is laying on some of the disadvantages of full harmonisation; specifically the problems the national legislature faces when implementing full harmonised directives.

In order to achieve their aims,[54] the European Union has several types of legal acts. Some of them are binding, others are not. Some apply to all EU countries, others to just a few. The Directive is one of the legal instruments available to the European institutions for implementing European policies. It is a very flexible instrument; it obliges the Member States to achieve a certain result but leaves them free to choose how to do so. The directive is a tool mainly used in operations to harmonise national legislations.

In relation to the European Union, harmonization of law describes the process of creating common standards across the internal market. The level of harmonisation acquired by directives from the EU may differ. They can be minimum or full harmonised [1, 33-34].

Originally, directives set a minimum standard in consumer protection, leaving it free to the member states to establish an even higher level of protection in their national law. This approach is primarily used to ensure a high level of consumer protection within the European Union as acquired by Art.169 of the Treaty about the Functioning of the European Union.

But because of the legal fragmentation, that often goes along with it, what the minimum harmonisation does not support is the development of the internal market. It still entails the risk, that traders, who offer their goods or services across the border may still face different rules that apply to their contracts than they accustomed to in their home country. A trader still has to adjust his conditions of contract and market modalities to specific national legal systems, which have different levels of consumer protection, in order to trade in the entire internal market. As a result cross border trade is often more expensive than purely domestic trade, which implies, that the

[54] For example the topics listed in Art.4 TFEU and also in particular the development of the internal market and the protection of consumer rights throughout Europe; http://europa.eu/about-eu/index_en.htm

conditions for competition are not the same throughout Europe and in fact worse for foreign traders than for domestic traders. Therefore the effectiveness of minimum harmonisation for the development of the internal market faces serious doubts [1, 33-34].

In the early past the European Union started a new way of harmonising their consumer protection directives, the so called full harmonisation. The policy shift from minimum harmonisation to full harmonisation was announced in the 2002 Communication on the Consumer policy strategy 2002-2006 of 7 May 2002 and immediately put into effect with the 2002 Directive on distance marketing of financial services. The new approach was followed by the adoption of the Unfair commercial practices directive in 2005, the revised Consumer credit directive in 2008 and the revised Timeshare directive in 2009. The 2008 proposal for a Consumer rights directive continues this new approach [2, 6].

The level of Full harmonisation still leaves it to the member states how they implement the directive but concerning the level of consumer protection they can no longer implement or apply either less or more restrictive or prescriptive consumer protection measures in the area the directive harmonises. Because of the advanced assimilation of the national legal systems the full harmonisation consequently supports cross border trade to a far greater extent than minimum harmonisation. Consequently, full harmonisation could cause traders and consumers to be able to rely on the fact that in the entire European Union there applies only one set of rights and obligations of the parties. According to the Commission this would remove the barriers to the internal market which result from the different rules that exist in the Member States. Full harmonisation therefore leads to a 'level playing field' for all traders and consumers– a uniform level of consumer protection throughout the EU.

On the other hand, as already mentioned above, concerning the level of consumer protection, full harmonisation does not allow member states to introduce or have a higher consumer protection level than required by the directive. Thus the general protection level is reduced. [2, 6]

Additionally European Member States are not allowed anymore, to extend the directives content to areas that are not covered by the directive, as for example done by the German legislature, who regulated the whole law concerning sales contracts according to the directive and not only consumer contracts [3, 47-98].

Furthermore the idea of full harmonisation has received criticism from the scientific community, because it is said, that it prohibits the desirable competition between the legislature of the member states [2, 5]. This is explained in the way that the assimilation of the law prohibits the decentral organized search for the best solutions to always changing currently emerging circumstances. The concept of learning from each other´s mistakes and solutions and also different cultural and economic backgrounds of the member states would not be taken into big account [4, 14].

Problematic is the relationship between full harmonised directives and the structures of the private law of the member states.

