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Harmonisation of EU Competition Law Enforcement

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To Selina and Elysia

Preface

The idea for this book came about after the involvement in several projects. The first project was on 'Comparative Private Enforcement and Collective Redress', led by Prof Barry Rodger and conducted during the period 2011–2012. This AHRC funded research project generated quantitative analysis of the extent to which private enforcement of competition law took place across 27 EU Member States.[1] The second project 'Field study on the functioning of the national judicial systems for the application of competition law rules' commissioned by the DG Justice and DG Competition of the European Commission was conducted from September 2013 to December 2013, with the results materialising in the 2014 EU Justice Scoreboard.[2] Finally, the newest project led by Rodger B, Ferro MS and Marcos F was on the transposition of the Antitrust Damages Directive across 16 EU Member States with the aim of harmonising, and facilitation competition law damages actions across the EU in 2017–2018.[3] Most certainly, my personal experience as a competition lawyer at the Competition Council in Lithuania during a challenging time 2001–2002 when Lithuania was preparing for its accession to the EU and mechanically translated and implemented EU rules without questioning to what extent these rules can support the needs of economy in transition at the time had to be documented. The interest for the CEE (Central and Eastern European) countries was built not only for personal connections but also due to limited comprehensive studies available about these countries' experience.

While writing this book, I also successfully led the Law department for an Athena SWAN Bronze award. The Athena SWAN (Scientific Women's Academic Network) charter was established in the UK in June 2005 with the aim to encourage and

[1] It excluded Croatia. The results were published in the book: Rodger B (Ed) (2014) Competition Law Comparative Private Enforcement and Collective Redress across the EU. Wolters Kluwer.

[2] http://ec.europa.eu/justice/newsroom/effective-justice/news/140317_en.htm. Accessed 15 July 2019.

[3] The results were compiled into the book: Rodger B, Ferro MS, and Marcos F (Eds) (2018) The EU Antitrust Damages Directive: Transposition in the Member States, Oxford University Press.

recognise commitment to advancing the careers of women in science subjects and expanded in 2015 in the other fields, such as arts, humanities, social sciences, business and law. In my role as the Athena SWAN lead and the Aurora champion (the Leadership programme for Women in Higher Education now led by Advance HE), women support in their career progression is close to my heart. There is still much work to be done to ensure gender equality in Higher Education, especially for women academics with careering responsibilities and their attempt to balance work and family life. Role models are essential for a career progression. My circle of personal women role models in competition law who are a source of inspiration to me include: Prof Alison Jones, barrister Suzanne Rab, Prof Pinar Akman and *Jūratė* Šovienė (former Board member of the Competition Council of Lithuania).

Words of gratitude

My words of gratitude go to the long list of people who either directly or indirectly contributed to this book.

First of all, I would like to express my immense gratitude to my colleagues Dr Maria Kotsovili, Dr Stelios Andreadakis and Dr Gerard Conway at Brunel University London for reading and commenting on selected chapters.

Secondly, I would also like to thank other good people from my competition law network from the various jurisdictions for providing relevant materials and for their constructive comments on my chapters, such as Prof Csongor István Nagy (the University of Szeged, Hungary), Dr Maciej Bernatt (University of Warsaw, Poland), Prof Anna Piszcz (University of Bialystok, Poland), Prof Karin Sein (University of Tartu, Estonia), Dr Peter Varga (Trnava University, Slovakia), Dr Vlatka Butorac Malnar (University of Rijeka, Croatia), Prof Petra Joanna Pipková (Charles University Prague, Czech Republic), Prof Antti Aine (University of Turku, Finland) and Jurgita Breskytė (Competition Council of Lithuania).

Thirdly, I would like to thank my former PhD student Dr Rim Hamacha and my current PhD student Fatih Erdem for their help with research and references.

Fourthly, I would like to express my gratitude to my life mentors: Prof Felicity Kaganas, Prof Hussam Jouhara, Prof Alexandra Xanthaki and Prof Lisa Webley without whose support and encouragement this book would not have happened.

Finally, I am thankful to my family for their continuous support, especially my parents who were looking after my children each August allowing me to write this book during my summer holidays.

Kaunas, Lithuania Jurgita Malinauskaite
2019

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Chapter 1
Introduction

1.1 Overview

"The only source of knowledge is experience" (Albert Einstein).

The European Union (EU) contains a complex system, where 'comparativism plays a crucial role in the "nurturing" of this [..] supranational system of law' with its legal order being defined by scholars as 'a real laboratory for the study of the comparative methods'.[1] Harmonisation of the laws of the Member States is a core instrument of the EU to secure the internal market. Comparative studies can be employed in the EU to achieve its ultimate goal of European integration which involves harmonising national laws. There can also be a *vice versa* process where the formation of the EU with its integration objective provides a strong impulse for comparative studies. Indeed, the EU recent attempts to harmonise some procedural and enforcement aspects of the enforcement of EU competition law[2] has been an inspiration of this book, which is based on a comparative inquiry. From a comparative perspective, the CEE (Central and Eastern European) countries particularly appealing due to their unique feature—their 'past shadow of Socialism'.

