# Yearbook of Private International Law

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Edited by: Petar Šarčević and Paul Volken

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# YEARBOOK OF PRIVATE INTERNATIONAL LAW

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# FOREWORD

In the Foreword to volume I of the *Yearbook of Private International Law*, we predicted that the science of private international law would take a new direction in the new millennium. At that time we noted that the effects of globalization in the field of commercial relations had intensified the search for uniform substantive rules that would apply worldwide. However, as shown by the recent Congress in Rome on the occasion of the 75th anniversary of UNIDROIT (International Institute for the Unification of Private Law), regional and national developments are still an obstacle to the quest for worldwide unification. The Inter-American developments presented in this volume in the column 'News from Washington' are another such example.

Three articles of volume IV of the *Yearbook* deal with regional matters, in our opinion, extremely important conflicts developments in the European Union. The fact that rules of private international law have become part of the *acquis communautaire* under the Treaty of Amsterdam does not seem to exclude national legislation. The best example is the fact that Belgium is now in the last phase of adopting a new Private International Law Act, the draft of which is presented in this volume. This shows that the tradition of national conflict of laws is still strong in the EU Member States and continues to develop parallel to the European quest for universalism. Thus it is safe to assume that developments in EU private international law will remain on our agenda for a considerable time.

In addition to reports on new developments in Canada and China, we are also pleased to have a Russian national report presenting an overview of the new legislation on private international law adopted in 2002. Although one might question the solutions of some of the new rules, they certainly represent significant progress in Russia's endeavour to endorse the rule of law. According to Prof. Lebedev, private international law had long been neglected in Russia not only by the legislator but also by legal scholars. While there were only a handful of PIL scholars in the past, the situation has changed dramatically in recent years. Today the subject is being taught at an increasing number of law schools throughout the country. Now regarded as a key subject because of its importance for the new free market economy, it is not surprising that a recent Russian textbook on Private International Law[1] cites the Strasbourg Resolution of 1997 of the *Institut de droit international* recommending that '[e]very school and faculty of law offer a foundation course or courses on public and private international law'.[2] We are pleased that this recommendation has been taken so seriously.

Petar Šarčević Paul Volken

[1] *Международное частное право*, Г.К. Дмитриевой, Moscow 2000, p. 4.

[2] *Annuaire de l'Institut de droit international*, Vol. 67, II, Paris 1998, p. 469, No. 1.

# ABBREVIATIONS

| | |
|---|---|
| Am. J. Comp. L. | American Journal of Comparative Law |
| Am. J. Int. L. | American Journal of International Law |
| Clunet | Journal de droit international |
| ECR | European Court Reports |
| I.C.L.Q. | International and Comparative Law Quarterly |
| I.L.M. | International Legal Materials |
| id. | idem |
| IPRax | Praxis des internationalen Privat- und Verfahrensrechts |
| OJ | Official Journal |
| PIL | Private International Law |
| RabelsZ | Rabels Zeitschrift für ausländisches und internationales Privatrecht |
| Recueil des Cours | Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law |
| Rev. crit. dr. int. pr. | Revue critique de droit international privé |
| REDI | Revista española de derecho internacional |
| Riv. dir. int. priv. proc. | Rivista di diritto internazionale privato e processuale |
| Riv. dir. int. | Rivista di diritto internazionale |
| RIW | Recht internationaler Wirtschaft |
| RSDIE | Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht |

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# DOCTRINE

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# I. Introduction

The worlds of private international law and European Union law are traditionally quite separate, with diverse fields of interest prevailing on either side of the dividing line, different sets of terminology and different general doctrines to clarify the cohesion within the field of expertise. It is hardly surprising that there is 'peaceful coexistence' in this context, given that the legal regulation of private relations used to be mostly a national affair, and to an important extent still is. Insofar as private law relations display cross-border traits, international arrangements may become relevant; however, these usually have been drawn up by other international organizations than the EU, such as the Hague Conference on Private International Law.

