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THEORY OF CONNECTED CONTRACTS IN GERMAN AND EUROPEAN LAW AND THE REGULATION OF ONLINE INTERMEDIARY PLATFORMS

Abstract

I. Introduction

On the basis of German law and also of the *aquis communautaire* of the EU the concept of the contractual relation is in general bilateral, involving two parties (principle of the privity of contract) or a formational agreement which governs the relation between the persons i.e. building a company which is along with German law a “Gesamtakt” which means that the declaration of intention is related to a common purpose the contracting parties want to achieve together. A third possibility along with the traditional understanding of the theory of intentions of will is not given.

Networks as a lately emerging fact of collaboration between social actors i.e. businesses or consumers are difficult to regulate legally.

From the view of economic theory networks create network effects. Economy examines cases in which "the utility that a user derives from consumption of a good increases with the number of other agents consuming the good". In other words, a network effect exists where purchasers find a good more valuable as additional purchasers buy the same good [Mark A. Lemley, David McGowan, Legal Implications of Network Economic Effects, California Law Review,Volume 86, Issue 3, p. 481].

From the sociological point of view networks are sets of people or groups linked to one another by specific relationships [See i.e. http://www.soc.cornell.edu/about/social-networks/ accessed 24.03.2017]. Networks are dizzying phenomena of social coordination because they can´t be subsumed neither under the market category nor under the category of an organization [Günther Teubner, Netzwerk als Vertragsverbund, Internationale Studien zur Privatrechtstheorie, Bd. 5 Nomos, 2004, p. 9].

II. Theory of connected contracts in German and European law theory

Network is not a legal concept [ibid]. Yet legal theory has to make pace with the market development and acknowledge forms of networks and incorporate them into the legal system. From legal theory networks differ from market contracting because the participants are not impersonal agents but well identified players chosen on the basis of resource complementaries [Fabrizio Cafaggi, Contractual Networks and the Small Business Act, EUI working papers law, 2008/15, p. 2.]. There is a distinction between multilateral contracts and networks based on bilateral linked contracts [ibid].

1. German law theory

The idea that networks are a challenge to the system of obligations and the law on contracts is not entirely new. In German law doctrine it was first addressed

by W. Möschl in 1986 in an article about the dogmatic structures of cashless payment transactions [Wernhard Möschel, „Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs“ AcP 186, 1986, 187]. For the very case he was examining – structures of the cashless payment transactions – he developed the term of connected contracts. It was besides the automation of the payment transactions the connecting and systemic character of the payment transactions which made him argue that this construction was pointing beyond a sole legal internal relation in this connection just between the two involved parties [ibid, p. 189]. He raised the question whether basically individualistic contractual structures were not superimposed by embedding them in an overall system [ibid, p. 211]. In such a “net-contract” or “system of connected contracts” duties to warn which are based on individual legal acts could be pushed aside and on the other side duties to protect could be interpreted widely without regard at which point of the network the misbehavior would have occurred [ibid]. He also argued in favor of a new category of contracts: “the net-contract”[ibid, p.225].

In 1997 M. Rohe [Mathias Rohe, „Netzverträge“ Jus Privatum vol. 23, Mohr Siebeck, 1997.] elaborated further on this concept and applied it not only on cases of cashless payment transactions but expanded the concept also on cases of multi-part transport of goods, just-in-time production, franchising, and authorized dealer systems. He distinguished between decentralized structured net-contracts and hierarchical net-contracts. Net-contracts along with Rohe occur when in a bundle of contract relations a common purpose can be distinguished [ibid, p. 387] although this purpose is not as strong as a common purpose in commercial law i.e. the purpose the contractors of a GmbH (German Private limited Company) would have to be.

