The European Law from Grundnorm towards the Cathedral

Constitutional Features of a Complex Legal System*

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Abstract

Many hopes of the adherents of constitutional reform in the EU remained in vain after the enactment of the Lisbon Treaty. Meanwhile the creeping constitutionalisation of the EU law leads to the empowerment of the UE quasi constitutional court – the Court of Justice of the European Union. This kind of constitutionalism is albeit firmly grounded on judicial cross-border cooperation. The main purpose of this paper is to address the question of whether and how the concept of judicial control based on transactional framework developed in law and economics could effectively supplement if not substitute the notion of constitutional democratic legitimacy. In order to demonstrate that it is logically possible and institutionally feasible to build a system based on circularity, self-referentiality and privatization of legal remedies, the paper contains the economic analysis of the recent development of the EU law which at least partially takes this direction.

Keywords: economic analysis of legal remedies, state liability for breach of the EU law, judicial dialogue in the EU, self-referring legal rules, efficiency of the EU law.

Introduction

The aim of this paper is to scrutinize the model of judicial activity within a complex legal system from the perspective of the theory of the so-called *transactional framework*.[1] The concept has been proposed by R. Coase and later developed by G. Calabresi and D. Melamed in their pioneering works. Concurringly, the paper is composed out of the three parts. The first one concerns the concept of a complex legal system which is to be perceived at the background of the analytical theory of a legal system. This part is heavily dependent on the concept of self-referring rules as proposed by H.L.A. Hart and later developed by J. Raz. The second part

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1 R.H. Coase, 'The Problem of Social Cost', *in* R.H. Coase (Ed.), *The Firm, The Market and the Law*, Chicago, The University of Chicago Press 1988, pp. 95-156; G. Calabresi & A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review* (1972) 85, pp. 1089-1128.

concentrates on the theory of the *transactional framework*. Thus the potential results of the study should serve as a benchmark for verification of some theoretical hypothesis offered by the economic analysis of legal remedies. The third part explores the problem of the scope of application of transactional framework in the EU law, especially in the form of liability rules conferring to the party a right to claim damages in case of a breach of the EU law.

Part I

It might seem that there is hardly anything more abstract than the contemplation of the features and composition of the virtual legal systems *qua* legal systems. Such a commitment to the analytical approach could rightly attract a criticism so charmingly expressed by one of the most famous English judges, namely Lord Denning, when he confessed: "Jurisprudence was too abstract a subject for my liking. All about ideologies, legal norms and basic norms, 'ought' and 'is', realism and behaviourism, and goodness knows what else."[2] The difference between the complex (Hartian) and the simple (Kelsenian) legal system seems however to play an important role in the description and explanation of the operations of some real legal systems. This especially pertains to the character and existence of the EU law.

A simple legal system is a normative system based on a stable hierarchy of rules in a Kelsenian sense.[3] As N. Duxbury recently pointed out, the Kelsenian concept of a legal system validated by the basic norm is affected by some contradictions.[4] According to the assumption accepted by H. Kelsen, every legal norm encapsulates the act of will, expressed by some authority empowered by another norm to create the given legal norm.[5] If this is true however, the basic norm cannot be regarded as a valid legal norm, for the basic norm could not be created by any authority in order to preserve its exceptional status of the pre-supposition of any legal system.[6] As a result Kelsen himself has changed his attitude toward the concept of the basic norm when he observed that it is a fiction in a special sense, as a fiction which not only contradicts reality but is additionally self-contradictory, stating, that: "...a basic norm...not only contradicts reality, since no such norm exists as the meaning of an actual act of will, but also contains contradiction within itself, since it represents the authorization of a supreme moral or legal authority, and hence it issues from an authority lying beyond that authority".[7]

2 Lord A. Denning , *The Family Story,* London, Butterworth 1983, p. 38.
3 H.L.A. Hart, 'Kelsen's Doctrine of the Unity of Law', in his *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press 1983, pp. 309-342.
4 N. Duxbury, 'Kelsen's Endgame', *Cambridge Law Journal* (2008), 67, p. 55-60.
5 *Ibid.*, p. 56.
6 R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (trans. B.L. & S.L. Paulson), Oxford 2002, p. 111.
7 H. Kelsen, *Pure Theory of Law*, 2nd ed. (M. King trans.), Berkley 1967, p. 117.