While the quote stated above could be applied in any daily-life scenario, in the context of this book it will address the CEE countries' efforts to align their enforcement tools within the EU requirements and their experience in the enforcement of EU competition law. The literature notes that establishment of a well-functioning competition law system is a slow process, requiring between 20 and 25 years before one can gauge its results.[3] However, the CEE countries did not have any transitional period, as they had to enforce the EU competition rules which did not exist in their socialism decades from their accession to the EU. The book has a predominant interest on the CEE countries. Furthermore, it groups the CEE countries into small

[1] Vranken (1997), p. 14.

[2] In this context referring to Articles 101 and 102 TFEU.

[3] Kovacic and Lopez-Galdos (2016).

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J. Malinauskaite, *Harmonisation of EU Competition Law Enforcement*,
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and large based on the size of their economies. The small CEE countries consist of Estonia, Latvia and Lithuania (which are also traditionally known as the Baltic countries), then Bulgaria, Croatia, Slovakia and Slovenia. Although Slovakia and Slovenia did not officially form the former USSR (the Union of the Soviet Socialist Republics) like the Baltic countries, nonetheless, both countries belonged to the former socialist regimes of Czechoslovakia and Yugoslavia respectively. The large CEE countries embrace the Czech Republic (part of the former Czechoslovakia), Hungary, Poland, and Romania. This distinction is essential when considering the intensity of enforcement and resources of the National Competition Authorities (NCAs).

The fall of the Soviet Union in 1990s led the CEE countries to leave behind socialism and express their interest in joining the EU. Theory recognises that newly formed countries, developing countries or countries which are reforming their systems have two main options in choosing sources of laws. The choice embroils either adopting a law from within its own institutional mechanism, or transplanting rules from outside its political-legal zone of dominance.[4] Given that in a socialist regime competition was non-existent, competition rules were introduced in the CEE countries because of 'borrowings', specifically, they were transposed as part of the *acquis communautaire* as a *quid pro quo* for being admitted to the EU. This means that the CEE countries did not have any choice: the competition law rules modelled on the EU law were mechanically anchored without 'tuning' them to meet these countries' needs and without questioning the extent to which these rules were suitable for transitional economies at the time. The short implementation period and the limited resources available in these countries contributed to this approach, as the transposition of the European legislation, including the competition law and policy, frequently required significant human and budgetary resources; it was often more than the new member states could afford. The public sector was quite often incapable of recruiting and retaining highly-qualified personnel.

The preparation of the CEE countries for the EU membership was immense: at no time in history have sovereign states voluntarily agreed to meet such vast domestic requirements and then subjected themselves to such intrusive verification procedures to enter an international organisation. At the time of the enlargement negotiations, all the CEE [countries] were still "in the midst of profound social, political and economic transformations."[5] The transposition of *acquis* in the CEE countries was not a single act *per se*, as their whole legal, economic and political environment as well as their soviet mentality had to be changed. The reforms were in place to convey from a Socialist legal system to a Civil law legal system and from a centrally-planned to a market economy. Crafting a competitive business environment required structural changes in the economies, including trade liberalisation as well as privatisation. Clearly, the transition did not only demand economic expertise but also comprehension of the legal conditions of a market economy, in particular, of the European

[4] Watson (1978), p. 313.

[5] Vachudova (2005), and Toshkov (2012).

Union. The policy to set and control prices, employed during the Soviet time, had to change almost overnight into the protection of competitive processes. The regulators, who worked at the old system and possessed a degree in law or economics obtained during the Soviet regime, but no knowledge of basic principles of market economy, had to change and adapt to the new rules of the game.[6]

This expansion has meant not only challenges for the CEE countries in meeting the EU standards but also, *vice versa*, the EU had to prepare for the acceptance of these new Member States and ensure that the EU working mechanism would not be stalled. Even though the debate about a better use of national competition administrations began in the 1990s in the EU after the collapse of the Soviet Empire,[7] the reformation of the antitrust enforcement happened in 2004 with Regulation 1/2003 opening the door to decentralisation and sowing the seeds for current enforcement harmonisation. 1 May 2004 marks the biggest enlargement in the EU history, commonly known as the 'Big Bang', when ten new countries[8] joined the EU with Bulgaria and Romania joining in 2007 (and Croatia in 2013) completing the fifth expansion. This date not only features the expansion, which brought to the EU a mixed bag of countries, but also the launch of the Modernisation Regulation (Regulation 1/2003 and its supporting documents) with its shift from centralised to decentralised enforcement. While this new approach freed up resources and allowed the European Commission (the regulator of EU competition law) to focus on the most serious infringements, the NCAs became like the main enforcers of EU competition law. The CEE countries had no exception—from day one of their accession, they had an obligation to be able to enforce EU competition rules in addition to their national equivalents, despite barely having any knowledge of competition law. There is no surprise that at the outset, the CEE countries avoided the enforcement of EU competition law and instead, relied on their domestic rules.

