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### Roman Roots at Plateau du Kirchberg: Recent Examples of Explicit References to Roman Law in the Case-Law of the Court of Justice of the EU

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# **MATER FAMILIAS**

## **SCRITTI ROMANISTICI PER MARIA ZABŁOCKA**

A CURA DI

**ZUZANNA BENINCASA  
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CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK  
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Wydanie I.

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Rafał Mańko

**ROMAN ROOTS AT PLATEAU DU KIRCHBERG**  
**RECENT EXAMPLES**  
**OF EXPLICIT REFERENCES TO ROMAN LAW**  
**IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EU**

I. INTRODUCTION

PROFESSOR MARIA ZABŁOCKA underlined, on numerous occasions, the importance of the legacy of Roman law for contemporary legal culture.<sup>1</sup> This legacy is also visible in references to Roman law in judicial discourse, both national and supranational. The courts of the European Union are not an exception here, as was noted almost two decades ago by Rolf Knütel.<sup>2</sup> The aim of this paper is to analyse some recent examples of such refer-

<sup>1</sup> Cf. e.g., Maria M. ZABŁOCKA, 'Ustawa XII Tablic źródłem zasad współczesnego prawa' [The Law of Twelve Tables as a Source of Principles of Modern Law], [in:] *Honeste vivere... Księga Pamiątkowa ku czci Profesora Władysława Bojarskiego* [*Honeste Vivere: Liber Amicorum* Władysław Bojarski], Toruń 2001, pp. 287–302; EADEM, 'U źródeł współczesnego prawodawstwa' [At the sources of contemporary legislation] [in:] *Z dziejów kultury prawnej. Studia ofiarowane Profesorowi Juliuszowi Bardachowi w dziewięćdziesięciolecie urodzin*, Warszawa 2004, pp. 71–84; EADEM, 'Alle origini della legislazione moderna' [in:] *Fides, humanitas, ius. Studii in onore di Luigi Labruna* VIII, Napoli 2007, pp. 5975–5990.

<sup>2</sup> Cf. e.g., R. KNÜTEL, 'Diritto romano e ius commune davanti a Corti dell'Unione europea' [in:] *Nozione, formazione e interpretazione del diritto dall'età romana alle esperienze moderne: Ricerche dedicate al professor Filippo Gallo* III, Napoli 1997, pp. 521–557.

ences, taken from the judgments of the Court of Justice of the European Union (CJEU)<sup>3</sup> and from the opinions of the Advocates General at the CJEU, pronounced during the last decade (2005–2015). The paper will focus only on *explicit* references to Roman law, *i.e.* those which openly refer to Roman law, either by using the term ‘Roman law’ or by indicating a specific reference to a Roman legal source, *e.g.* the *Corpus Juris Civilis* or the *Gai Institutiones*.

Therefore, the paper will not deal with the broader phenomenon of the use of Latin legal maxims, brocards or other legal expressions in judicial discourse,<sup>4</sup> unless their Roman origins are explicitly acknowledged.<sup>5</sup> *A fortiori*, the paper will not deal with the application of rules or principles of the EU legal order whose origins are traceable more or less directly<sup>6</sup> to Roman law, but which have been paraphrased and are not characterised by any formal link with Roman sources.<sup>7</sup> In other words, the aim

<sup>3</sup> The Court’s seat is located at the Plateau du Kirchberg in the City of Luxembourg, hence the title of this paper.

<sup>4</sup> For such an approach *cf. e.g.*, W. WOŁODKIEWICZ & J. KRZYNÓWEK (eds.), *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich* [Latin Legal Maxims in European Legal Culture and the Case-Law of Polish Courts], Warszawa 2001. For a brief summary (in English) of the findings of the aforementioned book *cf.* W. WOŁODKIEWICZ, ‘Rafał Taubenschlag and Roman law in Poland during real socialism’, [in:] G. KARSAI (ed.), *Classics and Communism: Greek and Latin behind the Iron Curtain*, Ljubljana 2013, pp. 254–255.

<sup>5</sup> This does not mean that their use – without explicitly acknowledging their Roman roots – does not entail an intellectual link with the Roman Law Tradition. *Cf.* W. WOŁODKIEWICZ, ‘Łacińskie paremie w orzecznictwie sądów polskich’ [Latin maxims in the case-law of Polish courts], [in:] WOŁODKIEWICZ & KRZYNÓWEK (eds), *Łacińskie paremie* (cit. n. 4), p. 24; F. LONGCHAMPS DE BÉRIER, ‘Z uwag do metodologii nauki prawa prywatnego: powoływanie łacińskich reguł i maksym na przykładzie *nemo plus iuris*’ [Remarks on the methodology of private law studies: The use of Latin maxims as exemplified by *nemo plus iuris*], *Krakowskie Studia z Historii Państwa i Prawa* 7 (2014), pp. 39–57, at pp. 40–41.

<sup>6</sup> As a rule, such principles were filtered through modern legal systems, which themselves were based on Roman law. Therefore, the reception of Roman rules and principles in EU law usually takes place *indirectly*.

<sup>7</sup> Such as the practical application of the Roman principle *exceptiones non sunt extendendae*, but without invoking the maxim (neither in Latin, nor in translation into vernacular). *Cf. e.g.*, CJEU judgment of 23rd April 2015 in Case C-96/14 *Jean-Claude Van Hove v CNP*

of this paper is an analysis of examples of *explicit* references to Roman law *qua* Roman law in the CJEU case-law.<sup>8</sup> Only if the text of a judgment or opinion contains such an explicit reference, can one be sure that the judge or advocate general was fully conscious of the Roman origins of a given principle, rule or institution, and specifically took that origin into account.

Furthermore, the judicial use of Latin maxims, even if originating more or less directly in Roman law, is a phenomenon qualitatively different from references to Roman law as such. Latin (not always Roman) legal maxims form part of many legal cultures of EU member states and are frequently resorted to without any actual connection to Roman law.<sup>9</sup> Some legal maxims, although formulated in Latin, were actually created more recently and do not originate in Roman law at all.<sup>10</sup> This does not imply that a research approach based on the tracing of Latin maxims in the case-law of modern courts is flawed or that it fails to provide data about

*Assurances SA*, par. 31: 'The Court has already held that that provision must be strictly interpreted, since it lays down an exception to the mechanism for reviewing the substance of unfair terms, such as that provided for by the system of consumer protection put in place by Directive 93/13 ...'. (Emphasis added – R.M.)