Where cross-border legal relations were concerned, the gap between the two worlds was traditionally bridged only by the 1968 Brussels Convention on jurisdiction and enforcement and its Protocol concerning the jurisdiction of the Court of Justice of the EC,[1] and by the 1980 Rome Convention[2] on the law applicable to contractual obligations, which also exclusively applies between the EU Member States.[3] Although the Brussels Convention is based on Article 293 EC (ex Article 220 of the EC Treaty), EC lawyers and private international law experts wonder whether it should actually be considered a part of ordinary Community law. While the EC Treaty expressly provides a legal basis for the matter in question, it does not provide such a basis for the adoption of an 'ordinary' Community act but for the conclusion of a treaty between the Member States.[4]

The *Maastricht Treaty* subsequently slightly reinforced the ties by placing 'judicial cooperation in civil matters' under the so-called third pillar of the European Union, dealing with cooperation in the field of Justice and Home Affairs

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[1] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (*OJ* 1972 L 299/32; consolidated version in *OJ* 1998 C 27/1); Protocol on the interpretation of the 1968 Convention by the Court of Justice (consolidated version in *OJ* 1998 C 27/28).

[2] 1980 Rome Convention on the law applicable to contractual obligations (*OJ* 1980 L 266/1; consolidated version in *OJ* 1998 C 27/34). See also the First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version in *OJ* 1998 C 27/47) and the Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version in *OJ* 1998 C 27/52).

[3] A complete overview (until 1996) of uniform EU private international law, including several provisions from EC Directives can be found in DE LY F., 'Europese Unie en Eenvormig Internationaal Privaatrecht', Communication from the Dutch Society for International Law [NVIR] 1996 (consultative report), pp. 6-10. The terms '*EC*' and '*EU*' are deliberately distinguished but the complex three-pillar-structure of the European Union cannot be discussed here in detail.

[4] For the exact status of the 1968 Brussels Convention, see, e.g., GABRANDT R., 'Het EEG-Executieverdrag is ook EG-recht', in: *Advocatenblad* 1989, p. 424.

(JHA).[5] In the ensuing period, however, this new area of EU policy hardly got off the ground. In this period between Maastricht and Amsterdam, the Brussels I Draft Convention and the Brussels II Draft Convention, for example, did not achieve much beyond the form of draft conventions on Justice and Home Affairs, and they never actually entered into force.[6]

Mainly as a result of the *Treaty of Amsterdam*, European law and private international law have, however, become more closely and more structurally intertwined. In the framework of the establishment of 'an area of freedom, security and justice', this Treaty suddenly placed the cross-border cooperation in civil matters as it were right in the middle of the Community pillar, i.e., more specifically, right in the middle of new Title IV on 'visas, asylum, immigration and other policies related to free movement of persons'.[7] This caused the general doctrines of European *Community law* – such as the principles of supremacy and direct effect – which had slowly evolved over a period of approximately fifty years, to become applicable to this new area of Community law in one fell swoop. This important change, however, took place in a rather hidden manner. The *Herren der Verträge* had really only devised the Amsterdam transfer from pillar 3 to pillar 1 for asylum and immigration issues.[8] The fact that private international law was transferred to the first pillar simultaneously with the 'communitarization' of asylum and immigration law is something we have only recently begun to realize, at a time when the new Community powers are effectively and intensively being activated in practice.

The initial impetus was given by the Tampere European Council and the Vienna Action Plan of the Council and the Commission, which contained a large number of concrete proposals for decision-making in the field of private international law and for the reinforcement of the cooperation between the Member State

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[5] See former Article K.1, point 6 of the EU Treaty.

[6] See, e.g., the (non-ratified) Council Act of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (*OJ* 1998 C 221/1). Other Title IV decisions to be mentioned below did not get beyond the status of non-ratified K.3 Conventions during this period. See, e.g., the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (*OJ* 1997 C 261/2).

[7] Cf. HESS B., 'Die Europäisierung des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag. Chancen und Gefahren', in: *Neue Juristische Wochenschrift* (*NJW*) 2000, pp. 23-32.

[8] On this transfer operation in general, see, e.g., KUIJPER P.J., 'Some Legal Problems associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen *Acquis*', in: *Common Market Law Rev.* (*CML Rev.*) 2000, pp. 345-366.

authorities involved in this field.[9] Subsequently, the first pieces of EC 'hard law' concerning private international law were enacted. The familiar 1968 Brussels Convention, for example, was turned into an (almost) ordinary Community law instrument, namely an EC *Regulation,* which entered into force on 1 March 2002.[10] The jurisdiction, recognition and enforcement of judgments in matrimonial matters – a unification project which was supposed to be regulated during the Justice and Home Affairs period in the form of a K.3 treaty (hence in the period between Maastricht and Amsterdam) – can now be found in what is known as the Brussels II *Regulation*,[11] with a 'Brussels II-bis' Regulation as its possible successor to also cover the areas of parental responsibility and child abduction.[12] Further

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[9] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – Text adopted by the Justice and Home Affairs Council of 3 December 1998 (*OJ* 1999 C 19/1). Points 16 and 39-41 of the Action Plan have particular relevance for private (international) law.