Initially, all Member States had flexibility to design their NCAs and enforce EU competition law according to their national procedural laws, subject to the principles of equivalence and effectiveness. Yet, this is about to change due to the Directive (EU) 1/2019 and its aim to empower the competition authorities of Member States to be more effective enforcers and to ensure the proper functioning on the internal market (known as the ECN+ Directive),[9] as the Member States have to adhere to some minimum procedural rules and standards set by the EU. Apart from public enforcement, the EU has also tried to harmonise private enforcement in order to facilitate competition law damages actions across the EU pursuant to the Antitrust Damages Directive.[10]

[6]Malinauskaite (2010).

[7]Ehlermann (1996), p. 90.

[8]Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

[9]Directive (EU) 2019/1.

[10]Directive 2014/104/EU.

This book will take the reader on a journey through the history by reviewing the EU attempts to harmonise the EU competition law enforcement and procedural issues (related to both private and public enforcement which are largely interwoven in the EU context). The book will identify four development stages of EU competition law enforcement ranging from the first enforcement Regulation 17/62, followed by the modernisation Regulation 1/2003 and ultimately, ending with more recent developments—the Antirust Damages Directive[11] and the ECN+ Directive.[12] The responses from the CEE countries and their experience to adopt the EU competition enforcement tools are discussed in the final part of the book. All CEE countries went through remarkable efforts to win the battle—to be accepted into the EU. They not only had to sow the seeds—to introduce a new branch of law—competition law, but also to prepare the right soil for the fruitful results, which involved setting up the mechanisms for enforcement of these rules, raising the public awareness of new market principles and finally, creating competition culture, which will be explored in this book.

1.2 Methodological Underpinnings

The main focus of this book is on harmonisation. Harmonisation of enforcement (especially in the context of public enforcement) is somehow limited.[13] Given that the main focus of this book is on harmonisation, the comparative law argument becomes indispensable. The book argues that harmonisation without comparative studies is not possible, though comparative analysis does not necessary guarantee harmonisation success. Specifically, the comparative law method has been employed in this book as a comparative inquiry, notably, micro-comparison, in the context of harmonisation of EU competition law enforcement. Yet, some engagement with macro-comparison has been essential especially in the context of positioning specific aspects of enforcement mechanisms in the compared legal systems. In contrast to the existing studies, this book covers both public and private enforcement, as they are largely interwoven in the context of EU harmonisation attempts.[14]

The book will propose three modes of comparison. First of all, this inquiry will address an EU level and its decision processes, followed by the acceptance (or resistance) by the Member States (namely the CEE countries) in their transposition of EU measures at national level; finally, deliberating on the relationship

[11]Directive 2014/104/EU.

[12]Directive (EU) 2019/1.

[13]So far, the most studies have focused on private enforcement. See, for instance, by Rodger et al. (2018), Marquis and Monti (2018), Bastidas et al. (2018), Piszcz (2017), Bergström et al. (2016), and Rodger (2014).

[14]Recital 6 of the Directive provides: "to ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules". Directive 2014/104/EU.

between horizontal and vertical levels. Secondly, apart from a hierarchical comparison, the book will also embrace a historical comparison (i.e. the evolvement of the EU requirements in the context of competition law enforcement and procedural issues). Thirdly, the book will contextualise EU harmonisation as a process. It will note a continuous comparison occurring at different stages, such as initial development of the broad policy ideas and consultation, followed by the conceptualisation of a draft and decision-making process, and then the transposition and application processes at different levels—EU and national, simultaneously, embracing regular interactions between them.

In addition, the book is drawn on the functional method to identify the *comparables*—the enforcement measures and mechanisms of competition law. In its doctrinal research, it uses an EU measure as a benchmark for comparison, mainly specific aspects defined by the two Directives—the Antitrust Damages Directive and the ECN+ Directive. Both differences and similarities will be considered in the book's comparative exercise, extending comparison beyond functionally equivalent rules of 'law as rules', also incorporating contextual approach, especially through addressing historical, social-cultural, political, and economic backgrounds. As discussed above, the CEE countries were chosen due to their socialist inheritance enabling a logical justification for comparison. This study, however, does not aim to accomplish complete immersion into the individual legal systems of the CEE countries, which is hardly possible (given the constrains, such as time, language skills, and most certainty cost), yet, when some unique features were identified, the attempt is made to provide further considerations.

As far as specific steps are concerned, there were different techniques employed to obtain data, to test their accuracy and then to analyse the data. The personal competition network was largely utilised. This book would have been fruitless without conducting some empirical research as well as using personal experience while working at the Competition Council of Lithuania. A template for the collection of the information was used in different CEE countries. However, the responses from some CEE countries were missing (i.e. Bulgaria, Latvia, Romania, and Slovenia). Some e-mails to the NCAs for further clarification remained unanswered. Nevertheless, the various publications and reports as well as official web-sites assisted in sealing the gaps. For instance, the Annual Reports of the NCAs of all CEE countries were reviewed dated from 2013 to 2018. The Annual Reports submitted to the OECD (the Organisation for Economic Co-operation and Development) were also largely utilised.