G. Teubner in 1990 [Gunther Teubner, „Verbund“, „Verband“ oder „Verkehr“, zur Außenhaftung von Franchising- Systemen, ZHR 154 (1990), p. 295-324] and in detail in 2005[Günther Teubner, Netzwerk als Vertragsverbund] described some types of networks such as i.e. Franchise systems, virtual enterprises, Just-in-Time networks as connected contracts. He started from sociological science which already for quite a time recognized and analyzed the phenomena of networks. From the background of Luhmanns system theory he reasoned that autonomy of a legal dogmatic (Rechtsdogmatik) could only be achieved under the condition that the legal terms were adequate to society and therefore he required for the law to build a network related legal terminology [ibid, p. 10]. Also Teubner narrowed the focus on his research down from all possible networks on some closer defined ones in the end the same network constellation Rohe elaborated on.

Beside the positive effects networks have Teubner also described the failing of networks (Netzversagen): networks which until lately were praised as “the organizational form of the future” are now normalities [ibid, p. 47]. They also created dysfunctional problems that needed to be addressed i.e. by legally regulating the risks emerging from networks which could lead to a re-stabilization of networks which are threatening themselves [ibid]. Generally – he argued – economical risks are transformed into legal risks by creating liability norms. From this starting point the connections between specific network risks and guidelines for a possible legal regulation become apparent [ibid, p. 48]. He proposed to address the specific risks of networks which are especially based on the long term relationships of networks especially trust inherent in this relationship. An example of the trust related risk he sees i.e. in the fact that a network member has to put

forward an advance which is going to be related to long-term counter performances from the network [ibid, p. 49]. He concluded that networks should be seen from a legal perspective as connected contracts and proposed to develop a future contractual organizational law which related adequately to the hybrid character of networks by recognizing organizational, multilateral elements into the contract [ibid, p. 101].

This double construction of a contract and a bond (connected contracts) in the premises of the regulation and the selective double attribution of legal consequences on the contracting partners and the bond would transform the economic theory of principal- agent incentives and information incentives into law [ibid, p. 114].

Yet the theory of connected contracts was almost never accepted by the leading legal opinion in Germany. In cases it could be brought under account the German Legislator chose to regulate the matter differently i.e. in regulating s. 675 f BGB for cashless payment [Palandt Sprau, Beck, Munich, 72. Ed. 2013, § 67b edge no 3: it is characteristic that in cases of payment (…) exists a multi-personal relationship. These legal relationships are strictly to be devided. Edge no 9: "no contractual relations exist and therefore also no contractual obligations exists relating to external payments between the payer and the payment agent of the recipient"].

2. European law theory

Yet on the theoretical level the theory of linked or connected contracts was further discussed [See i.e. the articles in Kritische Vierteljahresschrift für Gesetzgebung (KritV), vol. 89 (2006) issue 2-3, Cafaggio op. cit]. Cafaggio gave a comparative overview for EU legal systems [Cafaggio, ibid, p 24]. In France i.e. the notion of "ensemble contractuel" or "groupe de contrats" provides a basis for the recognition of strong interdependencies between the contracts. Yet the consequences of the interdependence may vary in relation to validity and rescission [ibid, p. 31].

Traditionally the concept of connected contracts has been narrowed down to specific more tightly connected contractual conglomerats as franchise systems, virtual enterprises or just in time delivery relationships.

Still it has also been argued that against the assumption of giving over the idea of networks and network contracts to history, the actuality of this idea remains helpful for at least two reasons. Firstly, contract law will have to revert to the idea of a network where it is necessary to protect the reasonable expectations of the parties to a transaction and to legitimate such expectations with due regard for the existing business practices in order to formulate the operational expectations of the contracting parties – with the appropriate consequences for the decision to be taken by a court or an arbitration tribunal. In this sense, the network concept could be opened to an even broader application: by taking consumers into account at the endpoints of integrated distribution systems; in the solution of competition law cases which contract lawyers have to deal with; in cases in which there are significant differences between an agreed credit model and its actual implementation; possibly by applying it to the practice of decentralized contracting, such as encountered in electronic marketplaces [Roger Brownsword, Zum Konzept des Netzwerks im englischen Vertragsrecht, KritV, vol. 89 (2006) issue 2-3, p. 133.].