[10] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* 2001 L12/1). On the content of this Regulation, see, e.g., MICKLITZ H.W./ ROTT P., 'Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001', in: *Europäische Zeitschrift für Wirtschaftsrecht* (*EuZW*) 2001, pp. 325-334; DROZ G.A.L./ GAUDEMET-TALLON H., 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale', in: *Rev. crit. dr. internat. privé* 2001, pp. 601-652; ANCEL B. 'The Brussels I Regulation: Comment', in this *Yearbook* 2001, pp. 101-114; GEIMER R., 'Salut für die Verordnung (EG) Nr. 44/2001 (Brüssel I-VO)', in: *IPrax* 2002, pp. 69-74. We speak of an 'almost ordinary' Regulation because the UK, Ireland and Denmark are in principle not bound by this Title IV decision and the Danes in this case do not actually participate in practice. See further section 4.3.

[11] Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (*OJ* 2000 L 160/19). See WIDMER C., 'Brüssel II – die neue EG-Verordnung zum internationalen Eheverfahrensrecht', in: *FamPra* 2001 pp. 689-719; BOELE-WOELKI K., 'Brüssel II: Die Verordnung über die Zuständigkeit und die Anerkennung von Entscheidungen in Ehesachen', in: *Zeitschrift für Rechtsvergleichung* (*ZRvgl.*) 2001, pp. 121-130; and SCHACK H., 'Das neue Internationale Eheverfahrensrecht in Europa', in: *RabelsZ* 2001 pp. 615-633.

[12] Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance (COM (2002) 222 final of 17 May 2002). This Brussels II-bis Regulation will not only replace the current Brussels II Regulation but will also include – to make things even more confusing – a 'Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility' (COM (2001) 505 final of 6 September 2001). On the latter proposal, see SUMAMPOUW M. , 'Voorstel Verordening ouderlijke verantwoordelijkheid: een voorbeeld

adopted were – to mention just a few examples – the Insolvency Regulation, the Service of Documents Regulation and the Evidence Regulation; in the pipeline are a large number of EC rules, including the private international law regulations concerning matrimonial property and inheritance law, on the one hand, and the contractual[13] and non-contractual law of obligations, on the other.[14] The introduction of a European enforcement order is also on the agenda.[15]

This remarkable tendency towards the communitarization of important parts of private law and, in particular, private international law, seems to be receiving the largest measure of attention in private law circles. However, the tendency in question has not gone entirely unnoticed among EU lawyers either – for example, there is talk of 'unprecedented ambition' on the part of the EC in this sector.[16]

This contribution will focus on the EC angle, the attempt to clarify the position of private international law within the European Union's first pillar and thus to put this new Community policy area 'on the map'. The private international law expert should furthermore acquaint and familiarize herself or himself with the European law doctrines. These two objectives require, in our view, examining the following fundamental institutional and substantive issues.

First, we will discuss what the concept of 'European private law' should or could be understood to mean (section 2). Next, Community private *international* law is more specifically dealt with, shifting the focus more to Article 65 EC. What action is permitted to the EC in the thus further defined new area of 'European private international law', both internally and in its relations with third countries? In other words, what kind of internal and external *competences* does the European Community have in the field of private international law? (section 3). How are legally binding rules on European private international law created, what kind of legal instruments are involved and whom do they bind? (section 4). What, after-

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hoe het niet moet', in: *Met recht verkregen - Liber Amicorum Ingrid Joppe*, Deventer 2002, pp. 201-218.

[13] Due to the conversion of the 1980 Rome Convention into a Title IV Regulation.

[14] See the 'Consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations': <http://www.europa.eu.int/comm./justice_home/unit/civil/consultation/index_en.htm>.

[15] Proposal for a Council Regulation creating a European enforcement order for uncontested claims (COM(2002) 159 final, *OJ* 2002 C 203 E/86). See in more detail WAGNER R., 'Vom Brüsseler Übereinkommen über die Brüssel I-Verordnung zum Europäischen Vollstreckungstitel', in: *IPRax* 2002, pp. 75-95.