Finally, it has been noted that all CEE countries have the main common feature—the limited availability of the materials in English, including the official translation of their competition laws. Given that the CEE countries entail 11 different languages, there were some language barriers. Still, fluency in Lithuanian (and to a lesser extent in Latvian) and in Russian (enabling to read in Polish, Bulgarian, and to some limited extent in Slovak, Czech) assisted research. Personal contacts in different CEE countries filled the missing gaps.

1.3 Structure of the Book

The book comprises of seven chapters, which are divided into three main parts. The first generic part will discuss comparative studies and their application in the context of the EU decision-making process (Chaps. 2 and 3). While the second part will focus on the EU attempts over the years to harmonise some aspects of public and private enforcement across the EU Member States (Chap. 4), whereas Part 3 will focus on the CEE countries and their experience to meet the EU requirements (Chaps. 5–7).

Specifically, the first part, which embraces two chapters, will start with comparative studies and comparative study inquiry (Chap. 2). Given that the book discusses harmonisation, it employs a comparative law argument. It will test the extent to which comparative studies have been undertaken in the EU to achieve its ultimate goal of European integration which involves harmonising national laws. Correspondingly, the book will place further emphasis on two different approaches: 'comparative law and culture' and 'comparative law and economics'. Most comparatists agree that harmonisation is only conceivable within a sufficiently homogeneous legal culture. This particular important in the context of harmonisation of enforcement and procedural rules, which are pertinent to the legal culture of a Member State. For successful acceptance of the legal rule, a harmonised law should ensure that it reflects socio-legal contexts and cultures in Member States. While the book does not aim to address the success of the EU legal transplants, nonetheless, it will examine the extent to which harmonisation is taking place or whether the EU measures are leading to the fragmentation of national legal systems. Furthermore, comparative law and economics cannot be ignored, which is designed to compare and assess the law of alternative legal systems and then suggest the most 'efficient' model.[15] The economic justification of harmonisation of an EU measure will be further discussed in Chap. 3, especially in the context of principles of subsidiarity and proportionality.

In general terms, Chap. 3 will assess comparative studies from an EU perspective in the context of EU decision-making, as the extent to which comparative law plays any role in every stage of European legal development: from drafting the legislation to the transposition and then its application. For instance, comparative studies are now more widely intertwined in EU consultation processes, as they are essential when considering harmonisation measures. The European Commission is now obliged to publish a public consultation (with accompanying documents, such as impact assessments and implementation plans) before any attempt to launch a new measure, as part of the new transparent decision-making process. This chapter will not only discuss the EU decision-making machinery and its competences and legal basis to justify the need for harmonisation, but also the interaction between the EU and national levels, namely, the EU tools, such as the preliminary reference procedure to facilitate harmonisation.

[15]Mattei (1994), pp. 3–19.

Part II, namely Chap. 4, will be devoted to the EU harmonisation attempts in the context of EU competition law enforcement and related issues from a historical perspective. This chapter will identify four different stages embracing both public and private enforcement. The first stage will discuss the introduction and a rein of Regulation 17/62, when competition enforcement was entrusted mainly to the European Commission, which supported a structure of the 1970s and 1980s, as the Member States lacked an established competition law system and had little experience in competition policy.[16] Therefore, a highly centralised nature meant that there was no need for harmonisation. This chapter will have recurring reflection on the CEE countries and their position from a historical perspective. For instance, the collapse of the Soviet Empire and the CEE countries' interest to join the EU meant that the enforcement mechanism in the enlarged EU had to changed, thus, leading to decentration becoming a necessity.[17] Therefore, the era of Regulation 1/2003 will be identified as the second stage with its decentralisation nature and foundation for further developments in private as well as public enforcement. The third stage will deliberate on the EU attempts to harmonise some aspects of private enforcement, whereas the fourth stage will discuss the ECN+ Directive and its emphasis to harmonise some aspects of public enforcement. The chapter will note the different sources of harmonisation employed during the last two stages, as directives provide more flexibility in relation to respecting national traditions in comparison with more rigid nature of regulations. Apart from the formalised harmonisation, this chapter will also discuss the so called 'soft' harmonisation via tools, such as the European Competition Network (ECN).

The final part of the book will focus on the CEE countries and their efforts to harmonise their national rules with the European measures by the techniques set in the second and third chapters.