<sup>8</sup> From a formal perspective, one could speak of three circles – the central circle (dealt with in this chapter) covers *explicit* references to Roman law; the second circle, covers the use of Roman legal maxims in Roman law, either in their Latin original or translated into vernacular, but *without* an explicit reference to their Roman origins (which means that the author of the text was not necessarily aware of them); the third – external – circle, covers the use of rules and principles derived from Roman law, but without any kind of explicit or implicit acknowledgment of their Roman origins. The CJEU judgment in Case C-96/14 *Van Hove*, cit., falls within the third, external circle. Opinion of Advocate General JÄÄSKINEN delivered on 26th May 2011 in Joined Cases C-89/10 and C-96/10 *Q. Beef NV v Belgische Staat*, par. 4, where two Latin maxims are cited, but without referring to their Roman origins, falls within the second (intermediate) circle. And the cases analysed in this chapter fall within the first (central) circle.

<sup>9</sup> Cf. K. GALUSKINA & J. SYCZ, 'Latin maxims and phrases in the Polish, English and French legal systems – The comparative study', *Studies in Logic, Grammar and Rhetoric* 34 (2013), pp. 9–26.

<sup>10</sup> LONGCHAMPS DE BÉRIER, 'Z uwag do metodologii' (cit. n. 5), pp. 44–45; GALUSKINA & SYCZ, 'Latin maxims' (cit. n. 9), p. 15.

the impact of Roman law upon modern law. To the contrary. However, this paper focuses on explicit references to Roman law as its aim is to analyse the conscious interaction of the EU judicial discourse with the legacy of Roman law.

Based on results obtained through research within *InfoCuria* – the CJEU on-line search engine<sup>11</sup> – the paper provides an analysis of a total of 17 cases of the last decade (mainly opinions of Advocates General) where Roman law was explicitly mentioned.<sup>12</sup> On the basis of the role of the reference to Roman law in the legal reasoning, those cases were divided into three groups. First of all, those in which Roman law was actually invoked to support the actual substance on the legal reasoning (§ II below). Secondly, those in which the Roman-law roots of a maxim, legal principle or institution were explicitly acknowledged and sometimes even described (§ III below), however, this historical background did not seem to influence the actual legal reasoning. Finally, a third group comprises examples of references to Roman law which were merely cursory, and neither served the purpose of influencing the legal reasoning as a supporting argument, nor served to highlight the broader historical background, mentioning Roman law merely *en passant* (§ IV below). Within these three sections, the cases are presented in chronological order. On the basis of the analysis, a number of preliminary conclusions are drawn (§ V).



<sup>11</sup> <<http://curia.europa.eu/juris/recherche.jsf?language=en>> (last accessed: 30/4/2015).

<sup>12</sup> The cases analysed in this paper were found by searching for an explicit mention of 'Roman law' in the texts of judgments and opinions of Advocates General. This specific research approach, on the one hand, allowed to find examples of explicit references to Roman law but does not, on the other hand, guarantee that all such references were found. Nevertheless, the number of 17 judgments studied in the paper can be treated as an interesting point of departure for an analysis of the place of explicit references to Roman law in the discourse of the CJEU.

II. EXAMPLES OF CASES  
WHERE ROMAN LAW WAS EXPLICITLY INVOKED  
AS AN AID FOR INTERPRETING EU LAW

1) *Horvath: Roman servitudes*

*Horvath* (Case C-428/07) was a case concerned with the compatibility of an English law allowing for public rights of way over agricultural land with an EU regulation. The applicant, Mr Horvath, claimed that the maintenance of public rights of way cannot be understood as belonging to the category of minimum requirements for good agricultural and environmental condition. In arguing for including the public rights of way into the notions of 'ensuring a minimum level of maintenance' and to 'avoiding the deterioration of habitats', Advocate General Trstenjak referred to Roman law:

... in my opinion, there is no doubt that public rights of way have a considerable importance for the preservation of human habitats in rural areas, especially since the importance of rights of way for human economic development was recognised even in Roman law. First and foremost, rights of way allow farmers access to the agricultural land farmed by them.<sup>13</sup>

The reference to Roman law was perhaps not decisive for her interpretation, but the fact that servitudes of way have been recognised legally since Roman times seems to have had some weight in the Advocate's General reasoning. In an explanatory footnote, she indicated the broader normative context of Roman law, explaining the typology of servitudes on the basis of a French and Austrian Roman law textbook.<sup>14</sup>

<sup>13</sup> Opinion of Advocate General Trstenjak delivered on 3rd February 2009 in Case C-428/07 *Mark Horvath v Secretary of State for Environment, Food and Rural Affairs*, par. 78.

<sup>14</sup> Opinion of Advocate General TRSTENJAK in Case C-428/07 *Horvath* (cit. n. 13), par. 78, n. 33: 'According to MONIER, R., *Manuel élémentaire de droit romain*, Paris 1947 (6 ed.), p. 432, real servitudes, which include rights of way, were intended to encourage an optimal economic use of a property. In Roman law, a distinction was drawn within real servitudes between rural servitudes (*servitutes praediorum rusticorum*) and urban servitudes

2) *Eschig: The principle ut magis valeat quam pereat*

*Eschig* (Case C-199/08) was a case concerned with the interpretation of the Legal Expenses Insurance Directive,<sup>15</sup> and in particular its Article 4(1)(a) of the which stipulates:

Any contract of legal expenses insurance shall expressly recognise that: ... where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person ...

The question at stake was whether a ‘mass torts clause’ in a contract, which allowed the insurance company to choose the lawyer for the insured persons if a large number of such persons suffered a loss as a result of the same event, was compatible with the aforementioned Article. One of the aspects of the legal reasoning was whether the right enshrined in Article 4(1)(a) is an independent right. The outcome of the reasoning depended on the relationship between that Article, and another Article of the Directive. Advocate General Trstenjak criticised one of the possible interpretations by pointing out that under it ‘Article 4(1)(a) of Directive 87/344 would no longer have any independent sphere of validity.’<sup>16</sup>

(*servitutes praediorum urbanorum*). That distinction did not depend on where the properties in question were located, but on the purpose of the servitude. Rural servitudes included the right of horse or foot passage (*iter*), a right for carriages drawn or cattle driven by man (*actus*) and *via*, which comprises the first two rights but extends also to carriage drawn by horses or other animals, and the right to conduct water across land (*acqueductus*). Those four servitudes are probably the oldest in Roman law. The right of way (*iter*) also permitted riding. The right to *via* encompassed the right to walk, to cross by carriage and to drive cattle. The servitude of *acqueductus* could also include the extraction of water. Other types of rural servitudes included the right of lead cattle to water, the right to draw water, the right of pasturage, and the right to search for minerals (cf. MAYER-MALY, T., *Römisches Recht*, 2nd edition, 1999, p. 97 et seq).<sup>7</sup>

<sup>15</sup> Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance.

