Private Law in the External Relations of the EU

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Introduction

Marise Cremona and Hans-W. Micklitz

1. The Purpose of the Book: Bringing Two Fields Together

This book is both an exploration and an invitation. It is intended to initiate an exploration of the interaction between European Union (EU) external relations law and private law, and a conversation between those working in these two fields. When we embarked on this project we had an intuition that the two fields are becoming increasingly interconnected and that this has important implications which are not always fully realized by either academics or practitioners. The experience of putting together this book has convinced us that the subject is indeed a significant one that needs more attention. We hope that the book establishes some of the themes and parameters for discussion, and provides some insightful sectoral examples as illustrations of those themes.

What does EU external relations have to do with private law? In what ways might European private law be a tool to achieve EU external policy objectives, especially in regulatory fields? In what ways might the rapidly developing EU external competence over the procedural dimensions of private law, including private international law, impact substantive law both externally and internally? These are the key questions that we explore in this book. This short introduction highlights our understanding of the topic; our ideas are developed more fully in the following two chapters, which are intended to serve as a longer introduction to the book as a whole.

External relations and private law are usually seen as two separate fields, unconnected to each other. The mutual deficit in perspective is the following: private law appears to be essentially bound to the nation state, by which we mean that private law is generally regarded and discussed in the context of a private legal order forming part of the nation state. This is what we call traditional private law. When it comes to the external dimension, private *international* law is the means to cope with differences between traditional national private legal orders. From such a perspective it does not matter in principle whether the cross-border dimension at stake operates within the EU or beyond; private international law operates in both cases. EU external relations law, on the other hand, tends to focus on the competence of the EU to act within the realm of *public* international law, and within the various fields of law that come under an explicitly external umbrella, such as trade, development aid, and foreign policy. Traditional private law is barely visible in this context.

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However, this picture changes dramatically if private law is understood as *regulatory private law*, the space where regulatory law intersects with private economic activity. This understanding of private law includes the directives and regulations the EU has adopted horizontally with regard to particular groups of citizens such as workers, consumers, and women, or vertically with regard to particular sectors such as telecommunications, postal services, energy, transport, financial services, or product safety.[1] Here the link between the European internal market and the global market—and thereby international law—is much more prominent. Again, we should differentiate between two sets of EU rules. First, those which have a direct link to the external world, such as international transport (e.g. the Open Skies Agreement between the US and the EU or the air passenger rights regulations). Second, those rules where the role of the EU as a regulator at the international level is less obvious. Regulated markets such as telecommunications, postal services, energy, transport, financial services, and product regulation (pharmaceuticals, chemicals, foodstuffs) may serve as prominent examples. Although less visible than, say, traditional trade policy, the European Commission is in fact heavily involved in rule-making via international organizations such as the Codex Alimentarius in the field of food safety, or IOSCO in the field of financial services, mainly with the purpose of opening up markets for European business and the consumer while maintaining or raising the standards of protection.

Within the law on external relations, an increased focus on private law has resulted first from the aim to establish in the EU, as one dimension of the Area of Freedom, Security and Justice, a 'common judicial area based on the principle of mutual recognition of judicial decisions'.[2] A 'common area' implies both boundaries to that area and its relations with other legal regimes and the external legal world. Indeed, in the field of private international law, the EU increasingly engages in treaty-making both multilaterally and bilaterally, and is developing an international identity separate from (but not always replacing) that of its Member States.[3] One obvious consequence is the impact that EU regulations in the field of international private law have on the outside world, an outside world regulated by treaties to which the Member States, but hitherto not the EU itself, are party. An increasing number of conflicts of jurisdiction, or over applicable law, occur in litigation between parties in the EU and its non-EU partners, quite often resulting from differences in standards of protection between EU law and international instruments.[4] In a parallel development, EU external competence in fields of direct

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[1] See for more details Micklitz, 'The Visible Hand of European Private Law', 28 *Yearbook of European Law* (2009) 3.

[2] Preamble to Council Decision 2009/397/EC of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, OJ 2009 L 133/1.

[3] See e.g. Council Decision 2006/719/EC on the accession of the Community to the Hague Conference on Private International Law, OJ 2006 L 297/1; Council Decision 2009/397/EC on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, OJ 2009 L 133/1.