Central to Chap. 5 will be the institutional designs of the NCAs in all CEE countries, with a specific emphasis on the principles of independence and accountability as well as the NCA's limited resources to perform their tasks. The chapter will argue that the NCAs developed in the CEE countries faced tasks unparalleled in the West, as they had to create a competition regime capable of facilitating and enduring the transition from a socialist economy to a market-based one. Yet, it was not only about the development of institutions, but also about capacity building and changes in values and thinking.[18] The regulators, who worked under the old regime with responsibility to control prices, had to change almost overnight into the protection of competitive process and adopt to a new system while developing their new regulatory skills.[19] This chapter will also review the institutional settings of the NCAs of the CEE countries on the verge of the newly issued ECN+ Directive. While the chapter will not be able evaluate the approach undertaken in the CEE countries in

[16]Wils (2013).

[17]Note: this was not a sole reason.

[18]Pecotić-Kaufman and Butorac-Malnar (2016).

[19]Nakrošis (2003), p. 111; Malinauskaite (2010).

their transposition of the Directive due to its recent appearance, nevertheless, the current institutional settings in these countries will be discussed based on the criteria primarily defined by the Directive and beyond. It will identify the constant development and experimentation of the institutional settings in the CEE countries, with some trends to widen the functions of the NCAs beyond the competition law field; and *vice versa* tendencies with these additional competences being allocated back to other public authorities in some CEE countries. Finally, this chapter will make the distinction between small and large CEE countries in the context of the financial and personnel resources of their NCAs, noting that the number of employees varies due to the different functions allocated to their NCAs.

Chapter 6 will deliberate on the second part of public enforcement, namely the NCAs' basic enforcement tools, fining policies, and leniency programmes. This chapter will review the public enforcement mechanisms and any distinctive features in the CEE countries as well as the main investigative and decision-making powers of their NCAs in the light of the ECN+ Directive. Similar to Chap. 5, this chapter will not be able to capture the transposition of the ECN+ Directive. Nonetheless, it will discuss the main aspects addressed in the Directive (save fundamental rights) and the extent to which the NCAs of the CEE countries are already meeting the minimal Directive's requirements and whether any changes will need to take place. It will also explore their NCAs' abilities to impose different types of sanctions, the effectiveness of their leniency programmes as well as mutual assistance, especially with the neighbouring countries. It will also discuss potential language barriers in context of summary applications. The chapter will argue that the effectiveness of the operation of the NCAs is not only characterised by the investigative and decision-making powers and the degree of sanctions imposed, but also their ability to maintain the public interest in fair competition and preserve a culture of compliance with the law.

Finally, the transposition of the Antitrust Damages Directive[20] with its aim to harmonise the existing national rules governing actions for damages for infringements of the EU competition law rules and the challenges faced by the CEE countries in their attempts to 'fit' it with their national legal systems will be discussed in Chap. 7. This chapter will, firstly, review the extent to which private enforcement in antitrust law is taking place in the CEE countries. Secondly, it will analyse whether double standards in the applicability of the Directive to both Articles 101 and 102 TFEU and purely domestic equivalents were avoided, and whether *lex generalis* or *lex specialis* was used to transpose the Directive. It will then explore the transposition of the various provisions of the Antitrust Damages Directive in the CEE countries. While employing a comparative approach defined in Chap. 3 in the context of the two transposition typologies: (1) literal/copy-out v elaboration method; and (2) minimalist v non-minimalist (also known as gold-plating) approaches, this chapter will analyse which approach was mainly utilised in the CEE countries. Finally, it will test the extent to which the new provisions imposed by

[20]Directive 2014/104/EU.

the Directive depart from the traditional liability of damages in the CEE countries potentially fragmenting their national legal systems.

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Chapter 2
Plethora of Comparative Studies

2.1 Introduction

Comparative law and comparative studies are indispensable in modern society. In our lives there are ongoing processes of borrowing, transplantation, imitation and imposition of law and increasing regional or even global interdependence (potentially both desired and undesired). Given that the main focus of this book is on harmonisation, the comparative law argument becomes indispensable, as harmonisation without comparative studies is not possible. Yet, comparative studies do not guarantee successful harmonisation. While the book does not aim to address the success of the EU legal transplants, nonetheless, it examines the extent to which harmonisation is taking place. Traditionally, comparative studies can be employed in the EU to achieve its ultimate goal of European integration which involves harmonising national laws. There can also be a *vice versa* process where the formation of the European Union with its integration objective can provide a strong impulse for comparative studies. This can be witnessed in a pronounced revival of both academic and practical interest in comparative studies within in the EU, where 'comparativism plays a crucial role in the "nurturing" of this [..] supranational system of law' with its legal order being defined by scholars as 'a real laboratory for the study of the comparative methods'.[1]

Therefore, this chapter begins with an exploration of the theoretical perspectives of comparative studies (in Sect. 2.2), as the extent to which legal transplant can survive a journey from one jurisdiction to another, and (potentially, from supranational to national level). It will then address different approaches attached to comparative studies (Sect. 2.3) with a specific emphasis being placed on comparative law and culture (Sect. 2.3.1) and comparative law and economics (Sect. 2.3.2). Rationale of comparative studies will be explored in Sect. 2.4 with further focus on comparative law and procedural law (Sect. 2.4.1) and comparative competition

[1] Vranken (1997), p. 14.