<sup>16</sup> Opinion of Advocate General Trstenjak delivered on May 2009 in Case C-199/08 *Dr Erhard Eschig v UNIQA Sachversicherung AG*, par. 63.

In order to corroborate her preferred way of interpreting the Article, she resorted to the Roman principle of *ut magis valeat quam pereat*:

In the light of the principle of Roman law *ut magis valeat quam pereat*, whereby an interpretation that allows each article an independent significance is to be preferred to one that denies such significance to individual articles, the interrelationship between Article 3(2) and Article 4(1)(a) of Directive 87/344 favours an interpretation under which Article 4(1)(a) of Directive 87/344 is construed as an independent right to choose one's legal representative.<sup>17</sup>

The origins of the maxim are indeed in Roman law, although the Advocate General did not specify the source citation.<sup>18</sup> However, in its original context – in *D. 34.5.2* – the maxim is concerned with the interpretation of statements of claims (*actiones*) and defences (*exceptiones*), and not the interpretation of legislation.

### 3) *Padawan*: The principle *cuius commoda eius incommoda*

*Padawan* (Case C-478/08) was concerned with the interpretation of the notion of 'fair compensation' used in the Copyright Directive.<sup>19</sup> Article 5(2)(b) of that Directive provides that:

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases ... in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

<sup>17</sup> Advocate General Trstenjak in Case C-199/08 (cit. n. 18), par. 64.

<sup>18</sup> *D. 34.5.2* (Iul. 50 *dig.*): 'Quotiens in actionibus aut in exceptionibus ambigua oratio est, commodissimum est id accipi, quo res de qua agitur magis valeat quam pereat.'

<sup>19</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

The Spanish implementing legislation concretised the ‘fair compensation’ for private copying by providing for a levy charged on equipment and devices for reproducing books, phonograms and videograms, as well as on media for sound, visual and audiovisual reproduction. The levy was charged on producers, importers, wholesalers and retailers of the products in question, and was payable to collective rights management societies. In interpreting the Directive’s rule on equitable compensation, Advocate General Trstenjak pointed out that the balancing of interests should take into account the natural person exercising the private copying exception, rather than the person liable to pay the levy. In justifying her stance, the Advocate General pointed out:

In my opinion, that person should be taken as the focus rather than the person liable to pay compensation. Since the user must bear the economic burden of the compensation pursuant to the maxim *cuius commoda, eius incommoda*, his interests should also be taken into account in the course of the balancing of interests.<sup>20</sup>

The Roman law roots of the maxim *cuius commoda, eius incommoda* were explicitly acknowledged in a footnote, where the Advocate General wrote:

This Roman law maxim states that the person who derives benefit from a thing should also bear the disadvantages. According to the submissions of the Spanish Government, the Spanish levy system is based on this principle.<sup>21</sup>

However, the Advocate General did not quote the original fragment from Ulpian, where this maxim takes its origin from, *i.e.* *D. 14.3.1.*<sup>22</sup>

<sup>20</sup> Opinion of Advocate General Trstenjak delivered on 11th May 2010 in Case C-467/08 *Sociedad General de Autores y Editores (SGAE) v Padawan S. L.*, par. 75.

<sup>21</sup> Opinion of Advocate General Trstenjak in Case C-467/08 (cit. n. 22), par. 75 n. 52.

<sup>22</sup> *D. 14.3.1* (Ulp. 28 *ed.*): ‘Aequum praetori visum est, sicut commoda sentimus ex actu institorum, ita etiam obligari nos ex contractibus ipsorum et conveniri ...’. Cf. Barbara ABATINO, G. DARI-MATTIACCI & E. PEROTTI, ‘Early elements of the corporate form: Depersonalization of business in Ancient Rome’, *Oxford Journal of Legal Studies* 31.2 (2011), pp. 365–389, at p. 384.

4) *Budějovický Budvar*:

*The maxim impossibilium nulla obligatio est*

The case of *Budějovický Budvar* (Case C-482/09) was a trademark dispute between a Czech brewery and a US brewery over the rights to the trademark 'Budweiser'. The American brewery filed an application to the UK Patent Office to invalidate the trademark *Budweiser* registered by the Czech brewery. During the five preceding years, both companies used the name *Budweiser* on the UK market. The main legal issue was whether the Czech brewery could oppose the American brewery's application for a declaration of invalidity by relying on an objection of limitation of rights under an earlier trade mark. To resolve this issue, the court had to clarify whether during the five year period of coexistence on the UK market, the US producer can be said to have 'acquiesced' to the use of the name *Budweiser* by the Czech producer.

On the of the issues that needed to be clarified was whether one can speak of 'acquiescence' if the allegedly acquiescing party was not in a position to take legal steps against its competitor using the same trademark. In order to clarify this aspect, Advocate General Trstenjak referred to the Roman law maxim *impossibilium nulla obligatio est*:

... the concept of 'acquiescence' implies that the person acquiescing was theoretically in a position to do something about an undesired situation, but deliberately did not do it. ... Furthermore, it should be borne in mind that in the 11th recital in the preamble to the [Trademark Directive] the European Union legislature expressly allowed the interests of the proprietor of the earlier mark to be prejudiced by limitation of his rights only on condition that this was 'equitable'. In view of the fact that no one can be legally obliged to do the impossible (*impossibilium nulla obligatio est*), it would have to be regarded as inequitable to exclude by limitation the rights of the proprietor of the earlier mark on the ground that he had failed to defend himself against the unlawful use of his mark by another even though he was quite unable to do so.<sup>23</sup>

<sup>23</sup> Opinion of Advocate General Trstenjak of 3rd February 2011 in Case C-482/09 *Budějovický Budvar, národní podnik v Anheuser-Busch, Inc.*, par. 72.

The quotation of the maxim *impossibilium nulla obligatio est* is a conscious reference to Roman law, as in the accompanying footnote Advocate General Trstenjak pointed out:

This maxim of Roman law is restated in the Digests, 50.17.185.<sup>24</sup>

However, apart from this acknowledgment, the Advocate General did not make any references to the original meaning and scope of the maxim.

