IS EUROPEAN PRIVATE LAW GOING THROUGH A CRISIS?

The Current Situation of European Private Law after the Financial Crisis

Phillip HELLWEGE

1. INTRODUCTION

The present volume brings together a number of contributions originating from a conference on "Testing the stress of the EU – EU law after the financial crisis". They do so by looking at the general theme from different angles, by focusing on different areas of law, and by asking different questions: What impact does the financial crisis have on EU law? How are the manifold problems resulting from the financial crisis addressed by the EU and by EU law? And which legal problems – even though they might have already been known before the crisis – have come to the centre of our attention? Thus, the contributions of the present volume do not simply address fiscal or monetary problems from legal perspectives. They go beyond that: insolvency law, merger control, consumer law, tax law, free movement of persons, and patent law are just some of the many areas of law which the contributions touch upon. I will add yet another perspective: what – direct or indirect – impact does the financial crisis have on private law and, more specifically, on European private law?

As a starting point I would like to pick up a distinction which *Paloma García Picazo* draws in her contribution, although I will interpret this distinction slightly differently than she does.[1] She asks whether one should talk of *the* crisis *of* Europe or merely of *a* crisis *in* Europe. Indeed, the general theme of the present volume is "EU law after the *financial* crisis". The idea of Europe and the EU cannot be reduced to fiscal or monetary matters. Both the idea of Europe and the EU go beyond fiscal and monetary questions. With this starting point one may argue that the financial crisis has initially been simply a crisis in Europe. Of course, a crisis in Europe which is at first confined to a very specific area can have the potential to develop into the crisis of Europe as a whole – extending to every facet of it. However, that is the very question I wish to address in my contribution with a view to European private law. Has the financial crisis had an impact on European private law? Or even more dramatically, is there a crisis of European private law today?

2. EUROPEAN PRIVATE LAWS AND THE FINANCIAL CRISIS

The financial crisis has caused new problems in private law relations, has increased existing problems, and has shed new light on old problems. In each case, private lawyers need to address these problems. Most of these problems, however, do not appear on a European level but on the level of the private laws of the Member States – or they have at least at first been discussed on the level of the Member States. Thus, it is worthwhile to pause for a moment and look at the impact of the financial crisis on the private laws of the Member States before turning to European private law. By way of example, I will present five such problems from German law.

2.1. ACTIONS AGAINST CREDIT RATING AGENCIES

Today's financial crisis has its origins in the American subprime crisis. Credit rating agencies have incorrectly assessed the risks of mortgage-related financial products. The question whether credit rating agencies are liable for the damage caused to investors if the latter have based their decision to buy such products on incorrect ratings has been discussed in German law and beyond. The subprime crisis has shed new light on an old problem and has moved it to the centre of our attention. The reason why the question of the liability of credit rating agencies may be mentioned in the present context

1 *García Picazo*, Exploring the European Crisis's Political Discourse. Europe as Consciousness, Europe as Narrative, in this volume, pp. 317 ff.

is that, according to German law, the basis of the claim is to be found in the general provisions of private law, even though these provisions apply in the context of capital markets law.[2] In 2010 the first action before a German court was filed by an investor against a credit rating agency.[3] However, since then the focus of the discussions has shifted away from the laws of the Member States as Regulation 462/2013/EC[4] has amended the Credit Rating Agencies Regulation of 2009[5] by introducing the liability of rating agencies, a liability which does not, however, exclude liability in accordance with the laws of the Member States.[6]

2.2. ACTIONS AGAINST BANKS

The first peak of the current financial crisis was reached when *Lehman Brothers* had to file for bankruptcy. In Germany, a number of private investors had bought certificates which had been issued by *Lehman Brothers*. The aforementioned action against a credit rating agency, by the way, involved the rating of such certificates. In addition, investors claimed that they had been incorrectly informed by their banks who recommended buying these certificates. A number of actions have been filed. Again, the crisis has shed new light on an old problem and has moved it to the centre of our attention. And again, the reason why this problem may be mentioned in the present context is that, according to German law, the basis of a claim is to be found in the general provisions of private law, even though these provisions apply in the complex context of the Securities Exchange Act.[7]

2.3. PROTECTION OF HOME OWNERS

German law provides for two security rights in land:[8] the accessory *Hypothek* and the non-accessory *Grundschuld* (regulated in §§1113 et seq. BGB[9] and §§1191 et seq. BGB, respectively). Being non-accessory, the latter exists independently of the secured debt. In practice, a special form of it is predominant: the

2 *Habersack* ZHR 169 (2005) 185 ff.; *Blaurock* ZGR 2007, 603 ff.

3 *Harr* NZG 2010, 1281 ff.

4 Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ 2013, L 146/1.

5 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ 2009, L 301/1.

6 *Dutta* WM 2013, 1729 ff.

7 *Poelzig* JZ 2014, 256 ff.

8 *Baur/Stürner*, Sachenrecht, 18th ed. 2009, p. 450.

