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BOOKS RECEIVED AND BOOK REVIEWS

HARTKAMP, Arthur: *Vermogensrecht algemeen, Europees recht en het Nederlands vermogensrecht*, Deventer: Kluwer, 2008, ISBN 978-90-13-5716-4, 232 pp.

GERARD DE VRIES*

This book on ‘European law and Dutch general patrimonial law’, which is written in the Dutch language, deals mainly with the effects European law exerts on Dutch general patrimonial law. Its observations and conclusions are, however, not only relevant for general patrimonial law in the Netherlands, but for European countries at large. Although it treats the effects of both European Community law and of the European Convention on Human Rights, the effects of EC-law on general patrimonial law are in fact its main subject matter. It is the effects of EC-law the author focuses on; only in the Annexes to this book is EC-law, notably directives in the field of general patrimonial law, treated as a subject on itself.

The approach Hartkamp has chosen to treat his subject is a very systematic one. After a general introduction on the effects of EC-law on systems of national law, its effects on general patrimonial law are dealt with per source of this law: the effects on patrimonial law of primary EC-law, the Treaty establishing the European Community (hereafter: EC-Treaty) and of general principles of Community-law, are dealt with first, then the effects of secondary EC-law, resolutions and directives, take their turn.

In order to gauge the effects of these sources of EC-law, the diverse objects of general patrimonial law these sources exert their influence on, are distinguished. Cases where the effects of the EC-Treaty concern provisions of national law, for instance, are distinguished from those where this Treaty exerts its influence on relationships between persons or entities, notably on the type of a relationship between persons that is most prominent in patrimonial law, a ‘horizontal’ one. And rightly so: judicial ‘review’ by the ECJ of a provision of national patrimonial law in the light of one of the fundamental freedoms of the EC-Treaty (eg *Alsthom* C-36/74) entails consequences for national law that are quite different from those of a judgment by the ECJ to the effect that a certain contract between private persons – the prime example of a hor-

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horizontal relationship – or some other agreement is invalid or ineffective in that it conflicts with such a freedom (cf *Walrave C-339/89*).

In this latter case, the effect of the EC-Treaty on a horizontal relationship is said to be ‘direct’. This Treaty is said to have an ‘indirect’ horizontal effect in cases where it exerts its influence only by way of the provision of national law that applies to the horizontal relationship. When, for instance, a company accepts aid from a Member State, even though Article 87 of the Treaty forbids the State to grant it, and a national judge is thus led to decide that this aid, according to his own national law, constitutes a tort vis-à-vis a competitor of the company, the EC-Treaty certainly has horizontal effect, but just ‘indirectly’ so.

Hartkamp argues convincingly that the ECJ should grant ‘direct’ horizontal effect to the fundamental freedom of free movement of goods (Articles 28 and 29 EC-Treaty) on the same footing as it has already done to the free movement of persons and of services. Isn’t it, for instance, rather peculiar that the question whether a contractual undertaking not to challenge certain property rights is compatible with Article 28 et seq of the Treaty cannot be raised, since the ECJ deems these Articles to be intended to eliminate measures by Member States only and since agreements between companies limiting competition are already governed by Article 81 (cf *Süßhofer C-65/86*), whereas the compatibility of a contractual undertaking with the free of movement of persons or of services may be tested in full, whereas Article 81 applies to the movement of persons and of services as well?

The effects of EC-law on national law have been boosted by the general principles of Community law that the ECJ has developed on the basis of Article 220 EC-Treaty, of which the principle of ‘effectiveness’ has been most influential on patrimonial law. One of its important and sometimes puzzling effects is the requirement that the ECJ has introduced for national courts to apply EC-law of their own motion. It has taken Dutch lawyers quite some time and writing to relate the judgment of ECJ with respect to the application *ex officio* of Article 81 of the EC-Treaty in the ‘Dutch’ *Van Schijndel* case (C-430 and 431/93) to the numerous judgments of this Court with respect to the requirement for national courts to examine, of their own motion, the unfairness of terms in consumer contracts on the basis of the directive 93/13 on unfair terms in consumer contracts (cf most recently *Pannon C-243/08* and *Asturcom C-40/08*) and to relate all these judgments to Dutch provisions of (procedural) law with a view to the need to adapt the latter. It takes Hartkamp just 5 pages to explain this abstruse subject in plain language (77–81).

The above-mentioned directive on unfair terms in consumer contracts leads us to the effects directives have on general patrimonial law. Since they do not have a direct effect on it (Article 249 paragraph 3 EC-Treaty), they influence

national law in most cases only after having been transformed into national law themselves or on account of the obligation of national judges to interpret their own national law in harmony with them. All the same, directives have quite an impact on general patrimonial law. It is not only the number of directives that accounts for this – Hartkamp treats 14 of them in the Annex, still, for some reason, leaving out directive 86/653 on self-employed commercial agents –, but at times also their wide scope – eg the above-mentioned directive on unfair terms in consumer contracts – and/or the importance of their subject matter – eg directive 99/44 on the sale of consumer goods, which has even led the German legislator to review the part of the BGB on non-performance of obligations.

It poses, therefore, all the more a problem to national law that the sum total of all these directives is such a patchwork: though a lot of the directives in the field of general patrimonial law are only intended to protect consumers, some of them protect only professionals and others both consumers and professionals, sometimes on the same footing and sometimes in different manners; some directives apply to a specific contract, other directives to any contract as long as it has been concluded in a certain manner, yet other directives apply to a specific contract only if it has also been concluded in a certain way. No wonder the sometimes disruptive effects of ‘multi-level governance’ make themselves felt so often where directives exert their influence on national law. Therefore, Hartkamp advocates the creation of a ‘general part’ that will apply to the general subject-matter of all or at least most of the present directives, after which only specific contracts will need further regulation. The proposal for a directive on consumer rights (COM[2008] 614 final) may be seen as a small step into this direction. Its drafters did not get a chance to read the following precondition Hartkamp advocates for endeavors such as theirs: ‘From the point of view of a well-functioning internal market full harmonization is to be preferred over minimum-harmonization. One should then of course avoid to lower in an unreasonable way the higher level of consumer-protection presently prevailing in several Member States’ (97). One would have wished these drafters could have cast a glance at these lines.

It rarely happens that a book on law can be said to have opened up to the reader in a systematic way a new field of law, but this one by Arthur Hartkamp on the effects European law exerts on general patrimonial law certainly can.