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EUROPEANIZATION OF PRIVATE LAW- IMPACT TO ECONOMICAL GROWTH

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Abstract

Paper explores role of the Europeanization of private law to economic growth in EU and especially in Eastern and Central Europe states. The purpose of the paper is two-fold. First, the paper seeks to bring out into the open various aspects of the Europeanization of private law – from process and outcome perspectives and analyses private law importance to economic growth especially to attract FDI. It focuses on selected aspects of EU private law and legal policies and other initiatives at European level. Second, and correlatively, the paper aims to introduce the theme of the Europeanization of private law into current debates concerning the effectiveness of Lisbon Agenda. Europeanization of private law both reinforces and strengthens the Lisbon agenda in order to create EU as a competitive in global market and by promoting entrepreneurship culture. On another hand importance of functional convergence of private law systems and competition of private law systems for economic growth can not be ignored because in CEECs foreign direct investment is one of the major sources of growth and those countries could not compete for capital using other means such as natural sources or size of their market as their competitive advantage.

Keywords:

Europeanization of private law, economic growth, systematization of private law, competition of private law systems.

Introduction

Central and Eastern Europe countries (CEECs) in their development strategies are torn between the US model and the various European alternatives. One of the key elements of economical development in Central and Eastern Europe is Foreign Directive Investment (FDI) because on average it generated three-quarters of economic growth in the region since the start of the transition process in the last 10 years (Neuhaus M. (2005), 14). To keep flow of FDI steady the private law rules should insure that needs of investors should be met properly. On another hand European economic growth strategy has been formulated in Lisbon strategy set out by the European Council in Lisbon on March 2000 and it formulated strategy for European economical development. The agenda aims to create competitiveness of EU in global economy especially by promoting entrepreneurship culture. Creation of entrepreneurship culture could radically change economical development in CEECs because currently namely foreign companies influences the economic development.

Aim of this article is to define possible trends of the process of Europeanization of private law and how methods of Eurpeanization of private law could be beneficial for CEECs, and their economical development.

Objects of research are:

1. Define process of the Europeanization of private law;
2. Distinguish different methods of the Europeanization of private law and their economical significance;
3. Initiate discussion of importance of private law for European Economic growth strategies, especially in CEECs.

Currently two models of economical development – based on FDI or promotion of knowledge based economy and especially of entrepreneurship culture, supported by financial assistance from EU have been competing in CEECs. Whatever methods will be chosen (foreign or domestic with financial support from EU) it directly relies on the process and outcome of the Europeanization of private law.

Europeanization of private law and impact to economical development

2000 European Council set the objective of Europe becoming the most competitive and dynamic knowledge-based economy in the world in the Lisbon.

Year 2002 this led to the Barcelona European Council setting an equally ambitious and more specific quantitative target - to increase the total European research and development expenditure (OECD defined Gross Expenditure on R&D (GERD)) to 3% of GDP by 2010, from its present base of 1.9% . It had foreseen as well that one of the tools for economic growth is promotion of entrepreneurship culture. In Communication from the Council and the European Parliament, Thinking small in an enlarged Europe, has been noticed that especially CEECs still lack entrepreneurship culture. As statistics shows small businesses represent the vast majority of businesses in Europe. However consultation of small and medium sized enterprises in policy and law making remains low across the EU because small businesses and their employees are not always good at communicating. Furthermore to be entrepreneur is a not so popular especially in comparison with other countries in other regions.

In CEECs former central role of government in economical development has been replaced by an emphasis on the leading role of markets in stimulating development and the participation of the private sector. With Lithuanian integration into EU, the Lithuanian national economic growth policies have been revised according European model and Lisbon agenda provides economic development guidelines. On another hand Lithuania as other CEECs has specific aims – namely economical and social convergence with other EU countries and rapid economic development based on European and transatlantic integration processes. Especially in this process is important FDI because it is the main driving force in economic growth. CEECs are competing for capital while they can not rely on domestic sources especially while transition period have not still finished and countries are still under pressure from outside factors- waves of immigrants to other countries, not mature enough political system, reforms in public sector, negative trade balance. Competition for capital is unavoidable because it is impossible to loose it while winning means having billions of euros invested in local economies (Kamar E.(2005), 32). But to keep the growth sustainable a state and its institutions should be active not only competing by providing low legal standards but as well have active policies: create monitoring system to find out outside factors as well changes in national market structure and to identify in due time danger and possibilities and to take necessarily actions. It is important to find out other competitive advantages then cheap labor costs and to create infrastructure for technological development and research, promote entrepreneurship culture.

