KLUWER LAW INTERNATIONAL

EUROPEAN ECONOMIC LAW

SECOND EDITION

ALBERTO SANTA MARIA

Wolters Kluwer
Law & Business

KLUWER LAW INTERNATIONAL

European Economic Law

SECOND EDITION

by

Alberto Santa Maria

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspenpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2536-1

Printed in Great Britain.

European Economic Law

Foreword to the Second Edition

To cure the 'new' edition of this volume has proved to be a challenging and demanding task more than what I could imagine.

The reasons for this are various. First of all, the time elapsed since the precedent edition in 1996 (too many years, and I apologise for it) has its evident importance.

But it is also true that, during these last twelve years, we have assisted to a development of the international economy in such relevant terms that a new era, commonly named 'globalisation', has opened. Furthermore, the various events concurring to characterise this new era – to which I will often refer in the text of the volume – in a more or less decisive manner, by combining among each other, have had a multiplier effect on most of the topics I have focused on.

In this context, the 'international' aspects, through this long period of time, have assumed, if possible, an even bigger importance for the reflexes they imply vis-à-vis the European Union legal order and the content of EC law. The development of material EC law, overflowing as occurred in the past, completed the picture.

The fact remains that I have used the precedent drafting of the book mainly as a landmark, not even as a starting point, for planning the new text which will then appear to the reader with contents totally new, in each part.

For logical needs, stemming from my interpretation of the deep changes occurred in the international context, I have modified even the structure of the work: the chapter related to the multinational companies has been inverted in respect to that concerning the developments of the international economy, while the chapter on competition law has been placed at the end of this volume in order to make easier its reading in the light of the new international frame, object of the previous chapters.

Among the topics covered in this work, I was not able to discuss, as I would have wished, the European Constitution, which has definitively expired; notwithstanding its substantial emptiness, of which the renounce to the affirmation of the

'common roots' is the most patent example, its approval would have had an undeniable political relevance, representing it the true, new motor of the European Union realisation. Because of this, it seems difficult to understand why the Commission – which has substantially lead such realisation – has given preference to such a conspicuous enlargement of the European Union rather than to the approval of the Constitution by those member States, consolidated in the same Union for a long time.

The Treaty of Lisbon, which by itself is only a palliative, and its analogous unfortunate events show a feeling of uneasiness among the European people, in my opinion, caused not by a generalised adversity to the European Union, but rather by the gap of indifference created between the present European Union and the European people, which the former cannot and must not disregard. However, I ascribe such progressive detachment, more than to the diffidence in the idea of Europe, rather to the scarce knowledge of the contents and the function of the European machine, by now too complex.

In order to come out from the current impasse, it shall be necessary to have the courage to re-draft the structure of the European Union, mainly in relation to the management of the executive and legislative powers for making up the overall confidence for the successful conclusion of the 'democratic' evolutionary process towards the political union started more than fifty years ago.

Without such a 'constitutional' effort, I am afraid it would not be possible to cross the ford, nor I believe desirable that this situation remains unchanged. In this, under various aspects, Europe represents surely more than an economic community, but, under many points of view, it is still far away by a satisfactory model of union of States.

To this aim, I have amended the title of this volume, willing to attain, for once me either, to the magic of the 'power of words', adding to 'Economic' Law – which actually better represents the present content of the book than the previous 'Commercial' Law – the connotation of 'European'.

First of all, I am sincerely grateful to Dr. Raffaele Petrillo that, with devotion and skill, has more than advised me in the translation from the original Italian version and then to Prof. Claudio Biscaretti di Ruffia and to Avv. Edoardo Gambaro for their patient and stimulating support throughout the entire period I have drafted this volume as well as to Prof. Mario Cattaneo for his comfort given to me in reading my wishful economic considerations.

Milan, 7 October 2008
ALBERTO SANTA MARIA

Introduction

SUMMARY:

1. Preliminary remarks: International origin of the European Union and relationship of EU law to national laws.
2. The Community's material law: Reasons for the title 'European Economic Law'.