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studies (Sect. 2.4.2). Before concluding on the technique of comparative inquiry employed in this book (Sect. 2.6), there will be a discussion on various aspects of the methodological technicalities, such as 'law as rules' and 'law in context' (Sect. 2.5.1), functional equivalents (Sect. 2.5.2), and finally, whether similarities, or differences (or both) should be stressed (Sect. 2.5.3).

2.2 Labyrinth of Comparative Studies: A Theoretical Perspective

"Modern, systematic comparative law is a child of the nineteenth century and an adolescent of the twentieth. During this period, beyond giving the comparative lawyer a 'free rein' and being regarded as 'interesting', comparative law has provided a seemingly unending pastime for comparatists and others to discuss its true meaning, historical development, dangers, virtues, scope, functions, aims and purposes, uses and misuses, and method […]."[2]

There is no one decisive definition of what comparative law and comparative method is yet.[3] It is open to discussion whether this is an independent discipline and comparatists have to re-think on their subject.[4] A rather vague definition of comparative law is given by Zweigert and Kötz there *'[…] the words suggest an intellectual activity with law as its object and comparison as its process'*; the extra dimension is given to internationalism.[5] The theme 'comparative' is related to the "phoros" of the comparative counterpart of foreign legal system.[6] Broadly speaking, comparative law involves exploring the similarities and dissimilarities of different cultural, legal or social phenomena. The emphasis has swung to accept comparative law as a 'big tent, encompassing lots of different types of scholarship'.[7]

Although comparative law as a legal discipline of its own is relatively new and the term 'comparative law' became established in 1900 in Paris where the first International Congress for Comparative Law and World Exhibition was held, the origin of comparison of foreign law can be found as early as in the science of law

[2]Örücü (2000), p. 3.

[3]Örücü (2002).

[4]Markesinis (1990), p. 1.

[5]Zweigert and Kötz (1998), p. 2.

[6]Kiikeri (2012).

[7]Kennedy (2002), p. 345.

itself, i.e. in the writings of Plato and Aristotle[8] (384-322 B.C.).[9] Even legal historians noted that finding the origins of comparative law to be a puzzling task.[10]

The main modern landmarks of scholarly and theoretical work of comparative studies initially include Alan Watson's general "transplants thesis",[11] and his debate with Otto Kahn-Freund.[12] Watson, a pioneer of the 'legal transplant' theory, argued that legal transplant, generally, means moving a rule/concept from one jurisdiction to another or from one person to another, which is even possible in the case of a different level of development or 'political complexion'. Pursuant to Watson, legal transplant leads to a recurrent borrowing of rules[13] and is a relatively straightforward task as there is no requirement to consider the societal environment.[14] Watson's reasoning refers that laws are only rules which are transferred and implemented in other jurisdictions, as these rules are not socially connected, any difference in historical or culture aspects do not interfere with their capacity to be transplanted, therefore, a rule is potentially equally at home and anywhere.[15] Legal transplants are largely a product of serendipity and chance.[16]

Watson's idea that borrowing was the common mode of legal development and that there was not necessary to have a real understanding of the system from which rules or institutions were borrowed was actively challenged by, first of all, Kahn-Freund and other scholars to follow,[17] who believed that it is not sufficient to have knowledge of the foreign law, but it is also essential to reflect on the nature of the society that generated the borrowed rule. Referring to Montesquieu's[18] test in defining law as compound of physical, cultural, and political ingredients, Kahn-Freund quests to find some workable criterion that can be used to determine how far

[8]For instance, Aristotle's Politics compiled the 'constitutions' of 158 Greek city-states. For further discussion, see Donahue (2008), pp. 3–32.

[9]Also, the drafting of the XII Tables for Rome preceded a comparative study involving enquiries in the Greek cities as suggested by David and Brierley (1985). Many other historical precedents were also involved in comparative studies. For instance, in the Middle Ages the Canon law and Roman law were compared. Later, Montesquieu based his famous L'Espirit des Lois on comparison in order to penetrate the spirit of laws and thereby form common principles of good government. For further reading, see David and Brierley (1985), pp. 1–2.

[10]Donahue (2008), pp. 3–32.

[11]Watson (1993). His most recent variations on the theme include Watson (2000a, b).

[12]Kahn-Freund (1974), p. 81.

[13]Watson (1993).

[14]Watson claims that those who chose to compare ought to have regard to the rules without reflecting on their impact on society. Nelken and Feest (2001).

[15]Watson (1993).

[16]Ibid.

[17]Apart from Kahn-Freund, other scholars, such as Legrand and Seidmans radically object the utility of 'borrowing'. See, Legrand (1997), pp. 44–46.