In Lisbon agenda and in Lithuanian national economic growth policies private law has been not prescribed as one of the major tools for economic growth. It could be noticed that legal dimension in EU economic policy as well in Lithuanian national economic growth policies has been often neglected. But private law has been seen as being particularly important for economic growth and development in sets of recommendations from international organizations dealing with economical development – World Bank, IMF. First and foremost important for creation of market economy are stable and credible property rights, preferably private rather than common and adequately documented in order to create living capital. Additionally a proper contract law regime and good commercial codes (including a corporate law that enhances capital investment by protecting investor rights and a bankruptcy law that enables fast exits of inefficient firms) are crucial. In addition, a credible tax regime with is important.

Especially with EU enlargement process, importance of Europeanization of private law for economic growth should be acknowledged. European Union legal order has created conditions for market economy, increased competition in CEECs. But European initiatives in private law field and economic growth policies are rather isolated from each other even then some of the elements expressly are correlated with each other.

Europeanization of private law- process perspective

Europeanization is rather the process coinciding with European integration but focusing rather on domestic issues of European integration. European integration has been described as activities and outcome of those activities of European institutions. European integration has certain unique features especially to be mention ambitions to participate in the process of the planning of the growth of economy. On another hand those activities of European institutions could infringe party autonomy principle but for small countries and CEECs without proper infrastructure for creation of competitive advantage, only public authorities could create conditions for economical growth by providing tools for European, national and regional economy players, due lack of traditions and eagerness to invest capital into long term projects. Europeanization of private law is one of the elements of the Europeanization and has been not only defined only by actions of EU institutions, but as well other actors as well- member states, research institutes. One of the main reasons is that there isn't any expressed competence in private law clearly attributed to EU institutions. That makes European private law system more flexible because strict hierarchy of legal rules could destroy system itself and could lead to unpredictable consequences.

Europeanization of private law should be not limited only by EU legal instruments but as well scholar initiatives and so called soft law rules. EU legal order is a peculiar one: it is torn between the constitutional and international levels. European legal order is dynamic from its nature and there is a variation between the effectiveness of EU legal acts. In comparison with European public law rules which have been discussed in society, and have been a part of general legal, political discourse, Europeanization of private law has been neglected in the process of European integration, especially at first stages of it. Europeanization of private law has been ignored despite a fact that European integration has economic dimension and namely private law rules insure proper functioning the Common Market. For example from a collection of Community acts on European private law, which consist from sixty-five regulations and directives which primarily concern private law, only seven had been adopted before 1980 (Basedow J. (2001), 37). Additionally very often European private law has been characterized as having inconsistencies and technical deficiencies. That causes the implementation problems in the member states, which have a national legal rules characterized by general rules and principles. That makes European private law EU ad hoc, directed towards specific issues. So European private law rather is unsystematic and pointillist, and didn't change national private law systems; especially European private law is defined in core areas such as contract, torts, property and family law.

Systematization of private law

One of the methods of Europeanization of private law is systematization of private law. Systematization of European private law into single source could foster and create identity in European Union, similar to private law role in a state. Furthermore if European private law would be not harmonized and systematized then the relationships between private law systems of the member states will be regulated by international private law. As well systematization of European private law could insure fair protection for the dispute parties because more reliable legal system would be created (Basedow J. (2001), 37).

Technically it could be not so difficult to systematize European private law, because there are many identical legal principles, values in the member states private law systems, which can create necessarily conditions of possible convergence and systematization of private law rules. There are many similarities between private law systems of the member states, – substantive rights and remedies of private individual actors are approximately the same. As the research projects in private law area show, the outcome of the legal cases will be similar in most of member states. Even the division into civil and common law countries doesn't play considerable role. Furthermore member states private law rules to large extent has been affected, initiated by EU law and it definitely has been applied to large extent in national private law systems which gradually get the same features.

Main economical argument is that single source of the European private law could help to foster an internal market.