##### 5) *ThyssenKrupp Nirosta: The principle of continuity of legislation*

In *ThyssenKrupp Nirosta* (Case C-352/09 P), the issue arose whether, after the expiry of the *ECSC Treaty*, the scope of the competition rules of that Treaty was automatically taken over by the *EC Treaty*. The General Court found that the *ECSC Treaty* was a *lex specialis* towards the *EC Treaty* which was a *lex generalis*, and therefore once the *ECSC Treaty* expired, the competition rules of the *EC Treaty* automatically became applicable to those sectors of the economy which were originally covered by the *ECSC Treaty* to the exclusion of the *EC Treaty*. The Court of Justice, on appeal, confirmed this understanding, pointing out that:

It follows from the case-law that, in accordance with a principle common to the legal systems of the Member States whose origins may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, the continuity of the legal system must be ensured, and that that principle applies to amendments to the primary law of the European Union (see, to that effect, Case 23/68 *Klomp* [1969] ECR 43, paragraph 13).<sup>25</sup>

Unfortunately, neither in the case at hand, nor in the cited *Klomp* ruling did the Court of Justice explicitly refer to a quote from Roman law to

<sup>24</sup> Opinion of Advocate General Trstenjak in Case C-482/09 (cit. n. 26), 72 n. 44.

<sup>25</sup> CJEU judgment of 29th March 2011 in Case C-352/09 P *ThyssenKrupp Nirosta GmbH v European Commission*, par. 73.

support the principle of continuity of the legal system. The same expression, basing the principle of continuity of the legal system, with an explicit reference to ‘Roman law’ but without any closer indication, was repeated also in two other cases decided on the same day.<sup>26</sup> It seems that the legal reasoning ultimately hinged on the principle that the abrogation of a *lex specialis* means that the subject-matter hitherto regulated by that *lex specialis* is now regulated by the *lex generalis*. This is a direct logical inference from the principle *lex specialis derogat legi generali*, which, however, was formulated by medieval jurists, not by Roman lawyers.<sup>27</sup>

#### 6) *Haralambidis*: The Roman notion of *potestas*

In the pending case of *Haralambidis* (Case C-270/13, pending before the Court of Justice) the legal issue at stake is whether post of a president of a port authority falls within the concept of ‘public service’ under Article 45(4) *TFEU* and, as a consequence, may Member States limit access to such posts to their own citizens. Article 45 *TFEU* is concerned with the free movement of workers. In its first paragraph it stipulates that:

Freedom of movement for workers shall be secured within the Union.

The fourth paragraph of the Article contains an exception from the rule:

The provisions of this Article shall not apply to employment in the public service.

<sup>26</sup> CJEU judgment in Case C-216/09 P *Commission v ArcelorMittal Luxembourg and Others*, par. 63; CJEU judgment in Case C-201/09 P *ArcelorMittal Luxembourg v Commission*, par. 63.

<sup>27</sup> Izabela LEWANDOWSKA-MALEC, ‘Przepisy uchylające, reguły kolizyjne i klauzule niederogujące w prawie staropolskim [Repealing provisions, conflicts of laws and non-derogatory clauses in the old Polish law], *Forum Prawnicze* 3 (2011), pp. 9–6, at p. 10. Cf. also S. ZORZETTO, ‘The *lex specialis* principle and its uses in legal argumentation: An analytical inquiry’, *Eunomia. Revista en Cultura de la Legalidad* 3 (2012/2013), pp. 61–87. However, some authors believe that the principle originates directly in Roman law (without substantiating those claims), cf. e.g., M. HAPPOLD, ‘International Humanitarian Law and Human Rights Law’ in N. D. WHITE & C. HENDERSON (eds.), *Research Handbook on International Conflict and Security Law*, Cheltenham 2013, p. 459.

In analysing the notion of ‘public service’, Advocate General Wahl connected the notion of ‘public service’ in Article 45(4) *TFEU* with the notion of exercise of official authority in Article 51 *TFEU*.<sup>28</sup> Explaining the meaning of those terms, he made explicit reference to Roman notions of *imperium* and *potestas*:

First, it is certain that those terms include the power of *imperium*, namely the supreme legislative, executive, judicial and military powers inherent in the concept of sovereign powers, which are exercised by the State through certain bodies or individuals. Second, it is in my view undisputed that those terms also encompass powers often indicated with the term *potestas*, meaning all those powers which involve the ability to adopt acts which are legally binding independently of (or despite) the will of the addressee, and which are enforced by means of coercion and punishment.<sup>29</sup>

The fact that the term *potestas* is used in its Roman-law context is explicit by the footnote following the word, in which Advocate General Wahl referred to Berger’s *Encyclopedic Dictionary of Roman law*.<sup>30</sup>



### III. EXAMPLES OF CASES WHERE THE ROMAN ROOTS OF A LEGAL INSTITUTION OR PRINCIPLE WERE EXPLICITLY ACKNOWLEDGED

#### 1) *Gasparini*: Roman origins of *ne bis in idem*

In *Gasparini* (Case C-457/04), a national court sought clarifications on scope of the principle of *ne bis in idem* embodied in Article 54 of the *Con-*

<sup>28</sup> Opinion of Advocate General Wahl delivered on 5th June 2014 in Case C-270/13 *Iraklis Haralambidis v Calogero Casilli*, par. 54.

<sup>29</sup> Opinion of Advocate General Wahl in Case C-270/13 (cit. n. 28), par. 55.

<sup>30</sup> Opinion of Advocate General Wahl in Case C-270/13 (cit. n. 28), par. 55, n. 42, referring to: ‘A. BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, p. 640’. On the relationship between *potestas*, *imperium* and *auctoritas* cf. e.g., D. HAMMER, *Roman Political Thought: From Cicero to Augustine*, Cambridge 2014, pp. 50–51.

vention implementing the Schengen Agreement. Explaining the rationale of the *ne bis in idem* principle, Advocate General Sharpston pointed to its historical roots:

... the principle of *ne bis in idem* ... whose origins in Western legal systems can be traced back to classical times, is mainly (although not exclusively) regarded as a means of protecting the individual against possible abuses by the State of its *jus puniendi*. The State should not be allowed to make repeated attempts to convict an individual for an alleged offence.<sup>31</sup>

In a footnote, she further referred to Greek philosophy and Roman law:

Thus, references to the principle can be found as early as Demosthenes, who states that ‘the laws forbid the same man to be tried twice on the same issue’ (Speech ‘Against Leptines’ [355 BC] *Demosthenes* 1, translated by J. H. Vince, Harvard University Press, 1962) and in Roman Law, where it appeared in Justinian’s *Corpus Juris Civilis* (D. 48.2.7.2 and C $\mathcal{J}$ . 9.2.9 *pr.*: 529–534 AD).<sup>32</sup>

The sources referred to by the Advocate General (but not explicitly quoted in the text) are as follows:

D. 48.2.7.2 (Ulp. 7 *off. procons.*): Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus Pius Salvio Valenti rescripsit: sed hoc, utrum ab eodem an nec ab alio accusari possit, videndum est. et putem, quoniam res inter alios iudicatae alii non praeiudicant, si is, qui nunc accusator exstitit, suum dolorem persequatur doceatque ignorasse se accusationem ab alio institutam, magna ex causa admitti eum ad accusationem debere.