1. PRELIMINARY REMARKS: INTERNATIONAL ORIGIN OF THE EUROPEAN UNION AND RELATIONSHIP OF EU LAW TO NATIONAL LAWS

The Treaty of Rome of 25 March 1957 establishing the European Economic Community and the subsequent international agreements amending that Treaty have one characteristic in common, peculiar to them: provisions for adequate regulatory sources to lead to the progressive formation of a derivative law, secondary to the primary law contained in those instruments. Within the scope of application of the Treaty, as subsequently amended by the European Single Act, the Treaty establishing the European Union, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon, if and when adopted (without considering former international agreements for further amendment never to take effect), such secondary law is now covering all sectors of the Community's *economic life*. The subjective scope of Community law, too, has expanded considerably, as various accession treaties have increased the number of Member States, from the original six to the present-day twenty-seven States.

The end-result has been a *material* Community law, whose main function is, on the one hand, to modify each Member State's body of laws, by replacing

domestic rules with Community rules, and, on the other, to compress their scope more and more effectively as new rules are being introduced at a European level, thus covering vast sectors formerly reserved to each Member State's national law.

Thus, beside Community rules, which are addressed to the Member States, which is typical of any international organization created by treaty, there are many 'primary' rules even introduced by *derivative* acts (Regulations among them), which have a 'direct effect' *per se*, to use a term first coined by the European Court of Justice (ECJ) and now part of everyday language. This means that both primary and derivative rules are addressed direct to the same individual parties that are normally the addressees of each Member State's rules of national law.

It was in this context that the Court of Justice held, well before the notion of 'European citizenship' was introduced,[1] that:

> The European Economic Community constitutes a new legal order of international law . . . the subjects of which comprise not only the Member States but also their nationals.[2]

The double thread linking the Community system with international law and the Member States' domestic laws has aptly been stressed by Capotorti in a limpid page he wrote when he still was Advocate General at the ECJ, which I feel it appropriate to reproduce in full below:

> As for international law, there is a connection, since the Communities were established by Treaties, and some later developments still arise from Treaties (just consider the possible accession of other States, such institutional changes as the direct election of the European Parliament, or the regulation of the matters contemplated in Article 220 of the Rome Treaty). There is also, and above all, the fact that Member States' core obligation to comply with, and perform, the Treaties arises from the well-known principle in international law that *pact sunt servanda*. However, the Community system provides institutions, institutional balances, sources, addressees and guarantees that, taken together, differ even profoundly from the traditional layout and legal system of institutional organizations.
>
> As for the Member States' internal laws, two apparently contradictory phenomena occur: reciprocal autonomy and complementariness. By *reciprocal autonomy* I mean the distinction between each national law and Community

1. See Articles 17 ff. EC, under the heading 'Citizenship of the Union', as introduced by the Maastricht Treaty. See also Chapter (Title) V, 'Citizenship', of the Charter of Fundamental Rights of the European Union, as proclaimed by the European Parliament, Council and Commission in Nice on 7 December 2000, in *OJ*, L 364, 18 Dec. 2000, and subsequently made binding by the Lisbon Treaty. For the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union, see *OJ*, C 115, 9 May 2008. See, in particular, Declaration 1 annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon.
2. See Judgment of the Court of 5 February 1963, Case 26/62, *van Gend & Loos*, in *ECR*, 1963, Summary, 3.