To deal with Europeanization of private law system through systematization of private law, European Union institutions took several initiatives. For instance the European Parliament in its Resolution on the approximation of the private law of the Member States called for work to be started on the possibility of drawing up a common European code of private law. Furthermore in its Resolution on the harmonization of certain sectors of private law in the Member States, Parliament urged the Commission to begin work on the possibility of drafting a common Community code of private law and encouraged creation of a committee of qualified scientists with partial harmonization in the short term perspective and more general harmonization in the long-term. In addition European Council took position about the approximation of civil law at the extraordinary meeting in Tampere of 15 and 16 October 1999 on the creation of a common zone of freedom, safety and justice within the European Union. The Commission in Communication to the European Parliament and the Council in an action plan for a more coherent European contract law have foreseen practical measures of harmonization of private law. Several instruments have been created- consultations with member countries, mix of regulatory and non regulatory measures. On 11 July 2001 the European Commission published a Communication to the Council and the European Parliament on European Contract Law. Those initiatives for systematization of European private law have similar pattern with systematization of private law in national private law systems.

There are different options for systematization of private law in EU. It could be possible to systematize transnational issues of private law only, then it could be assumed that the Community has competence in dealing with the outside world. Competence in foreign affairs in international private law matters have been attributed to European Community due to their relevance to Internal Market. But there is expressed fear that Community competence especially in transnational issues only could create a threat to the functioning of other international organizations, because the Community tries to impose its own regimes between the member states, even if it contradict to international initiatives But scholars

dealing with Europeanization of private law as a rule do not try to depict it as a set of new rules and principles and describe process of Europeanization of private law as rather dynamic by its nature itself (Joerges Ch. (2003), 149).

Functional convergence

One of the options for Europeanization of private law is functional convergence of private law systems of the member states. Reform of private law systems in CEECs wasn't influenced by Common European private law (Remien O. (1992), 283). As a rule countries have chosen national private law system of the EU member states as a model for their private law system reform. So the functional convergence began during transitional period from command economy into market economy. On another hand the need of common European private law missed the right time for serving as a model in those countries (Remien O. (1992), 283). Lack of systematic source of private law in EU has been compensated by the ECJ activities and the court has been using comparative method to fulfill the gaps in the Treaty (Bakker R. (1993), 334). Currently newly admitted EU member states have seen their private law systems as one the symbols of the gained independence and as a tool for the competition for investments.

There isn't any consensus about the systematization of private law. Firstly because it could be difficult at current level of European integration Europeanization of private law especially in the form of European Civil Code because such competence has been not covered in EU Treaty itself, or have been implicitly attributed to the competence of the EU institutions. One of the main legal arguments is that a European Civil Code would lead to stagnation of private law (Kotz H. (1997), 55). Furthermore there is subjective factor against systematization of private law in EU because diversity of laws could be more easily accepted by individuals, while it is difficult for individuals to have commitments over abstract and instrumental frameworks (Hahn A. C. (2002), 282). Additionally there is an opposition from the lawyers in member states, especially from common law countries. So English lawyers are rather critical towards European initiatives in private law field, civil lawyer takes a quite different view and sees these Directives as the expression of a still embryonic European jus commune, after the model of Justinian's Corpus Juris (Jack A. (2001), 1). That shows that cultural divergences between European legal systems are simply unbridgeable (Hahn A. C. (2002), 282). Furthermore differences between common law and civil law don't allow convergence because even small differences can be essential, due different concepts and principles (Collins H. (1997), 407). There is a cultural element in opposition against systematization of European private law. Private law has been considered as part of a national legal culture and harmonization efforts could destroy or negatively affect national legal system. In addition the nature of private law itself is harmonization resistant, even when confronted with centrally imposed rules.

One of the methods for functional convergence is a regulatory competition of private law systems, when as an outcome of competition the best rules will survive and would be transplanted from one country to another. Various national private law systems interact with each other and that lead to convergence in European legal practice (Jackson B. S. (1993), 29). Discussions about regulatory competition are focusing on economic regulation, namely that regulation can be justified if it repairs market failures, and minimize regulatory costs (Sun J.- M., Pelkmans J. (1998), 444), and the economics of federalism- how the federalism could foster and distort markets, and functioning of redistributive politics work in decentralized settings. But those studies have been not dealing with impact of private law to economical development. Especially the distinction between competition for investments and competition using private law rules should be made. Main difference is that competition for investments results not only copying of foreign law but as well formation of regulatory agencies and is not so widely used in EU (Kamar E. (2005), p. 6). Furthermore regulatory agencies could decrease a negative effect of competition of private law systems, then economic producers can use actual or potential movement abroad as a pressure tool on individual jurisdictions to lower domestic regulatory standards below what they would otherwise have been.