C $\mathcal{J}$ . 9.2.9 *pr.* (Impp Diocl. et Maxim.): Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest.

<sup>31</sup> Opinion of Advocate General Sharpston delivered on 15th June 2006 in Case C-467/04 *G. Francesco Gasparini et al.*, par. 72.

<sup>32</sup> Opinion of Advocate General Sharpston in Case C-467/04 (cit. n. 31), n. 56.

2) *Les Éditions Albert René*:  
*Roman system of actiones*

In *Les Éditions Albert René* (Case C-16/06 P), a case heard by the Court of Justice on appeal from the General Court, the issue of *reformatio in peius* before EU courts was raised. Advocate General Trstenjak noted in this respect that the prohibition of *reformatio in peius* is limited by the Court's duty to raise *ex officio* pleas of public policy (*moyens d'ordre public*), whilst pleas of substantive legality (*moyens de légalité interne*) must be raised by the parties.<sup>33</sup> She then went on to state that:

It must be pointed out that the concept of public policy (*ordre public*) in the context of pleas before the Community courts is 'reserved to matters which, owing to their importance to the public interest, are not left to the discretion of the parties or of the Court and must be examined as a preliminary issue even though they have not been raised by the parties.'<sup>34</sup>

In an explanatory footnote, she added:

It must be noted that the concept of pleas [*notion de moyens*] that are typical of, for example, French and Belgian law corresponds fairly closely to the notion in Roman law of an *actio*. The application of this system before the Community courts and the division into public policy pleas and substantive legality pleas have rightly been criticised in the commentaries by former judges of the Court of Justice.<sup>35</sup>

Thus, Advocate General Trstenjak pointed to the genealogy of the system of *moyens* in the proceedings before the CJEU, indicating not only its French-Belgian origins, but also the fact that they stem from the Roman system of *actiones*.

<sup>33</sup> Opinion of Advocate General Trstenjak delivered on 29th November 2007 in Case C-16/06 P *Les Éditions Albert René SARL v Office for Harmonisation in the Internal Market (Trade marks and designs)*, par. 38.

<sup>34</sup> Opinion of Advocate General Trstenjak in Case C-16/06 P (cit. n. 33), par. 38. The French translation in square brackets is taken from the French version of the opinion.

<sup>35</sup> Opinion of Advocate General Trstenjak delivered on 29th November 2007 in Case C-16/06 P (cit. n. 33), n. 10.

3) *Atxalandabaso*:*Roman roots of 'nemo iudex in causa sua' principle*

The case of *Atxalandabaso v European Parliament* (Case C-308/07 P) was concerned with a former MEP's application for annulment of a decision of the Secretary-General of the European Parliament concerning the repayment of improperly received MEP's allowances. On appeal, the former MEP pleaded a violation of his right to a fair trial. This is because the same judges decided two cases which he subsequently brought, which were based on the same facts. In examining the appellant's arguments, the Advocate General considered Article 6(i) of the *ECHR* to be of high relevance for the case. That Article concretises the right to a fair trial by requiring that a tribunal be both 'independent' and 'impartial'. In explaining these notions, the Advocate General referred to the Latin maxim *nemo debet esse iudex in propria causa*:

There is a functional link between 'independence' and 'impartiality' in so far as the former is a requirement for the latter. The term 'impartial' refers primarily to the subjective position of the judges. They are to be above the parties and to take their decisions without regard to the person, objectively and according to the best of their knowledge and belief. The present principle of impartiality, which is also recognised in the legal orders of the Member States, originally dates back to the Roman law maxim of *nemo debet esse iudex in propria causa*.<sup>36</sup>

In an accompanying footnote,<sup>37</sup> the Advocate General quoted a paper on 'administrative human rights' in the EU<sup>38</sup> 'which traces the requirement of impartiality back to that maxim of Roman law' and explained, referring to D. Liebs,<sup>39</sup> that 'The Roman law principle literally means that

<sup>36</sup> Opinion of Advocate General Trstenjak delivered on 11th September 2008 in Case C-308/07 P. *Koldo Gorostiaga Atxalandabaso v European Parliament*, par. 58.

<sup>37</sup> Opinion of Advocate General Trstenjak in Case C-308/07 (cit. n. 43), n. 17.

<sup>38</sup> Klara KAŇSKA, 'Towards administrative human rights in the EU – Impact of the Charter of Fundamental Rights', *European Law Journal* 10.3 (2004), pp. 296–326, at p. 313

<sup>39</sup> D. LIEBS, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 1998, p. 145.

no one may be a judge in their own case'. However, the source quotation from the *Codex Iustinianus* is not provided.<sup>40</sup>

#### 4) *Seagon: Roman roots of the actio Pauliana*

In *Seagon* (Case C-339/07) the Court of Justice had to answer the question whether an action to set a transaction aside in the context of insolvency is governed, for the purposes of determining jurisdiction, by the Insolvency Regulation<sup>41</sup> or by the Brussels I Regulation.<sup>42</sup> According to Advocate General Ruiz-Jarabo Colomer, the proper answer is that jurisdiction should be determined by the (sector-specific) Insolvency Regulation and not by the (general) Brussels I Regulation. However, in order to arrive at this result, the Advocate General found it necessary to look into the history of the remedy in question:

Actions in the context of an insolvency to set a transaction aside have their roots in the *actio Pauliana*, a legal remedy governed by civil law which protects creditors against disposals of assets made by their debtors with the intention to defraud. Accordingly, it is necessary to examine the development and the current state of both remedies and to interpret the two regulations concerned with a view to establishing the correct jurisdiction.<sup>43</sup>

The Advocate General devoted a special section (entitled: 'Origin and evolution of the action to set aside in insolvency law') to a historical introduction. Three entire paragraphs were devoted to the origins of the *actio Pauliana* in Roman law:

<sup>40</sup> Cf. *Cf.* 3.5.1 (Impp. Valens, Gratianus et Valentinianus): 'Generali lege decernimus neminem sibi esse iudicem vel ius sibi dicere debere. in re enim propria iniquum admodum est alicui licentiam tribuere sententiae'.