> law. This is a quite clear distinction, if one only thinks of the diversity and separateness of the sources of each of them. Yet, one should not forget that Community law *interferes* with the scope of application of the Member States' internal laws, since the territory in which the former effectively operates and the subjects it addresses are nothing but the summation of the Member State's territories and subjects, and many of the matters covered by Community law could be regulated by any of such internal laws as well. Thus, in order to prevent such interference from causing conflicts, and to allow Community law to attain its objectives unobstructed, the Member States have left a free space to it, so to speak, *by recognising its jurisdiction over the matters contemplated by the Treaties and giving up their own entitlement to act in this area, except to the extent permitted by the Treaties.* In this sense, one can speak of the Member States' *limited sovereignty*, and of the delegation or transfer by the Member States of their jurisdiction to the Communities. It is appropriate to add that *the co-existence of Community law with national laws is such as to rule out the transformation of the former into a national law.* If there were such a transformation, Community law would be fragmented into nine [now twenty-seven, ed.] different systems of law, and absorbed by each them. On this point, there is a clear-cut difference with the law created by other international treaties, and such difference is also justified by the fact that *distinguishing between international effects and internal repercussions*, as is the case with the other treaties, *would make no sense in the case of Community Treaties, in which the international aspect and the internal aspect are indissolubly linked to each other.*[3]

Even international conventions concluded at a Community level, whether or not legally sourced by Article 293 EC, which, without amendment, incorporates Article 220 of the Treaty establishing the European Community, are apt, where accompanied with 'protocols' referring their interpretation to the ECJ, to bring about a *uniform community law*.

This peculiarity of the conventions in question – which remain instruments typical of international law – bears witness to an 'encroachment' of community law even on international law.

In fact, the unprecedented growth in international trade helped by a number of new factors, which are discussed in this book, is such that even competition law, already shifted as it has been from the national to the Community ambit, is bound to take into account the 'open' international context in which the undertakings are now operating.[4]

In light of these brief comments, it appears even too obvious that a core problem was posed as far back in time as 1964, about the primacy of Community

---

3. See Capotorti, *Il diritto comunitario dal punto di vista del giudice nazionale*, in *Riv. dir. int. priv. proc.*, 1977, p. 497 f., p. 500 f. Italics added. The international origin of Community law is emphasized by Monaco, in *Manuale di diritto comunitario* by various authors, Vol. I, Turin, 1983, p. 57 f., p. 59 f.
4. Please refer to Chapter VI of this book for these aspects as well.

law over any national norm found to be in conflict with it – even if introduced at a later time or having constitutional status.

I am referring to the judgment of the ECJ of 15 July 1964, in Case 6/64, *Costa* v *Enel*, which paved the way for a protracted debate with the Italian Constitutional Court during twenty years. Only following the landmark judgment of the ECJ of 9 March 1978, in Case 106/77, *Simmenthal*, did the Italian Constitutional Court, by Judgment No 170 of 1984, accept the principle of the supremacy of Community law, although on the basis of different theoretical presuppositions, and, in its subsequent Judgment No 113 of 1985, recognized prior status also to the ECJ's interpretational decisions.[5]

Also, immediate applicability has been recognized, *in lieu* of conflicting rules of national law, to judgments issued by the ECJ at the end of *infringement procedures*.[6] The Italian Constitutional Court has further recognized the primacy of any provisions in *regulations* with a direct effect under Community case-law. According to the Italian Constitutional Court, direct applicability must be tested