[4] For example, case C-308/06, *Intertanko*, [2008] ECR I-4057; Case C-301/08, *Bogiatzi v. Deutscher Luftpool and Others*, [2009] ECR I-10185; Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, [2010] ECR I-4107.

relevance to regulatory private law, in particular services and investment, has been put on a firmer footing by Article 207 TFEU (Common Commercial Policy). The implied powers doctrine has also enabled the EU to enter into external relations in areas such as transport and energy. Here, EU competence extends not only to market access rules but also to post-establishment regulation, and the exercise of that competence externally as well as internally may penetrate deeply into private law and the regulation of private enterprise. Against this background, in what ways is the legal position of private parties affected by EU external relations?

2. Private Law and EU External Competence

By a focus on competence we mean first and foremost the analysis of the overlapping scope of international law, EU law, and private law.

In private law matters, we have to distinguish clearly between traditional private law and regulatory private law. In traditional private international law, the EU's external powers are implied from its treaty-based internal competence. As the *Lugano* opinion of the European Court of Justice (CJEU) clearly demonstrated, the Court held that the EU possessed exclusive external competence in the field of the Brussels Regulation.[5] Ten years later, this exclusive competence has been held to cover the Hague Convention of 1980 on the civil aspects of international child abduction, based on the close connection between that Convention and the EU's Regulation 2201/2003 on jurisdiction and recognition and enforcement of judgments in matrimonial matters.[6] In regulatory private law, competence is more fragmented between the more general competences based on the common commercial policy (Article 207 TFEU) or internal market (Article 114 TFEU), and the specific sectoral competences in the fields of transport, energy, or telecommunications. Together they enable the EU to adopt external regulatory measures in order to further the objectives of the internal market. The practical effects of the extension of the common commercial policy competence to services and investment are still being worked out. How does this (exclusive) competence relate to the (shared) competence of the EU over regulation of services via Article 114 TFEU, capital movements under Article 63 TFEU, and specific sectoral competences such as energy?[7] In its judgment on the Convention on conditional access services, the CJEU took the significant step of finding that an international agreement intended to extend the internal market regulatory *acquis* to third countries fell within the scope of the common commercial policy.[8] On this basis the EU will be able to engage

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[5] Opinion 1/03, [2006] ECR I-1145. [6] Opinion 1/13, of 14 October 2014.

[7] Under Art. 207(5) TFEU, external agreements in the field of transport are governed by the transport provisions of the Treaty, but the relationship with other services sectors is not made clear. On the scope of the common commercial policy in matters of intellectual property, see Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon*, judgment of 18 July 2013.

[8] Case C-137/12, *Commission v. Council*, judgment of 22 October 2013.

in international agreements and to take a more powerful stand in the making of international rules on services. Enlarging the exercise of external competence in regulatory private law would shape a European identity in core areas of private law.

This discussion of the basis for competence leads us to consider two further questions. The first is the interrelationship between international law in the field of regulatory private law and (traditional) international private law, hitherto largely the province of Member State activity, and the increasing body of the EU *acquis* in the field, both internal and external. We have here a complex set of relationships which have developed over time and which interact in different ways: between national and EU private law and EU external activity, and between EU law and the international regulatory and private international law regimes to which the Member States are party. The second is to ask how specific is private law when we examine the law of EU external relations? To what extent does it possess specificities, or has it given rise to different tools or instruments in managing the relationship between internal and external regulation, between Member State and EU competence? The phenomenon which we are calling 'connection clauses' links these two questions: these are the clauses which regulate the relationship with existing (and possibly also future) treaties concluded by Member States on subjects coming within the scope of existing EU legislation; they are used noticeably in the context of private law. These clauses may incorporate into Union law, in whole or in part, an international treaty or convention to which the EU is not a party; they may link the instrument to EU law via an authorization of the Member States to participate, or they may regulate the relationship between existing Member State treaties and the EU *acquis*, including through so-called disconnection clauses. The first two chapters which form Part I will introduce these questions and they are then addressed in more specific contexts in Parts II and III.

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3. Extending Traditional Private Law Beyond the Boundaries of the Internal Market

In Part II of the book, we explore the ways in which the EU is extending its own approach to traditional private law beyond the boundaries of the internal market. We start with a chapter in which Timmermans addresses the question of the specificity of private law in EU external relations and then present three chapters by Francq, Pataut, and Jääskinen and Ward on private international law, jurisdiction, applicable law, and enforcement of judgments, followed by Grundmann on contract and company law.