<sup>41</sup> Council Regulation (EC) No 1346/2000 of 29th May 2000 on insolvency proceedings.

<sup>42</sup> Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>43</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16th October 2008 in Case C-339/07 *Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium NV*, par. 5.

23. The protection of creditors against the fraudulent schemes of debtors has improved considerably with the passage of time. Roman law produced the first learned legal views on the matter, although those beginnings were not distinguished as being a model of moderation and equity.

24. The *actio per manus iniectio*, the original version of the action to set aside, was an enforcement instrument which granted the creditor the right to sell the debtor as a slave, together with his family, or to kill him, if the debt was proved by judgment or confession. Table 3 of the Law of the Twelve Tables enshrined in explicit terms the severity of the Roman procedural system, closing the table on debt with the famous maxim *adversus hostem aeterna auctoritas esto* (against an enemy, the right of property is valid forever).

25. In around 150 to 125 BC, a praetor named Paulus, about whom little is known, contributed to the removal of the excessive adherence to formalities from the earliest civil actions by creating a procedure that was personal and discretionary in nature, which enabled a creditor to revoke any acts carried out fraudulently and to his detriment by a debtor. Centuries later, the Digest consolidated the most sophisticated version of the *actio Pauliana*, by merging it, in its classical form, with the *interdictum fraudatorium*. From that time, the *actio pauliana* was based on the concepts of *alienatio* (alienation), *eventus fraudis* (detriment), *fraus* (fraud) and *participatio fraudis* (knowledge of the fraud).

The footnotes accompanying these three paragraphs<sup>44</sup> refer both to works of legal historians, such as Xavier D'Ors,<sup>45</sup> Pierre Collinet,<sup>46</sup> Johan A. Ankum,<sup>47</sup> Hans Coing,<sup>48</sup> Fautino Gutiérrez,<sup>49</sup> and Armando Torrent,<sup>50</sup> as well as to Roman sources, such as Gai. 4.21 (quoted in English) or *D. 22.1.38.4*.<sup>51</sup>

<sup>44</sup> Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-339/07 (cit. n. 51), n. 6–11.

<sup>45</sup> X. D'ORS, *El interdicto fraudatorio en el derecho romano clásico*, Rome – Madrid 1974, p. 1.

<sup>46</sup> P. COLLINET, 'L'origine byzantine du nom de la Paulienne', *Nouvelle revue historique de droit français et étranger*, 43 (1919), pp. 182–208.

<sup>47</sup> J. A. ANKUM, *De geschiedenis der actio pauliana*, Zwolle 1962.

<sup>48</sup> H. COING, 'Simulatio und fraus in der Lehre des Bartolus und Baldus', [in:] *Festschrift P. Koschaker III*, 1939, pp. 402–419.

<sup>49</sup> F. GUTIÉRREZ, *Diccionario de derecho romano*, Madrid 1982, p. 25.

<sup>50</sup> A. TORRENT, *Manual de derecho privado romano*, Zaragoza 1995, p. 381.

<sup>51</sup> *D. 22.1.38.4* (Paul. 6 *Plaut.*): 'In fabiana quoque actione et pauliana, per quam quae in fraudem creditorum alienata sunt revocantur, fructus quoque restituuntur: nam praetor id agit, ut perinde sint omnia, atque si nihil alienatum esset: quod non est iniquum (nam et

5) *Galatea*:*Roman roots of the principle in dubio pro libertate*

In *Galatea* (Joined Cases C-261/07 and C-299/07) the Court of Justice was requested to interpret the Unfair Commercial Practices Directive<sup>52</sup> with reference to national law prohibiting combined offers. Comparing the national (Belgian) legislation with the Directive, the Advocate General observed:

Unlike the Belgian Law, the Directive presupposes that commercial practices are fair as long as the precisely defined legal conditions for a prohibition are not fulfilled. It thus follows an opposite approach, in favour of the trader's entrepreneurial freedom, which accords essentially with the legal concept of *in dubio pro libertate*.<sup>53</sup>

The Roman roots of the *in dubio pro libertate* adage were acknowledged in a footnote,<sup>54</sup> where the Advocate General explained the meaning and, referring to Dietlef Liebs,<sup>55</sup> pointed out that it 'originally applied only to the question of whether or not someone was a slave', before presenting its later use, as illustrated by the views of Hans Kelsen and Robert Alexy. However, the Roman source citation was not provided.

6) *Commission v Germany*:*Roman roots of contractus simulatus*

The case of *Commission v Germany* (C-536/07) was concerned with the issue whether a contract, described otherwise, was in fact a public works

verbum "restituas", quod in hac re praetor dixit, plenam habet significationem), ut fructus quoque restituantur'.

<sup>52</sup> Directive 2005/29/EC concerning unfair commercial practices in the internal market.

<sup>53</sup> Opinion of Advocate General TRSTENJAK delivered on 21st October 2008 Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*, par. 81.

<sup>54</sup> Opinion of Advocate General TRSTENJAK in Joined Cases C-261/07 and C-299/07 (cit. n. 53) par. 81, n. 34.

<sup>55</sup> D. LIEBS, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 1998, p. 103.

contract awarded by the City of Cologne in violation of the EU legislation on public procurement. Advocate General Trstenjak, after recalling that in light of CJEU case-law whether a contract is a public works contract should be determined not in light of its title, pointed out that the contract concluded by the City of Cologne was in fact a ‘sham contract’ (*contractus simulatus* – the Advocate General used the Latin term), and therefore:

the legal classification of such contracts is based principally – as is the case in national legal orders, too – on the actual content of the agreement.<sup>56</sup>

In a long footnote accompanying this statement, Advocate General Trstenjak explicitly acknowledged the Roman roots of the institution of *contractus simulatus*:

The assessment, whereby in the case of a *contractus simulatus* legal classification of the contract concerned is based on the actual content of the agreement, is to be found already in the Roman Law maxim *plus valere quod agitur, quam quod simulate concipitur* (Justinian Code, title to book 4.22).<sup>57</sup>

Following this acknowledgment, the footnote proceeded to a comparative overview of German law (with the use of the Latin maxim *falsa demonstratio non nocet*), Slovenian law, Austrian law, Belgian law, French law and Spanish law.