---

5. About the principle of the supremacy of Community law over national laws generally, and a considered examination of ECJ case-law, see LUZZATTO, *La diretta applicabilità nel diritto comunitario*, Milan, 1980, esp.lly pp 51 f. and 108, in relation to the judgment of 9 March 1978, in Case 106/77, *Amministrazione Finanze v. S.p.A. Simmenthal (Simmenthal)*, in *ECR*, 1978, 629 f. See also Judgment of the Court of Justice of the European Communities of 19 June 1990, Case 213/89, *Factorame Ltd* v *Secretary of State for Transport*, in *ECR*, 1990, 2433 f. In this connection, see Judgments of the Italian Constitutional Court No 170 of 8 June 1984, in *Foro it.*, 1984, I, c. 2062 f., with commentary by TIZZANO, and No 113 of (19 April) 23 April 1985, in *Giur. cost.*,, 1985, I, p. 694. See also: CARBONE, *Il nuovo spazio giudiziario europeo. Dalla Convenzione di Bruxelles al Regolamento CE 44/2001*, Torino, 2002; TESAURO, *Diritto comunitario*, Padova, 2008, pp. 196-219. Judgment No 170/84 crowned a lengthy case-law process by laying down the principle that 'Community regulations are to be applied at all times, irrespective of whether they come before or after ordinary laws incompatible with them. The national court seized with their application can rely on references for preliminary rulings on questions of interpretation pursuant to Article 177 of the EEC Treaty'. A later decision taken by the Italian Constitutional Court in 1985 extended this principle to the *judgments* of the Court of Justice as well. That decision (Judgment No 170) stated: 'Community rules shall enter into, and remain in force in, our territory without their effects being impaired by the State's ordinary law; an this shall be the case whenever they meet the requirement of immediate applicability. As indicated above, this principle applies non only to the rules produced by EEC organs by regulations, but also to any rules resulting, as in the case at issue, from the Court of Justice's interpretative judgments'. In this regard, the Italian Supreme Court (First Chamber), stated in its Judgment No 634 of 23 January 1987: 'The national court's power and duty to disapply a rule of domestic law if its is found incompatible with Community law must be acknowledged – including in accordance with the principles laid down by the Constitutional Court in Judgments No 170 of 1984, and No 113 of 1985, both in case a conflict arises with rules produced by EEC organs by regulation and in case it is in contrast with general rules of Community law resulting from an interpretation of that law given by the Court of Justice of the European Communities in performing its institutional tasks under Article 177 of the Treaty'. Along the same lines, see Judgments of the Italian Constitutional Court No 389 of 11 July 1989, in *Foro it.*, 1991, I, c. 1076 f., and No 168 of 18 April 1991, ibid., 1992, I, c. 660 f.

6. See Judgment of the Italian Constitutional Court No 389 of 11 July 1989, *Provincia autonoma di Bolzano*, in *Foro it.*, 1991, I, 1076.

by national judges from time to time, on the basis of substantive grounds, not only on the basis of how the relevant act is formally qualified.[7]

Finally, the Italian Constitutional Court has held that, in a main proceeding as to constitutionality, the conflict of internal rules with Community rules can and must be settled by the Constitutional judges by a declaration of *unconstitutionality*.[8]

It should be noted that, in the progressive establishment of the EU, special recognition must be awarded to the ECJ for the powerful momentum it has historically provided to all sectors of Community life.

The ECJ's function has had an institutionally fundamental impact: The EU's political and legislative efforts to set up a wider internal market – and a 'single' one for the Member States' individuals and undertakings – would have been done to no avail without the guarantee of a correct implementation of the provisions of the European Treaties and of the acts deriving from them, or without the possibility afforded since the very beginning to any individual to resort to the ECJ whenever he or she perceives that his or her rights are jeopardized by any of the Community institutions' binding acts of his or her 'direct' and 'individual' concern, or when any such institution has 'failed to issue an act which is not a recommendation or an opinion addressed to him or her'.

Within the Community judicial framework, precisely in relation to the protection of individual rights, the Court of first Instance has been added, as a result of which the Court of Justice has been empowered as a court of appeal.

In this respect, the first paragraph of Article 220 EC (which superseded, with amendment, Article 164 of the Treaty of Rome) provides:[9]

> The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

Thus, the ECJ has played a propelling role in more than one respect, from the original Economic Community to the present-day EU, Its judgments have led to so highly innovative solutions in Community law as to anticipate many of the changes later made to the original text of the Rome Treaty, first by the European Single Act,