Full harmonised directives as the consumer rights directive tend to have a not insignificant impact on the general contract law of the national laws of the member states. Due to the requirement of full harmonisation the national law has to be changed in a very specific way, which may be conflicting with other rules in the system. In some cases the requirement full harmonisation of specific rules can cause a possible incoherency in the legislation of a member state.

Even though, the full harmonisation of the right of withdrawal in the directive on Consumer Rights55 caused some problems for the german lawmaker, it is generally seen as not too problematic to harmonise this right, especially the time limit, because it is comparatively easy to fit it in the national legal system. This can be explained very simply by the fact that the rules about the right of withdrawal do not belong to the very core of the private law. They just complement the traditional institutions of law. The rules about the right of withdrawal, which originate in the acquis communautaire, regulate everything completely on the level of the European Union. Therefore they do not even have to be implemented in national law to operate properly.

It is disproportionately more difficult to do the same with for example the regulation about the duty to provide information or the system for monitoring contract terms. In the case of the system for monitoring contracts the problem is, that it is installed differently in the national legal systems. A full harmonisation would inevitably affect the entire general contract law, if an incoherent system is not an option.

There is no way that, for example, the major obligation of a monitoring violation of moral principles could be executed, if they only apply to the negotiated terms in consumer contracts. This would lead to a conflict of values. In those cases the relationship to the general clauses of contract law, which allow a kind of fairness test is not distinct. If a black list of prohibited clauses was full harmonised, there would immediately be the question whether the national legislature still has the power to prohibit other clauses with the instrument of cogent law. Would a ban like this be compatible with the concept of full harmonisation?

Another question is, whether it would be possible to implement certain full harmonised parts of the law of irregularity in performance in a legal system? Where would be the barrier effect if it is not meant to full harmonise the complete institution of compensation?

The discussion about the full harmonisation of the directive on Consumer Rights showed that it is only possible to regulate a legal system, which is completely functional without the support/use of other rules of the national law in a full harmonised directive. If the directive regulates an institution of the very core of private law the requirements on the completeness becomes even higher [5, 136 - 137].

In my view, the legal basis of full harmonised directives is uncertain. Furthermore there is the threat of full harmonisation causing incoherency and inconsistency of national contract law. The full harmonisation approach seems to me like not really thought through and maybe not necessarily the right idea at the right time. In my personal opinion, the use of the concept of patchwork of regulations created by the European Union might be coming to an end soon. The space for the ‘small and easy’ regulations seems to be regulated already. With the new approach the European Union started to regulate with bigger ‘patches’. In order to use this concept of full harmonisation in a reasonable way for the problems which are left the patches might be needed to be even bigger, though. In any case, if the European

[55] Directive 2011/83/EC. It replaces, **as of 13 June 2014**, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises. Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees as well as Directive 93/13/EEC on unfair terms in consumer contracts remains in force and can be found online here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1

Union keeps the speed in which it regulates these problems there will be soon a time when there will be the need of an even ‘newer’ approach. As I see it, in order to grow as a union, the attempts should be made to form something like a European Code. This is said easily but unequally harder to accomplish but maybe an aim for the future.

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FINANCING TRANSPORT INFRASTRUCTURE IN POLAND. TRENDS AND RISKS

On January 15, 2016, Standard & Poor's Ratings Services (S&P), which is one of the Big Three credit-rating agencies, lowered the long-term foreign currency sovereign credit rating on Poland from 'A-‘ to 'BBB+'. In support of that decision, S&P stated that new Poland’s government led by Law and Justice party, which in the election in October 2015 won an absolute majority in the parliament and the senate, has initiated various legislative measures that weaken the independence and effectiveness of key institutions, such as the constitutional court and public broadcasting. S&P also changed the Poland’s rating outlook to negative fearing that there is potential for further erosion of the independence, credibility, and effectiveness of key institutions, especially the National Bank of Poland. The Agency also expressed concern that – contrary to earlier expectations – Poland’s fiscal metrics would not improve and some reversals in the country’s sound macroeconomic management of the past years would be observed. Several days after the S&P announcement, Moody's Investors Service – another credit-rating agency