Company law perspective

FDI as a rule have been made by transnational corporations. Transnational activities of corporations have been addressed by several international organizations. The need for regulations in international level has been caused by rise to the bottom issue, when corporations get benefits from unregulated market. This process could produce undesired results for the World Community. There are several international initiatives in this field, and the multinational companies' behaviour has been regulated. So in Paris based Organization for Economic Cooperation and Development (OECD) has promulgated a Code of Conduct for Multinational Corporations (I.L.M. 15 (1976), 969). Additionally the United Nations an International Working Group and the United Nations Centre on Transnational Corporations have adopted a Code of Conduct (Horn N. (1980) 479). Those initiatives have been characterised as soft law, which produces justificatory effect because one state can not claim that other state violated any rule of international law(soft law

included) if it incorporated international law rules into domestic law order (Seidl- Hohenveldern I. (1987), 13). Additionally the soft law gradually is becoming part of legal customs (Horn N. (1980), 14), which is one of the main sources of private law. The soft law has been used as one of the source in dispute settlement between countries. Another element of company law regulation at international level is corporate governance. There is variety of legislations in corporate law field in different countries and corporations can choose such legislations which don't protect shareholders and creditors in order to misused company law for their own aims and especially for the benefit of managers.

The justification of Community institution activities in corporate law area have been based on internal market creation. EU initiatives especially in company law field are rather limited because too broad Europeanization of private law in corporate law field could lack of justification. According expressed opinions the Community should focus on core areas of internal market such as freedoms of movement of goods, capital, persons and services then to try reshape legal system of the member states. Company law could be based on and freedom of movement of capital and freedom of establishment. There are several options open for EU regulation. One of the options would be to insure the common standards for functioning financial market. It could help to attract capital into companies then the same standards of disclosure, corporate management would be adopted. Other way would be to go even further and create the unified standards for companies' recognition to create common standards for companies creation. But it could lead to huge changes in legal system of member states because company law is tightly bound within a general bundle of public goods in a state. Then specifically company laws would be altered, it could change the larger public structure in a state and cause some undesired social problems such as unemployment, since from all factors of production, capital is mostly movable. The key issue facing EU Member States is to determine how much their company law can bend to allow for functional convergence, and how much formal convergence will be necessary to allow the jurisdiction to remain competitive for incorporations, yet offer protection to citizens operating under the older regime of the seat doctrine. There is opinion that competition of legal systems (Barnard C. (2000), 57) will be better then a centralistic harmonisation, and introduction of European company law with common recognition standards. But as an outcome, companies will be free to move from one state (or country) to another, and they will choose for the state (or country) with the lowest standards (like in the case of American company law the state of Delaware). The "home country control principle" will guarantee that this low standard will be exported from one member state to other to keep a company competitive. As a consequence of this competition eventually will evolve a uniform law of the lowest standard. This race to the bottom could arise then in a deregulated internal market, a state unilaterally lowers its social standards in an attempt to attract business from other states (Barnard C. (2000), 57). But the competition of private law systems and competition in order to attract capital should be distinguished because in competition for capital it is possible to avoid the negative consequences of competition.

Conclusions

Lisbon agenda dealing with economic growth policies and Europeanization of private law process are rather thinly correlated with each other. As history and comparative examples show private law could be one of the major tools in the economical development of the Member States of EU (social, cultural as well). The analysis of Europeanization of private law has been concentrated rather on the methods (systematization or functional convergence through competition of private law systems of the member states) then impact to economic growth. As a rule it has been argued that competition of private law systems could insure economic success especially to CEECs. But even competition of private law rules do not guarantee success in competition for investments and do not in every case lead to economic growth especially if the member states will not take any other measures. Strict systematization of private law and attempts to draft single source of European private law could have even more negative effect to economic growth and push the business entities to invest capital outside of EU, and promote outsourcing to countries outside of EU and especially by increasing mandatory requirements. From the process perspective the both methods of the Europeanization of private law should be used in limited extent in combination with each other. It could be desirable to let the Member States to compete with each other using their private law rules. Especially it could be useful for new EU Member States to attract capital, to restore their business environment, which had been damaged by totalitarian regimes then all business decisions had been made by the state authorities.

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