---

7. See Judgments of the Italian Constitutional Court No 64 of 2 February 1990, *Referendum pesticidi*, in *Foro it.*, 1990, I, 747, and No 168 of 18 April 1991, *Industria dolciaria Giampaoli*, in *Foro it.*, 1992, I, 660.
8. It is so because, since the procedure in question is a main proceeding as to constitutionality, no judge on the merits is there to decide the relevant relationship or to rule for the disapplication of national rules. See Judgments of the Italian Constitutional Court No. 384 of 10 Nov. 1994, *Regione Umbria*, in *Foro it.*, 1994, I, 3289, and No. 94, of 31 Mar. 1995, *Regione Sicilia*, in *Foro it.*, 1995, I, 1081. About the suitability of Community rules to alter the jurisdictional relationships between the State and the Regions, see the Judgments of the Constitutional Court of 17 Apr. 1996, *Province di Trento e Bolzano*, in *Giur. it*, 1977, I, 76, and of 11 Apr. 1997, *Regione Umbria*, in *Foro it.*, 1998, I, 1382. Let me also mention the case-law approach under which the Italian Constitutional Court has restricted the admissibility of referenda for the abolition of rules related to Community commitments, See Judgments Nos 31, 41 and 45 of 7 Feb. 2000, in *Foro it.*, 2000, I, 712, 701 and 699.
9. The jurisdictional scope of the Court of First Instance is specified in Article 225 EC.

then by the Maastricht Treaty. And so, it will not come as a surprise that the ECJ's constant invaluable contribution to the solution of various problems is emphasized throughout this book – even in connection with some of its decisions I do not feel inclined to share.

The Commission, too, has played a highly professional role, through its members, from the Commissioners to the officials of its various Directorates who have been appointed over time, in building the EU, far above its qualification as a 'technical' body that seems to emerge from the Treaties. It has been so because of the ways in which it has discharged its multiple institutional functions, from its activity as a lookout watching over compliance with the Treaties and the rules deriving from them, to its general law-making efforts and its work as the protector of free competition and the body essentially responsible for managing the EU's trade policy – all of which combine to have made the Commission the driver of the Community engine. The Commission's members will certainly bear with me if some criticism is offered at some points of this volume as to the cumulation of its functions. This is essentially due to my belief that the jump in quality the EU will hopefully make requires that its institutions' powers and duties be adequately reallocated.

2. THE COMMUNITY'S MATERIAL LAW: REASONS FOR THE TITLE 'EUROPEAN ECONOMIC LAW'

Thus, there is a Community law made up of material rules that now cover most sectors of juridical life across the Continent, within the scope of the EU's expanding jurisdictional powers, in subjective and spatial terms, but also in terms of material contents, from the Treaty of Rome to the European Single Act, the Maastricht Treat, the Amsterdam Treaty and the Nice Treaty – and to the Lisbon Treaty as well, if it is ever to enter into force. Accordingly, we can now speak of, inter alia, European civil law, commercial law, industrial law, tax law and even criminal law.

Common to all areas of the law qualified with the antecendent '*Community*' or 'European' – the latter now taken as synonymous with the former, partly because of the territorial extent gradually covering the whole Continent – is the fact that they are systems set up by an international organization. Therefore, although the rules composing them are addressed, more or less directly, to subjects of internal laws, whether natural or legal persons, 'internationality' is the overriding element in each of the Community or European (or EU) laws.

This phenomenon has even wider implications, though. I am referring to that peculiar aspect of *present-day* international law so aptly emphasized by P. Ziccardi as having developed because of:

> the significance and novelty of the phenomenon of international society being organised through institutions operating at all levels and in all sectors of the States' activity.

Accordingly:

> The sphere of the States' exclusive jurisdiction is narrowing, not because of abstract proclamations, which would no longer be fit for the purpose, but because of the effective exercise by international institutions of functions in many fields formerly reserved to the States' jealous exclusivity. The formidable growth of these functions is a result of the intrinsic internationality that characterises social activity in modern times. . . .[10]

These words, especially in light of the incredible developments that have occurred in the international economy for the last few years, show the sharp intuition of the scholar who wrote them nearly thirty years ago, based on thoughts rooted in even more remote studies. The fact is that such words now describe the new setting of the rules of international law, most of them introduced on the basis of multilateral agreements of an unprecedented reach – in both the number of signatories and the quality of contents – within which first the States, then, albeit at a different level, the undertakings, both multinational and national, are made to recognize, and to deal with, one another.[11]