[18]In his book 'Esprit des Lois' (Book I, Chapter 3).

a legal institution is transplantable and what its place in the continuum is.[19] His bold statement was that it should not be taken 'for granted that rules or institutions are transplantable'.[20] The criticism of the transplant theory swelled even further in 1990s, when Legrand expressed that legal transplants are impossible,[21] because laws cannot be considered as an independent body and are deeply embedded in the 'legal culture' of nations. Therefore, a legal institution cannot travel without being affected by culture and society. The first radical attack against the idea of a "European civil code" also was from Legrand,[22] European legal systems would never converge, because of fundamental differences amongst their underlying legal cultures, especially unbridgeable epistemological differences between the civil law and the common law traditions. These differences are reflected in the context of a concept of law, a theory of valid legal sources, a methodology of law, a theory of argumentation, a theory of legitimation of law, and a common basic ideology.[23] Along similar lines, the Seidmans radically objected the utility of borrowing altogether.[24]

There is a third trend of scholars, who do not share either Watsons positivism or Legrand's pessimism (Schlesinger 1961[25]; Bogdan 1994[26]; de Cruz 1995[27]; Nelken 1997[28]; Teubner 1998[29]; Zweigert and Kötz 1998[30]; Mistelis 2000[31]; Van Hoecke 2000[32]; Örücü 2002[33]; Kanda and Milhaupt 2003[34]; Berkowitz et al. 2003[35]; Glen

[19]Freund-Kahn believes that the law is so closely to its environment, and any attempt to transplant a law outside its environment will carry the risk of rejection. Kahn-Freund (1974).

[20]Kahn-Freund (1974), p. 27.

[21]For reading on Watson's legal transplants, see Watson (1993), p. 116. For Nelken's comments see Nelken (2003), pp. 442–449.

[22]Banakas (2002) and Legrand (1997).

[23]For further discussion on the reflection of Legrand's arguments (especially in the context of the differences between common law and civil law legal systems), see Van Hoecke and Warrington (1998), pp. 495–536.

[24]Seidman and Seidman (1994), pp. 44–46.

[25]Schlesinger (1961). Schlesinger noted that the future belongs to integrative comparative law and predispose the EU's *ius commune* as an example of integration of similar and different legal systems.

[26]Bogdan (1994).

[27]De Cruz (1995).

[28]Nelken (1997).

[29]Teubner (1998).

[30]Zweigert and Kötz analysed comparability through the prism of functionality, namely in the context of usefulness and need. Zweigert and Kötz (1998).

[31]Mistelis (2000). Mistelis observed that globalisation required global or at least regional solutions and integrative transnational approaches seemed to be a realistic response.

[32]Van Hoecke (2000).

[33]Örücü (2002).

[34]Kanda and Milhaupt (2003).

[35]Berkowitz et al. (2003).

2004[36]; Reimann and Zimmerman 2008[37]; Smits 2007[38] to name a few). They can be called realists in a sense that they believe that legal transplants are more complex than Watson tried to describe them and that the concept of 'transplant' is largely misleading. For instance, while suggesting the term 'transposition',[39] Örücü argues that each legal institution or rule is introduced in the recipient's system as it was in the system of the model, '[..] the transposition occurring to suit the particular socio-legal culture and needs of the recipient'.[40] Teubner,[41] who introduced the prominent concept of 'legal irritant', argues that the transplant theory needs some conceptual refinement in order to "analyse institutional transfer in terms of different from the simple alternative context versus autonomy" (referring to the debate of sterile alternative of cultural dependency versus legal insulation).[42] Building on Watson's argument, Teubner agrees that transplants have been a major source of legal change, but objects, *inter alia*, to Watson's dismissal of the significance of context in the process of legal borrowing, as 'to understand the dynamics of legal transplants one must analyse external pressures from culture and society carefully'.[43] Along similar lines, Kanda and Milhaupt believe that "fit" between the rule of donor country and the environment of receiving country is the essential key to find a successful legal transplant.[44] Thus, a legal 'transposition' can work provided it fits within the socio-legal culture and the local demand of the receiving country. Furthermore, Teubner while criticising Watson's thinking that 'the transplant appeared to be something that can be controlled and somehow predicted', accentuated that

> when something is transferred from one foreign legal culture to another, something happens, but not what is expected: it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. In other words, what follows the transplantation is certain evolutionary legal dynamics whose consequences it is extremely difficult, if not impossible, to predict.[45]

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[36]Glen (2004).

[37]Reimann and Zimmermann (2008).

[38]Smits (2007).

[39]Each note (as legal institution or rule) is sung (otherwise used or introduced) at the same place in the scale of the new key (of the recipient) as it did in the original key (of the model); the 'transposition' occurring to suit the particular voice-range (socio-legal culture and needs) of the singer (as the recipient country). For further reading, see Örücü (2002).

[40]When elements from two different communities combine, for instance, one drawing its understanding from culture and the other from law, they may mesh bringing 'cultural conversation' into a broader narrative. This is the 'fit', and 'transpositions' and 'tuning' at the time of transplant are vital for this 'fit'. For further discussion, see Örücü (2003), pp. 16–17. In agreement with Örücü, Nelken also questions the notion of 'transplant' for its ambiguity and warns not to lose the sight on 'how different metaphors mobilise and favour different ideas about how law fits society'. Nelken (2004).