9 *Bürgerliches Gesetzbuch* (German Civil Code) of 18 August 1896, in the version published on 2 January 2002, BGBl. I, 42, as amended.

Sicherungsgrundschuld. It is characterised by the fact that the right of the creditor to enforce his security right is limited by a surety agreement. This agreement has personal effect only. This is of great disadvantage to home owners in the event that the secured debt and the security right is transferred to a third party. With respect to the secured debt the provisions on assignment protect the debtor. Yet with respect to the security right the protection of the home owner was incomplete. His right to invoke exceptions based on the surety agreement against the new holder of the security was limited and he lost his right if the new holder of the security was bona fide. The subprime crisis brought to everybody's attention the resulting problems and the legislator introduced, among other reforms, a new paragraph 1a in §1192 BGB[10] in order to strengthen the rights of the property owner by, for example, eliminating the possibility of excluding the home owner's exception in case the new holder of the security right was bona fide.[11]

2.4. THE NEW "RENTAL PRICE BRAKE"

For a number of reasons real estate prices in Germany have seen a significant increase as a result of the financial crisis: German private investors are comparatively reluctant to invest in stocks; interest rates are low; real estate prices in Germany were stable as it did not experience a real estate bubble in the 2000s as did many other countries; and German real estate prices are said to have been low to start with compared to those in other countries. Consequently, real estate prices have risen significantly, yet not everywhere, but foremost in big cities. However, Germany has, unlike many other countries, a housing market in which many private individuals rent rather than buy the home they live in. The increase of real estate prices had the effect that rental prices increased significantly too. Especially in big cities affordable living space is becoming rare. The German legislator has decided to react to this problem by introducing the so-called "rental price brake" (*Mietpreisbremse*). The Tenancy Law Amendment Act[12] came into force on 1 June 2015. The act restricts the freedom of contract insofar as a landlord is not allowed to charge rent which exceeds the comparable rent in the same area by more the 10% if the property is located in an area covered by a regulation on the basis of the act (§556d(1) BGB).[13] Rising rental prices is not a new

10 Introduced by the *Gesetz zur Begrenzung der mit Finanzinvestitionen verbundenen Risiken (Risikobegrenzungsgesetz)* v. 12. August 2008, BGBl. I 1666.

11 *Meyer* JURA 2009, 561 ff.; *Weller* JuS 2009, 969 ff.; *Koch* ZBB 2008, 232 ff.

12 *Gesetz zur Dämpfung des Mietanstiegs auf angespannten Wohnungsmärkten und zur Stärkung des Bestellerprinzips bei der Wohnungsvermittlung (Mietrechtsnovellierungsgesetz* – MietNovG) v. 21. April 2015, BGBl. I 610.

13 *Gnisa* DRiZ 2015, 126 f.

problem caused by the financial crisis, and efforts to regulate rising prices and to protect tenants have been made in the past.[14] However, the financial crisis had the indirect effect of increasing the problem and as a consequence the legislator stepped in.

2.5. INTEREST RATES

According to §288 BGB, the statutory default interest rate is 5% or 8% above the so-called "basic rate of interest" (*Basiszinssatz*). The "basic rate of interest" is defined in §247 BGB. To make a complex story short, the "basic rate of interest" is 0.88% below the main refinancing operation (MRO) of the ECB. As a result of the financial crisis, the ECB has lowered the MRO for monetary reasons to currently 0.05%, a figure which was probably unforeseeable when §247 BGB was introduced. Consequently, the "basic rate of interest" as defined in §247 BGB is currently -0.83%. To have a negative statutory rate of interest is surprising. The "basic rate of interest" is not only referred to in statutory provisions such as §288 BGB but it is also used for defining contractual interest rates. The question has been raised what consequence a negative "basic rate of interest" has on the calculation of statutory and contractual interest rates which refer to it. Does §288 BGB, for example, have to be read such that it fixes the minimum statutory default interest rate at 5% and 8%? Or can the statutory default interest go below 5% and 8% if the "basic rate of interest" is negative?[15]

2.6. CONCLUSION

The conclusion which I would like to draw from these examples is that the financial crisis did not push German private law into a crisis. It rather seems that private law was further developed in reaction to some well-defined problems. However, my conclusion should not be generalised: as the impact of the financial crisis on the economies of the individual Member States varied, it is obvious that the problems which the financial crisis caused in private law relations in the individual Member States were different, too. Furthermore, as the existing private laws of the individual Member States differ from each other, the need to react to these problems by developing new answers might not have been felt the same way in each Member State. Thus, the picture may be completely different if we focused on the private law in other Member States.

14 *Derleder* KJ 2015, 5 ff.

15 *Kollmann*, Negative Zinsen, der negative Basiszinssatz und die Auswirkungen auf gesetzliche Verzugszinsen, master's thesis, Augsburg 2015, to be published in 2016.