[16] According to DRIJBER J. in his annotation of the *Tobacco Advertising Case*, in: *Sociaal-Economische Wetgeving* (*SEW*) 2001, p. 319. For a specific private international law perspective, see the recent consultative reports of JOUSTRA C.A., 'Naar een communautair internationaal privaatrecht', Nederlandse Vereniging voor Internationaal Recht 2002 No. 125, pp. 1-60 and POLAK M.V., 'Oppassen – Inpassen – Aanpassen', *ibid.*, pp. 61-119.

wards, is the role of the European Court of Justice (ECJ) in Luxembourg as regards the rules of Community private law that have been adopted? (section 5).

The content of the European legislation in the field of private international law, such as the recent (draft) regulations based on Article 65 EC, may be integrated in this approach by way of illustration. The rather too recondite legal problems, such as the case law concerning the interpretation of Article 5 of the 1968 Brussels Convention or the question whether the Directive on unfair terms in consumer contracts has been properly transposed into national law, must on the contrary – however important – be left to one side.[17]

## II. What is European Private Law?

The descriptions of European law, on the one hand, and private international law, on the other, may be considered to be common knowledge. In order to be able to place the new designation *European private international law* in its proper context, it is first necessary to examine the more general term *European private law*. On the face of it, everyone seems to have their own description of the term and it is used in quite a variety of meanings. Viewed more closely, however, in our opinion it is possible by and large to distinguish *two* main definitions.

Two approaches may therefore be distinguished.[18] First, the *Community* description of the concept of European private law (section 2.1) and, second, the *ius commune* description (section 2.2). Depending on the definition used, the object of research, education or professional activity can be entirely different. It is our contention that the problem of definition is too often overlooked or that a self-devised working definition is too often used as a matter of course. This will explain the elaborate attention devoted to the matter here, which is not intended, however, to impose any normative choice in favour of one or the other approach.

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[17] On these two specific issues, which cannot be discussed in detail here, see, e.g., Case C-256/00, *Besix*, judgment of 19 February 2002 and – more generally – DIETZE J./ SCHNICHELS D., 'Die aktuelle Rechtsprechung des EuGH zum EuGVÜ', in: *EuZW* 2001, p. 581, and Case C-144/99 *Commission v. the Netherlands* [ 2001], in: *ECR* I-3541; see also LEIBLE S., in: *EuZW* 2001, p. 437, and LOOS E. in: *Nederlands Tijdschrift voor Europees Recht* (*NTER*) 2001, p. 242.

[18] See in more detail FLESSNER A., 'Juristische Methode und europäisches Privatrecht', in: *Juristenzeitung* (*JZ*) 2002, pp. 14-23.

## A. The Community Definition of the Concept of European Private Law

*European private law* can first be considered to include: (1) legal rules which are *part of Community law* (Treaty, legislation of the EC institutions and the case law of the European Court of Justice) and (2) rules which are mainly or exclusively relevant for the regulation of certain legal relationships *between private individuals*.

The first element is of a more formal nature. It elucidates that what needs to be involved are rules emanating from the European Community or the European Union.[19] In this approach to the concept, the Hague Conventions on private international law would, for example, already drop from the equation and could not be considered part of the concept of *European* private law in the (strictly) Community sense of the word.

The second element ('between private individuals') aims to further restrict the area of focus to only a handful of EC policy areas, namely those which have special relevance for 'horizontal' relations, i.e., citizen-to-citizen, company-to-company or citizen-to-company relations.[20] Needless to say, the dividing line is not unblurred and further specifications will need to be put into place to be able to reach a more precise self-formulated working definition of European *private* law (in the Community sense of the word).

A very important specification in this context is to be obtained by distinguishing between European (in the sense of: Community) *private international law* and *substantive* European/Community *private law*. In our system and terminology, these two together form 'the' European private law in the Community sense of the word.

This first component of the multi-faceted term *European private law*, i.e., Community private international law, involves EC rules concerning one or more of the three core questions of 'ordinary' private international law, i.e., (1) rules on the international jurisdiction of the (civil) courts in cross-border matters, (2) rules establishing the applicable private law of a specific country and (3) rules on the mutual recognition and enforcement of judgments and semi-judicial decisions in civil and commercial matters. Viewed from the perspective of the EC Treaty, it is

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[19] After the communitarization brought about by the Treaty of Amsterdam it is likely that *EC* law will be involved in most instances. The extra-Community law of the EU was mainly relevant at the time when 'judicial co-operation in civil matters' was still covered by the third pillar (see ex-Article K.1, point 6, of the EU Treaty and the introductory paragraph).