[41]Teubner (1998).

[42]Teuber (2000), p. 250.

[43]Teubner (1998), p. 17.

[44]Kanda and Milhaupt (2003), p. 891.

[45]Teubner (1998), p. 12.

Nelken also expresses a word of caution, as one must not lose sight of "how different metaphors mobilize and favour different ideas about how law fits society" and most importantly how the notion of 'transplant' can be ambiguous and inapposite in certain contexts.[46] Therefore, it seems that the key is localisation, as it ultimately depends upon the institutional system in the receiving country to integrate the new law ensuring that it 'fits' within the receiving country's culture and meets its needs.[47]

2.3 Approaches of Comparative Law

There are different aspects in which comparative law is used: be it in the context of specific subject area (i.e. comparative competition law); or in the context of specific jurisdiction (-s), or regions (i.e. comparative law in Central and Eastern European (CEE) countries), a combination of both. There are also different approaches[48] to comparative law discourse. For example, comparative law and legal philosophy (comparative jurisprudence), which claims that only the blend of comparative law and legal philosophy can attain a true understanding of law, attempting to establish comparative law not only as a discipline in itself, but also legal science.[49] Comparative law and legal history has been utilised by legal historians via examining past legal transplants in an effort to both offer an understanding of and an explanation for the development of the law and justifying future legal development exploring law reform through the use of foreign models, especially in the context of Europe (a *ius commune*). In the trend of 'comparative law and economics' economists are aiming to define a blueprint by which systems can choose the most efficient solution from the pool of solutions offered by competing systems.[50] Comparative law and culture aims to provide a better understanding of multi-culturalism and integration and by querying the mismatch between legal and social cultures. There are other approaches, such as comparative law and religion, comparative law and socio-legal studies, comparative law and critical legal studies.[51] There is also a strong opinion that all approaches should be placed under one umbrella of 'Critical Comparative Law', as most of the current concerns of comparatists are "on

[46]Nelken (2003), p. 463.

[47]Berkowitz et al. (2003).

[48]Örücü identifies them as trends. Örücü (2000).

[49]See, for instance, Yntema (1956).

[50]Örücü (2000).

[51]See, Reimann and Zimmermann (2008). The large part of this book is dedicated to various approaches. For example, see Comparative Law and Religion, by Berman HJ Chapter 22; Comparative Law and Legal History, by Gordley J, Chapter 23; Comparative Law and Critical Legal Studies, by Mattei U, Chapter 25 etc.

convergence versus divergence, mismatch in borrowings, problems for the importer and the exporter of legal ideas and institutions".[52]

While there are lessons to be learnt from all different approaches, 'comparative law and culture' and 'comparative law and economics' require further discussion given the nature of this book.

2.3.1 Comparative Law and Culture, and Ethnocentrism

The approach of comparative law and culture stresses the mismatch of recipients and models, particularly in one-way trajectories of mobility law (for example, related colonial experience, but could be applied in a wider context) and ensuing problems of rejection of transplanted norms, especially values and standards.[53] In his critique, Legrand argues that comparative legal scholarship is affected by an excessive positivism, characterised by a narrow focus on authorised legal text, which appear rational and coherent.[54] Comparativists should free herself of the positivist's demand for certainty and instead should embrace the essential unruliness of legal texts and legal culture, recognising law to be "a massively incorporative cultural formation".[55]

Comparatists are usually stuck with the epistemological problem, as it may be difficult to understand a foreign legal system with its legal rules and texts being typically rooted within a specific economic, political, moral, and cultural background. Knowledge of the actual state of theory and its implementation in practice in national legal systems are important, but even more so the understanding of the national legal cultures.[56] First of all, a question arises what is meant by 'legal culture'. According to Ehrlich "the center of gravity of legal development lies not in legislation, nor in jurisdic science, nor in judicial decisions, but in society itself".[57] Legal culture is usually predisposed as a configuration of "values, practices, and concepts [that] are integrated into the operation of legal institutions and the interpretation of legal texts".[58] Secondly, a comparatists lawyer must be 'culturally fluent' in another legal language.[59] Scholars urge to pay attention to the questions

[52]Örücü (2000), p. 10.

[53]For instance, as one of the examples could be the clash of cultures between British law and local law during the colonial period, which had very significant consequences since the export of British law was a one-way process, an imposition, with no element of choice involved. For further discussion, see Örücü (2000).

[54]Legrand (2017). "Positivism" in this context is referred as a set of epistemological convention defining of scientific rationality in the western world, rather than positivism addressed by John Austin.

[55]Legrand (2017), p. 51.

[56]Banakas (2002).

[57]Ehrlich (1939), p. XV.

[58]Bell (1995).

[59]Lasser (2003), p. 154.