#### 7) *E. Friz: The Roman roots of societas*

The case of *E. Friz* (Case C-215/08) was concerned with the interpretation of Distance Selling Directive<sup>58</sup> in the context of a consumer entering

<sup>56</sup> Opinion of Advocate General TRSTENJAK delivered on 4th June 2009 in Case C-536/07 *Commission of the European Communities v Federal Republic of Germany*, par. 88.

<sup>57</sup> Opinion of Advocate General TRSTENJAK in Case C-536/07 (cit. n. 53), par. 88, n. 42.

<sup>58</sup> Council Directive 85/577/EEC of 20th December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

a closed-end real property fund established in the form of a civil-law partnership. In her opinion, Advocate General Trstenjak presented an overview of the regulation of a civil-law partnership in the laws of the Member States. She indicated explicitly the Roman roots of the institution, by pointing out that:

The civil-law partnership (*societas*) dates back to Roman law and is today a feature of the legal systems of many Member States.<sup>59</sup>

She also used Latin expressions, such as *intuitus personae*<sup>60</sup> or *actio pro socio*, however, she did not refer to the Roman rules on *societas* but rather to its codification in modern European legal systems.

8) *Internetportal und Marketing*:  
*Roman roots of prior tempore, potior iure*

In *Internetportal und Marketing* (Case C-569/08) a case dealing with the registration of internet domains, Advocate General Trstenjak, pointing to the 'first come, first served' principle in the registration of such domains, made reference to the Roman principle *prior tempore, potior iure*:

... the claimant ... should have waited for the opening of the 'landrush' phase in order to try to secure its domain name on an equal footing with the other parties wishing to register that same name, in accordance with the 'first come, first served' principle, a modern form of the Roman adage *prior tempore potior iure*.<sup>61</sup>

A footnote pointed to the *Codex Iustinianus*.<sup>62</sup>

<sup>59</sup> Opinion of Advocate General TRSTENJAK delivered on 8th September 2009 in Case C-215/08 *E. Friz GmbH v Carsten von der Heyden*, para. 44.

<sup>60</sup> This phrase in a French legal 'term of art' expressed in Latin – cf. GALUSKINA & SYCZ, 'Latin maxims' (cit. n. 9), p. 15.

<sup>61</sup> Opinion of Advocate General TRSTENJAK delivered on 10th February 2010 in Case C-569/08 *Internetportal und Marketing GmbH v Richard Schlicht*, para. 108.

9) *Modelo Continente Hipermercados*:  
*Roman roots of spes debiturum iri*

In the pending case of *Modelo Continente Hipermercados*, the Court of Justice will have to interpret provision of a directive regarding the mergers of public limited liability companies.<sup>63</sup> The dispute is concerned with the decision of a public authority charged with the surveillance of working conditions to fine a company for infringements of the Labour Code committed by a different company prior to its merger with the applicant. Essentially, the legal question boils down to whether a merger leads to a transfer of the merged company's debts onto the new company. In this context, Advocate General Wathelet took the view that a

merger by acquisition ... implies that the acquiring company acquires the entirety of the company being acquired, including its past history', and that 'the acquiring company takes over the legal liability of the company acquired following the merger.'<sup>64</sup>

He added that

this rule does not always operate to the detriment of the acquiring company, which also acquires all the assets, in other words, not only claims that are due at the time of the merger but also the expectation of a future claim (*spes debiturum iri*) and rights which only arise after registration of the merger.<sup>65</sup>

<sup>62</sup> The original fragment, not reproduced in the Opinion, is as follows: *CJ*. 8.17.3 (Imp. Antoninus): 'Si fundum pignori accepisti, antequam rei publicae obligaretur, sicut prior es tempore, ita potior iure.'

<sup>63</sup> *Third Council Directive* 78/855/EEC of 9th October 1978 based on Article 54(3)(g) of the *Treaty* concerning mergers of public limited liability companies, most recently amended by *Directive* 2009/109/EC of the European Parliament and of the Council of 16th September 2009 and by *Directive* 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies.

<sup>64</sup> Opinion of Advocate General WATHELET delivered on 12th November 2014 in Case C-343/13 *Modelo Continente Hipermercados SA v Autoridade Para As Condições de Trabalho — Centro Local do Lis (ACT)*, pars. 61–62.

<sup>65</sup> Opinion of Advocate General WATHELET in Case C-343/13 (cit. n. 64), par. 65.

Explaining the notion of *spes debiturum iri*, the Advocate General made, in a footnote, an explicit reference to Roman sources:

The expectation of a future claim has long been recognised as forming part of a person's assets. To that effect, I would cite from the Institutes of Justinian, Book 3.15.4 ('The immediate effect of a conditional stipulation is not a debt, but merely the expectation that at some time there will be a debt: and this expectation devolves on the stipulator's heir, supposing he dies himself before fulfilment of the condition': The Institutes of Justinian, transl. by J. B. MOYLE, Oxford 1913 [5 ed.]), and the passage at Book 50.16.54 of the Digest of Justinian, attributed to the Roman jurist Ulpian ('Conditional creditors are those who are not yet entitled to an action, but who will be entitled to it; or such as expect that an action will lie in their favour': The Digest or Pandects of Justinian, transl. by S. P. Scott, Cincinnati, 1932).<sup>66</sup>

Although the two fragments of the *Corpus Iuris Civilis* (*IJust.* 3.15.4 and *D.* 50.16.54) were not used for the purposes of interpretation of the EU provisions un question, they appeared as a testimony to the Roman roots of the concept of *spes debiturum iri* accepted by modern legal systems and applicable, in his view, to the EU legislation at stake.



#### IV. EXAMPLES OF INCIDENTAL MENTIONING OF ROMAN LAW

Apart from situations in which a Roman legal rule or institution is used as a tool helping to interpret EU law (above, § 11) and those, in which the Roman law background of an existing legal institution is acknowledged or even discussed (above, section 3), there are situations when Roman law is mentioned only incidentally, and without any closer connection with the case at hand.

<sup>66</sup> Opinion of Advocate General WATHELET delivered on 12th November 2014 in Case C-343/13 *Modelo Continente Hipermercados SA v Autoridade Para As Condições de Trabalho – Centro Local do Lis (ACT)*, n. 19.