In recent years, with the declared objective of developing a common judicial space, the EU has adopted regulations on jurisdiction, on the applicable law in contract and tort, on family law, and on cross-border enforcement. These regulations focus on the inner world of the EU, free movement of judgments in the Area of Freedom, Security and Justice, the European legal order, and its constitutional charter. The bold opinion of the CJEU in *Lugano* has not in practice led to a centralization of external powers in the hands of the EU, perhaps wisely so. However,

these procedural rules affect the relationship between the EU citizen and EU-based companies, and the outside world. This is most obvious and most advanced in steadily growing litigation over jurisdiction and applicable law. However, we can also see some of the same tensions arising as the growing EU *acquis* in family law, contract law, and company law carries external as well as internal market implications.

The fundamental premise of the EU regulations, in particular their basis in a high level of mutual trust between the Member States, is in tension with the basis of international private law which in principle does not allow for a distinction between Member States and non-Member States. The mere fact that the EU has established its own 'European' international private law rules, which determine the place of jurisdiction and the applicable law, already demonstrates the tension between a 'European' approach and an international approach as exemplified by the Hague Conference. In theory, procedure (the issue of jurisdiction: the Brussels Convention and Regulations) and substance (the issue of the applicable law: Rome I and II) should be kept separate. The hypothesis which has guided our analysis, however, is that in practice, in the case law of the CJEU, we can recognize an ever stronger interplay between procedure and substance, and a tendency to use jurisdiction as a means to 'defend' European substantive standards against different—and sometimes lower—international standards.

Company law is different. Contract and company law—market transactions and the firm—have considerably increased their global dimension over recent years. This raises the question of a global perspective also for European private law. The question asked is twofold: (i) to what extent does EU private law—in its two paradigmatic fields of contract and company law—respond to sets of problems from a global perspective? And (ii) in what respects could or should a more global reach be expected or desired? There is no equivalent of Rome I and II in company law. To some extent, the fundamental freedoms and in particular the case law of the ECJ serve as a substitute for the absence of political agreement over whether the law of the country where the company is located should remain applicable in cases where the company transfers its seat. It is only in the interplay between the Brussels and Rome Regulations and the substance of EU company law that we can discern the reach of the external dimension.

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4. The Making of International Private Regulation and the Role of the EU

In Part III, our focus shifts to the ways in which the EU is helping to shape regulatory private law at the international level. What is at stake here has been nicely termed the 'Brussels effect',[9] by which is meant the tendency of the EU to influence non-member countries and legal orders through unilateral regulatory action

[9] Bradford, 'The Brussels Effect', 107 *Northwestern University Law Review* (2012) 1.

as well as participation in bilateral, regional, and multilateral agreements and fora. In environmental regulation, product safety, and human rights, the EU has already adopted an active international stance. The EU's objective is to contribute to a goal which has now been given shape in the Treaty, an international system based on good global governance.[10] A decisive step forward is the growing use of European private law as a tool to build a positive European identity, an identity where European private law enshrines values that are often under-represented in an international environment. The promotion by the EU of its approach to consumer protection in its neighbourhood and beyond, mainly through international agreements, is an example of this tendency, discussed here by Stuyck and Durovic. This section of the book focuses on the field of regulatory private law, where the role of the EU is less visible and much less debated.

This focus of our research is more empirical and case based. The contributions shed light not only on the legal question of whether the EU has competence and how it uses it but also on what happens in the practice of international law-making. The particular type of private regulation which is elaborated at the international level may escape a clear distinction between law and non-law but nevertheless plays an ever increasing role in the different sectoral markets for, inter alia, energy (Marhold), financial services (Wouters and Odermatt, and Marcacci), healthcare (Rizzi), and food safety. It goes without saying that these chapters represent examples and illustrations of the phenomenon we are exploring, and that they are designed to demonstrate some of the salient features of this domain of EU external relations law rather than to produce an exhaustive survey.

Here our task has been to identify the areas within regulatory private law where the EU plays a role, and then to draw attention to the more conceptual question of the use of European private law to achieve the EU's good governance objectives in its external relations, some hard legal issues on the handling of conflicts between lower standards in international conventions and higher standards in EU law, and, last but not least, the degree to which a genuine European (regulatory) identity takes shape in sectoral fields such as telecommunications, pharmaceuticals, financial services, and financial regulation.

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[10] Art. 21(2)(h) TEU.