[20] The term *private individual* is thus in EC circles often interpreted to be *considerably wider* than is customary in private law circles (namely by including companies/partnerships/legal persons in the concept of private individual as well – as opposed to national private law).

clear that the new Article 65 EC is particularly relevant here, as the primary basis for the development of this European/Community private international law. [21]

In this contribution, the emphasis will be on Community private *international* law as defined in this way. What usually immediately and intuitively springs to mind when hearing the term *European private law*, however, is – what we consider to be – the second component of the multi-faceted concept of European private law in a Community sense, namely *substantive* European/Community *private law*. This concerns the norms/rules themselves that apply to citizens and companies, not the rules concerning jurisdiction and recognition or conflict rules that are typical of private international law. One could think of EC rules on consumer protection, the many EC Directives concerning the harmonisation of corporate law and also, for instance, European labour law, including the Directives concerning equal treatment between men and women. As regards their content, these mainly deal with employment relationships between the employee/natural person and private employers. In its wider meaning, even competition law, particularly the prohibition of cartels under Article 81 EC, could be considered part of substantive European/Community private law.[22]

From this perspective, the question where precisely to draw the line and which EC rules are to be considered sufficiently relevant to apply to mutual relationships of private individuals is quite subjective. Could EC law concerning the free movement of workers, which applies horizontally and may be invoked between private individuals,[23] be included as an object of study of substantive European private law, and what would be the position of the Culture Regulation and Directive, or the TV Directive? A certain freedom of choice, of course, applies to self-formulated working definitions, making it possible to draw the subjective boundaries of EC substantive private law. The European Commission, for example, lists, if not exhaustively, some ten categories of decisions 'relevant' for private law, especially the law of obligations: consumer contracts, payment systems, self-employed commercial agents, posting of workers, liability for defective products, electronic commerce, financial service, protection of personal data, copyright and related rights and public procurement.[24] It is further possible that the same set of

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[21] See further the discussion of Article 65 EC in section 3.1.1.

[22] See, e.g., the Wouters Case concerning accountants, practising lawyers and the Dutch Bar Association (Case C-309/99 *J.C.J. Wouters* [2002], in: *ECR* I-1577; see also VOSSESTIJN A., in: *CML Rev.* 2002, pp. 841-863; K. MORTELMANS/ VAN DE GRONDEN J., in: *Ars Aequi* 2002, pp. 441-465.

[23] See, in particular, Case C-281/98 *Angonese* [2000] I-4921. See also Case C-415/93 *Bosman* [1995], in: *ECR* I-4139 and Case 36/74 *Walrave/Koch* [1974], in: *ECR* 1405. On these cases, see, e.g., STREINZ R./ LEIBLE S., 'Die unmittelbare Drittwirkung der Grundfreiheiten', in: *EuZW* 2000, pp. 459-466.

[24] See Annex I to the Communication from the Commission to the Council and the European Parliament on European contract law (*OJ* 2001 C 255/1). See also, e.g., DE LY's enumeration in his inaugural lecture (*Europese Gemeenschap en Privaatrecht*, Tjeenk

EC rules, for example, the Directives on consumer protection, is discussed from the perspective of (substantive) European private law, while at another time the same set of Directives is characterized as part of the Community's 'horizontal and flanking policies', i.e., considered as a kind of annex to the hard-core internal market policy.[25]

Making such self-imposed choices is in itself not a bad thing, if it is kept in mind that one should not assume too readily that others would automatically understand what is meant by 'substantive European private law'. Quite apart from the fact that European private law may be said to comprise not only *substantive* European/Community private law, but also – as was discussed earlier – Community private *international* law.

When examining the term *European private law* (either private international, but especially substantive private law) in the Community sense of the word, whether in the strict or narrow sense, one should in any event take account of the *general doctrines of European Community law*, and in particular link these general doctrines with one's own private law field of expertise. This could entail making the meaning of the doctrine of the direct effect of European law more explicit for the national private law system of a certain Member State. More particularly, this involves the problem whether EC Directives can be invoked in private relations,[26] or the importance of the duty of the national judiciary to interpret national law in the field of private law ('as far as possible') in conformity with EC law and Directives.[27] The general doctrines of substantive European Community law are especially concerned with clarifying the theoretical and practical meaning of the four freedoms of the internal market for national private law,[28] or, more generally,

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Willink, 1993, pp. 4-13) and the selection made by HAKENBERG W., 'Gemeinschaftsrecht und Privatrecht. Zur Rechtsprechung des EuGH im Jahre 2000', in: *Europarecht* (*EuR*) 2001, pp. 888-913.