### 1) *Gysbrechts: Roman law of sale*

For instance, in *Gysbrechts* (Case C-205/07) the Court of Justice had to determine whether a Belgian law prohibiting traders, in the context of distance contracts, to ask consumers for payment before the expiry of the cooling-off period is compatible with the Distance Selling Directive.<sup>67</sup> In her opinion, Advocate General Trstenjak mentioned the Roman law of sale, indicating at the outset that:

In a broader context, the present case provides a good illustration of how the arrangements and conditions for payment of the purchase price must also adapt to the development of the contract of sale. In Roman law, a contract of sale, for example, was performed by the vendor delivering the goods to the buyer and receiving from him the sale price; the two obligations were therefore performed simultaneously. With the development of the contract of sale, the arrangements and conditions of payment have changed considerably ...<sup>68</sup>

This reference to Roman law was accompanied with a footnote referring to A. Watson and a Slovenian romanist, V. Korošec.<sup>69</sup> However, despite being invoked in the opening part of the opinion, Roman law was not returned to in the Advocate General's further reasoning.

### 2) *Industrias Nucleares do Brasil: Roman commodatum*

The case of *Industrias Nucleares do Brasil* (Joined Cases C-123/04 and C-124/04) was concerned with property of fissile material under the

<sup>67</sup> Directive 97/7/EC of the European Parliament and of the Council of 20th May 1997 on the protection of consumers in respect of distance contracts.

<sup>68</sup> Opinion of Advocate General TRSTENJAK delivered on 17th July 2008 in Case C-205/07 *Criminal proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA*, par. 2.

<sup>69</sup> Opinion of Advocate General TRSTENJAK in Case C-205/07 (cit. n. 68), n. 2: 'A. WATSON, *Roman Law & Comparative Law*, Athens – London, 1991, p. 45; V. KOROŠEC, *Rimsko pravo I*, Ljubljana, 2005, p. 277.'

Euratom Treaty. Advocate General Maduro saw the need to explain the origins of the system of ownership under the *Treaty*. In contrast to US law, where fissile material is owned exclusively by the Federal Government, in the European Community:

it was recognised in principle that the Community had a right of ownership that was *dépatrimonialisé*. This compromise is an original solution. The Community is recognised as having the legal title to special fissile materials which gives rise to rights and obligations. The holders of special fissile materials have the ‘economic ownership’ thereof. They have all rights to make effective use of the materials. The Community, however, retains sovereign control of them.<sup>70</sup>

In a footnote, the Advocate General mentioned that this ‘original solution’ of Euratom law is seen by some jurists as similar to the Roman *commodatum* (G. Vedel), whilst by others to the medieval *dominium directum* and *dominium utile*.<sup>71</sup>



## V. CONCLUSIONS

The methodology adopted in this paper focused only on *explicit* references, thereby excluding the use of Latin legal maxims, often derived from Roman law, from the scope of analysis. The reason behind this approach was to look only into those cases where Roman law is openly and consciously invoked. The mere use of a Latin maxim, such as *pacta sunt servanda*, *audi alteram partem* or *in dubio pro reo*, is a phenomenon of legal culture interesting in its own right, which, however, was not analysed in this paper.

<sup>70</sup> Opinion of Advocate General POIARES MADURO delivered on 6th April 2006 in Joined Cases C-123/04 and C-124/04 *Industrias Nucleares do Brasil SA, Siemens AG v UBS AG, Texas Utilities Electric Corporation*, par. 80.

<sup>71</sup> Opinion of Advocate General POIARES MADURO in Joined Cases C-123/04 and C-124/04 (cit. n. 70), n. 35.

A conclusion of the research into 17 cases of such explicit references shows essentially three things. First of all, that such explicit engagement with Roman legal sources is a relatively rare phenomenon in the case-law of the CJEU. Secondly, that such examples are mainly found in the opinions of Advocates General. Thirdly, that the role played by explicit references to Roman law can be threefold. The qualitative analysis showed that out of the 17 explicit references to Roman law, in six cases Roman law did actually play a certain role in the legal reasoning. In *Horvath* it corroborated the view that praedial servitudes are a normal and desirable phenomenon. In *Eschig* the Roman principle *ut magis valeat* guided statutory interpretation. In *Padawan* the Roman adage *cuius commoda eius incommoda* was an argument in favour of adopting a specific perspective of interpreting the scheme of levies charged on hardware used for legal private copying. In *Budějovický Budvar*, the Roman maxim of *impossibile nulla obligatio est* reinforced a certain understanding of the principle of acquiescence in trademark law. In *ThyssenKrupp Nirosta*, the Court invoked, as a Roman principle, the continuity of legislation, although it did not specify any Roman sources. Finally, in *Haralambidis*, the Roman notion of *potestas* was used to clarify the EU law notion of ‘public service’.

In nine further cases in which an explicit reference was made to Roman law, the reference did not serve any clearly identifiable purpose in the process of interpretation, but rather served to indicate the historical background. Sometimes only on the level of a short footnote, but in certain cases, as in *Seagon*, three entire paragraphs were devoted to the historical evolution of a Roman legal institution (the *actio pauliana*). In most cases the references included a precise citation of the *Corpus Iuris Civilis*, often accompanied by a translated quote of the Roman legal text.

Finally, in two cases Roman law was mentioned incidentally, without the aim of using it for purposes of interpretation of an EU legal text nor the aim of giving a broader historical perspective.

In light with its focus, strictly limited to explicit references to Roman law *qua* Roman law, which excluded from its scope both references to Latin maxims without acknowledging their Roman origins, as well as an analysis of the unacknowledged reception of Roman legal thought upon

the case-law of the Court of Justice,<sup>72</sup> the paper, in a sense, analysed only the ‘tip of the iceberg’. However, despite the relatively scarce amount of cases, the fact that advocates general of the Court of Justice and occasionally even its judges enter into an explicit intellectual dialogue with the legacy of Roman law is remarkable and testifies to the fact that Roman law ‘shaped the concepts regarding general legal culture’,<sup>73</sup> as Professor Zabłocka once remarked.<sup>74</sup> Roman roots can also be found at the Plateau du Kirchberg.\*

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<sup>72</sup> One of such aspects is the broad use, by the Court of Justice, of teleological (functional, purpose-oriented) interpretation, whose roots can be traced to Roman law (D. 1.3.17–19). Cf. ZABŁOCKA, ‘U źródeł...’ (cit. n. 1), pp. 80–81.

<sup>73</sup> ZABŁOCKA, ‘U źródeł’ (cit. n. 1), p. 71.

<sup>74</sup> Cf. M. KURYŁOWICZ, *Prawo rzymskie. Historia, tradycja, współczesność* [Roman Law: History, Tradition, Contemporaneity], Lublin 2003, pp. 109–113.

\* All views expressed in this paper are strictly personal to the author and expressed in his academic capacity. They should not be attributed to the European Union or any of its institutions, bodies or agencies.