3. EUROPEAN PRIVATE LAW AND THE FINANCIAL CRISIS

However, what effect did the financial crisis have on European private law? In October 2011, the European Commission published the Proposal for a Regulation on a Common European Sales Law (CESL).[16] The idea of harmonising European private law was, of course, not born in 2011. It dates back to the 1980s, when *Ole Lando* founded the Commission of European Contract Law which drafted the Principles of European Contract Law (PECL).[17] Later, further texts were added, for example the Principles of the Existing EC Contract Law (ACQP)[18] and most recently the Draft Common Frame of Reference (DCFR).[19] These academic texts were thought to serve different functions: for example, they offer a genuine European text which may be fit to serve as model for future European private law; they are crystallising points for European legal scholarship. And many have argued that these texts could function as a first draft for a European code on contract law or, even more ambitiously, for a European Civil Code.

The European Commission took up the idea that these texts could function as an immediate academic draft for a piece of legislation and commissioned a text for a European sales law. When presenting the CESL to the public, the European Commission argued that the different private law systems in Europe act as trade barriers in the common market as they result in additional transaction costs to anybody who wants to conclude cross-border contracts. The negative results are also felt by consumers who often have no choice but to shop in their home markets. The Commission concluded:[20]

> "The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules ..., the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State."

It could be argued that it would have been the right measure to react to the financial and resulting economic crises by enacting the CESL. Of course, it is

16 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635.

17 On these *Zimmermann*, Principles of European Contract Law (PECL), in: Basedow/Hopt/Zimmermann (eds.), The Max Planck Encyclopedia of European Private Law, vol 2, 2012, 1325 ff.

18 On these *Grigoleit/Tomasic*, Acquis Principles, in: Basedow/Hopt/Zimmermann (fn. 17), vol 1, p. 10 ff.

19 On the DCFR: *Zimmermann*, Common Frame of Reference (CFR), in: Basedow/Hopt/Zimmermann (fn. 17), vol 1, p. 261 ff.

20 COM(2011) 635, p. 4.

doubtful whether in Member States that have suffered economically the most as a result of the crisis consumers would have profited from an enhanced cross-border trade except that consumer prices might have become more competitive. Furthermore, of course, it is doubtful whether in such Member States traders would have profited from an enhanced cross-border trade as consumers from suffering economies would probably not have engaged in cross-border purchases as they have more pressing needs. Yet in such Member States traders might have benefited from the enactment of CESL as this could have opened new markets to them.

However, the opposite has happened: the European Commission withdrew the proposal for the CESL and what we might see is a less ambitious instrument which is part of the digital agenda and which is consequently restricted to cross-border e-commerce.[21] Is this the wrong way forward? And does this development indicate that European private law is currently going through a crisis?

I would like to argue to the opposite. The way leading to the CESL has been heavily criticised in academia for many reasons.[22] What is important in the present context is that the Austrian *Bundesrat*, Belgian Senate, German *Bundestag*, and the United Kingdom House of Lords have asserted that the CESL does not comply with the principle of subsidiarity.[23] Furthermore, in a joint letter of November 2014 to the Commissioner for Justice, the Ministers of Justice of Austria, Finland, France, Germany, the Netherlands and the United Kingdom have raised objections to the CESL:[24] they question whether the CESL can be based on Article 114 TFEU; they refer to problems concerning the principles of subsidiarity and proportionality; they critically assess the interplay of the CESL with EU law; they criticise that the CESL will lower the level of consumer protection in some Member States; they assert that the need for the CESL has not been proven; they point to the resulting complex problems and the legal insecurity following the introduction of the CESL; all in all, they fear that the CESL will weaken the trust which EU citizens have in the Common Market. The letter has picked up many of the points which have been formulated by academia.[25] The arguments link to a discussion which we witness in the context of monetary and fiscal matters: many have called for a "return to legality" and have argued against an "over-production of law" on the European level.[26] Indeed the withdrawal of the CESL from the Commission's agenda may be understood

21 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2015. A New Start, COM(2014) 910, Annex II, p. 12.

22 *Doralt* AcP 211 (2011) 1 ff.; *Doralt* RabelsZ 75 (2011) 260 ff.

23 See the reference in *Basedow* ZEuP 2015, 432 f.

24 The German version of the letter is printed in ZEuP 2015, 433 ff.

25 *Basedow* ZEuP 2015, 432, 433.

26 *Kirchhof* NJW 2013, 1 ff.; *Oppermann* NJW 2013, 6 ff.; *R. Schmidt* JZ 2015, 317 ff.

as a return to legality and as a sign against "legal over-production". Understood in this way, the withdrawal of the CESL does not indicate that European private law is currently in crisis.

4. CONCLUSION

The questions which I wanted to address in my contribution are simple: what impact does the financial crisis have on European private law? And more specifically, is European private law undergoing a crisis? My answer to the latter question is a clear no! The fact that the Commission has withdrawn the CESL from the agenda is rather a sign that the Commission is finally taking the many legal objections to the CESL seriously. European private law legislation will only have the effect of strengthening the European identity of its citizens if any legal objections are taken seriously in the process of drafting such legislation. In the long run, the withdrawal of the CESL will strengthen European private law.