3. Traces of the concept in new EU-legislation?

On the European level the term of linked contracts has lately found its way into the new directive on package travel [Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ 2015, L 326/1,11.12.2015] defining the term "linked travel arrangement facilitated by traders for travelers" (Art. 2 s. 1) which has to be understood as at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates: (…) (Art. 3 s. 5).

The new directive hereby introduces new obligations for the stationary and online intermediary which go beyond the previous obligations of travel agencies mostly defined by case law [Ernst Führich: Die neue Pauschalreiserichtlinie, Neue Juristische Wochenschrift (NJW), 2016, p. 1204]. The directive creates alongside the term of the classical package travel the new category of linked travel arrangements to protect the traveler better in cases of self compiled travels. This type of travel is not a package travel and guaranties the traveler only basic protection by providing information duties and protection against insolvency risks if the intermediary who facilities the travel receives the payment and therefore there is no direct cashing by the trader who delivers the service (art. 19) [ibid].

III. Conclusions for the legal regulation of the operation of online intermediary platforms

The theory of connected contracts can become fruitful in some respects for the regulation of online intermediary platforms even without pointing explicitly to this theory which has a strong based argumentation until today mainly towards special business network-relations by applying some general features which can be deviated from network theory.

1. By carving out special features the network situation creates as a whole – beyond the concrete triangular contract situation:

Such possible network effects [See above p.1. in case of intermediary platforms the network effect may affect firstly the platform supplier relationship: the more persons are in the network the more revenues will emerge, but secondly also the platform customer side: the more customers will join the network the more variety of goods and services may be available] could be i.e.:

- advertising for the platform by the platform is good for the supplier, the same effect could not be achieved by the supplier alone.
- the possibility of the supplier to reach through the platform a large number of clients;
- the possibility for suppliers to present their goods or services in a professional (more or less) uniform way through the platform;
- the terms and conditions of the platform creating trust towards the customer: i.e. the recommendation system;
- the bundling of suppliers offers a wider variety of goods or services for customers;
- the channeling of communication between suppliers and the customers;
- the network members accept the conditions of the platform;

- provides quality standards that are in line with the requirements of the platform (regarding quality of goods and services, delivery, return options, payments);

2. The thought that economical risks are transformed into legal risks by creating liability norms

- Is it appropriate that liability is limited to the single directly involved network member because the regulating contracts are solely bilateral, taking into regard the co-responsibility of the network i.e. in view of the insolvency risks or should liability also be addressed towards the network central other members of the network or the network itself [see Günther Teubner, Netzwerk als Vertragsverbund, p. 55]

- Problems of the attribution of knowledge [ibid, p. 56].

LIST OF REFERENCES:

1. Directive (EU) 2015/2302 Of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ 2015, L 326/1,11.12.2015
2. http://www.soc.cornell.edu/about/social-networks/ accessed 24.03.2017
3. Roger Brownsword, Zum Konzept des Netzwerks im englischen Vertragsrecht, KritV, vol. 89 (2006) issue 2-3,
4. Fabrizio Cafaggi, Contractual Networks and the Small Business Act, EUI working papers law, 2008/15
5. Ernst Führich: Die neue Pauschalreiserichtlinie, Neue Juristische Wochenschrift (NJW), 2016, p. 1204-1209
6. Wernhard Möschel, „Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs“ AcP 186, 1986
7. Mark A. Lemley, David McGowan, Legal Implications of Network Economic Effects, California Law Review,Volume 86, Issue 3
8. Mathias Rohe, „Netzverträge“ Jus Privatum vol. 23, Mohr Siebeck, 1997
9. Palandt, Sprau, Beck, Munich, 72. Ed. 2013
10. Günther Teubner, Netzwerk als Vertragsverbund, Internationale Studien zur Privatrechtstheorie, Bd. 5 Nomos, 2004
11. Gunther Teubner, „Verbund“, „Verband“ oder „Verkehr“, zur Außenhaftung von Franchising- Systemen, ZHR 154 (1990), p. 295-324