Now, the impact of internationality is also most evident in the relationships between Community law and Member States' laws: This applies not only when EU law, through primary or derivative rules, eliminates the conventional distinction between a Community foreigner and a Community citizen, thereby guaranteeing the exercise of rights to individual subjects and imposing corresponding obligations on other subjects of internal law in any one Member State's national system, but also when EU law introduces rules of uniform law replacing those of national law in the various sector of juridical commerce.[12]

These plain observations most clearly apply to the areas attributed to Community jurisdiction on an exclusive basis, and thus precluded to national law-makers. Just consider the area of monetary policy with regard to the States participating in the *Eurozone*[13] or to that of common trade policy, especially the rules on international trade, in respect of which internationality has become an absolute value. This is because the Community legislator himself is bound by other international instruments and cannot but comply with obligations undertaken under the World Trade Organization (WTO)/General Agreement on Tariffs and Trade (GATT) 1994 – a 'worldwide' organization, in fact, to which the EU as well as its Member States are parties.[14]

Yet, at a closer look, these comments have a more general reach. It should be remembered that any Community rule of derivative law – even if in the form of a

---

10. See Ziccardi, *Ordinamento giuridico (dir. intern.)*, article in *Enciclopedia del Diritto*, Vol. XXX (Milan, 1980), pp. 766 f., pp. 835 and 836. Id., *Vita giuridica internazionale* (Milan, 1992), Tome I, p. 105 f.
11. Please, refer to Chs IV and V, *passim*, of this book.
12. In this connection, see the considerations offered in Chs I and II, *passim*, of this book.
13. Please, refer to Ch. III, *passim*, of this book.
14. On this topic, see Ch. IV of this book.

directive, i.e. of an act addressed in principle to the States – must first be interpreted in light of the norm of the international instrument providing its source (the Treaty of Rome, that is, with its multiple subsequent amendments), and then by looking at the letter and purpose of the relevant Community act.

Also consider that it is now settled case-law of the ECJ – i.e. of the supranational judicial body that has *exclusive* jurisdiction over the enforcement and interpretation of EU law – that any internal law not conforming to EU law must be disapplied, and EU law applied instead, not only in the relationships between private individuals and a Member State's public authorities, but also, by growing extension in national practice, in respect of inter-subjective relationships.[15]

Further, this 'internationality' operates in such a way that the contents of a material Community law cannot closely match those which traditionally make up the corresponding national law.

It must be clear, though, that the choice of a title is never too easy, and no title can ever be as comprehensive as one would have it.

Thus, to provide immediate emphasis to the novelties introduced in this book from the contents of previous editions, and also as a token of 'good wish' at a particularly difficult time for the EU, I have substituted 'European' for 'EC' as a more fitting adjective in the title of the volume.

In addition, it seemed to me that referring to a European 'Economy' law was the most synthetic way to express contents ranging from the frame of the global economy and its international rules to the structure and vicissitudes of bodies corporate and the enterprises' activities in the present-day European economy open to the whole world and leading to ever-new situations governed by the rules contained in, or even derived from, the EC Treaty.

It seemed to me that the glue fastening together the various topics considered below, such as the right of establishment and the free provision of services by business companies, the harmonization of company laws, the free movement of capital, the regulation of international trade, multinationals' operations, and the aspects of competition law I consider most significant, is a new view of the present aspects of the life of companies and firms under international law – a 'European view', in fact. There will certainly be topics and issues other than those I have considered here, but the aspects examined and studied in this book have seemed to me to be the most challenging.

---

15. It is appropriate to mention that the new Article 117 of the Italian Constitution provides: *The legislative power shall be exercised by the State and by the Regions in compliance with the Constitution and of the constraints arising from Community law and from international obligations.*

Table of Contents