[25] The perspective of, e.g., the journal *European Review of Private Law/Revue européenne de droit privé/Europäische Zeitschrift für Privatrecht* and the approach of KAPTEYN P.J.G./ VERLOREN VAN THEMAAT P., *Introduction to the Law of the European Communities*, 3rd ed. (edited by L.W. GORMLEY) London (etc.) 1988, Chapter X, respectively.

[26] Answered in the negative by the European Court of Justice in the *Marshall I* and *Faccini Dori* cases, although on the other hand there is the 'semi-invocable' nature of the Notification Directive in private relations: Case C-443/98, Unilever Italia t. Central Food [2000], in: *ECR* I-7535. See, e.g., WEATHERILL S., 'Breach of directives and breach of contract', in: *European Law Rev.* (*EL Rev.*) 2001, pp. 177-186; KÖRBER T., 'Europäisierung des Privatrechts durch Direktwirkung des Gemeinschaftsrechts?', in: *EuZW* 2001, p. 353.

[27] See M.H. WISSINK's dissertation, *Richtlijnconforme interpretatie van burgerlijk recht*, Serie Recht en Praktijk 115, Deventer 2001.

[28] E.g., ROTH W.-H., 'Der Einfluss des Europäischen Gemeinschaftsrecht auf das Internationale Privatrecht', in: *RabelsZ* 1991, pp. 623-673; REMIEN O., 'European Private

with an overview of substantive EC law, making it possible to 'measure' its influence on the national private law systems.[29]

### B. The *ius commune* Description of the Concept of European Private Law

On the other hand, there is the idea that the term *European private law* must be regarded as the sum total of various common elements found in the *national* private law systems of the different EU Member States. The comparison of these national private law systems, i.e., the analysis of differences and similarities, subsequently constitutes the 'European' element in this *ius commune* approach.[30] Under this approach come the numerous comparative law studies of private law principles, legal rules or legal institutions comparing the national legal systems of the EU Member States. In many cases this type of research has resulted in the establishment of a European 'common core' in the areas under examination.[31] These studies are the necessary building blocks for the possible enactment of a European Civil Code.[32]

It will be clear that, in this second meaning, the term *European private law* can only refer to *substantive* private law. A comparison of the private law rules of different countries/EU Member States can by definition only concern the actual rules/norms themselves, which is why a *ius commune* description of the term *European private law* will always call to mind substantive private law norms and how they compare. Private international law as allocation law presupposes the (continuing) existence of differences between the legal systems concerned.[33] The European unification of private *international* law therefore remains outside the

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International Law, the European Community and its Emerging Area of Freedom, Security and Justice', in: *CML Rev.* 2001, pp. 53-86.

[29] E.g., HARTLIEF T., 'Enige opmerkingen over mogelijkheid en wenselijkheid van een Europees privaatrecht', in: *Nederlands Tijdschrift voor Burgerlijk Recht* (*NTBR*) 1994, p. 205.

[30] This approach can be found, *inter alia,* in: HARTKAMP A., HESSELINK M., HONDIUS E.H., JOUSTRA C.A. and PERRON E. (eds.), *Towards a European Civil Code*, Kluwer 1998.

[31] See HONDIUS E.H, 'Nieuwe methoden van privaatrechtelijke rechtsvinding en rechtsvorming in een Verenigd Europa', *Koninklijke Nederlandse Akademie van Wetenschappen*, 2001, Part 64, No. 4.

[32] In more detail on the form of the codification, see VAN GERVEN W., 'Codifying European private law? Yes, if...!', in: *EL Rev.* 2002, pp. 156-176. See also section 3.1.2 on the competences of the EC to adopt such a European Civil Code.

[33] See also BETLEM G./ HONDIUS E.H., 'European Private Law after the Treaty of Amsterdam', *ERPL* 2001, pp. 3-20, who argue that private international law, contrary to what the name suggests, is essentially *national* law.