Those contradictions have already been revealed by the careful analysis of the Kelsenian concept of a legal system provided by J. Raz, who contended that the Kelsenian basic norm is obsolete and asked the question about the potential substitute for it.[8] Certainly the first possible alternative to the basic norm could possibly be the concept of the rule of recognition as proposed by Hart. Unfortunately the rule of recognition falls short in confrontation with close scrutiny of its merits. As M. Kramer observed, the rule of recognition presupposes either infinite regress or circularity.[9] It could well be right that it is not possible for the rule of recognition to provide with a justification of the origin of a legal order. However the alleged circularity of it could be explained and justified by Hart alone, when he has analysed the concept of the so-called self-referring rules, finally reaching the conclusion that the phenomenon of the self-referentiality could rightly be deployed as a vehicle apt for the validation of a legal system.[10]

A complex legal system is a system whose rules are validated by two apparently different rules of recognition, which means that the practice of judges and officials in a subsystem X is notoriously different from that of subsystem Y. The relationships between the rules of X and the rules of Y may take two forms. Firstly, X and Y could operate as complimentary. This would happen if rules X complemented rules Y. Secondly, X and Y may be regarded as substitutes and thus competing one with others.[11] Moreover, such a system could also comply with a description of a legal system provided by J. Raz, who analyses the following structure of the self-validating system.[12] The system possesses the following characteristic: A→B→C→D→A, which means that rule A validates rule B and so on. Such a relationship could rightly be characterized as self-referentiality. The hierarchy of rules is illusive or at least provisional (defaeasible). The system is based on the set of self-referring rules, as it has rightly been observed by H.L.A Hart.[13] The question arises about the character of the link between D and A. How is it possible for the hierarchically inferior rule D to validate a supposedly superior rule A? The solution given to the problem may be supported by the observation that the rule D could be a specific and concrete rule, such as encapsulated within a verdict of any court.[14] The set of such rules create a proper ground for the reconstruction of the existing rule of recognition, underpinning the existence of the legal system.[15] If this is so, the rule of recognition is at the same time a sum of practices of the

8 J. Raz,, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed., Oxford, Oxford University Press 1980, pp. 134-138.

9 M. Kramer, 'The Rule of Misrecognition in the Hart of Jurisprudence', *Oxford Journal of Legal Studies* (1998), 8, pp. 406-411.

10 H.L.A. Hart, 'Self-Referring Laws', *in Festskrift Tillägnad Karl Olivecrona*, Stockholm: Kungl. Boktryckeriet, P.A. Norstedt & Söner 1964, pp. 307-16; reprinted in his *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press 1983, pp. 170-178.

11 Y. Zasu, 'Sanctions by Social Norms and the Law: Substitutes or Complements?' *Journal of Legal Studies* (2007) 36, pp. 379-396.

12 J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed., Oxford, Oxford University Press 1980, pp. 139-140.

13 Hart (1964), p. 173.

14 H.L.A. Hart , *The Concept of Law*, Oxford, Oxford University Press 1961, pp. 92-97, 106, 142.

15 *Ibid.*, p. 149-150.

judges and officials and the ultimate source of criteria of validity of the same legal system.[16] In other words, the intrinsic characteristic of the rule of recognition places it between points A and D. As a conventional reason for rule following the rule of recognition reveals itself as the rule A, whereas as a set of single operations of the legal institutions the same rule is consisted of the rules of the type D.[17]

The theory of a complex legal system offers a peculiar description of the structure and functions of contemporary public institutions. The main characteristics of the systemic nature of law include a coexistence of various judicial bodies and institutional structures concentrated on adjudication within a given jurisdiction. Quite often this kind of coexistence of adjudicating institutions leads to the evolution of their adjudicative functions and expansion of their jurisdiction due to a creative interpretation of existing constitutional and statutory laws. Since some courts of last instance gained autonomous position within a legal system as institutions responsible for constitutional review of lawmaking process and judicial control of administration, the problem of interpretation and validity of existing legal rules becomes a crucial element. In other words, the institutional practice of judicial bodies leads to the creation of new legal concepts, principles and rules.

It seems that this kind of proliferation of judicial centres and 'constitutional reviewers' had already been predicted by H. Kelsen, who warned against the process of constitutionalization. According to Kelsen the process of converting constitutional courts from negative to positive lawmakers would lead to the multiplication of conflicting interpretations as to the substance and scope of constitutional rights. Kelsen even suggested that:

> ...different law-applying organs may have different opinions with regard to the constitutionality of a statute, and ... one organ may apply the statute whereas the other organ will refuse the application on the ground of its alleged unconstitutionality. The lack of a uniform decision ... is a great danger to the authority of constitution.[18]

Moreover, the alteration of judicial practice leading to the transformation of courts from negative to positive lawmakers, adjudicating not only on the content of the constitutional but also on the criteria of validity and legality, leads to substantial change in legal system, a change which could only be compared with revolution. Kelsen endorses that:

> The principal that a norm of a legal order is valid until its validity is terminated in a way determined by this legal order or replaced by the validity of

16 J. Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' *Oxford Journal of Legal Studies* (2007), 27, p. 373-381.

17 A. Marmor, *Positive Law and Objective Values*, Oxford, Oxford University Press 2001, pp. 2-33.

18 H. Kelsen, 'Judicial Review in Legislation. A Comparative Study of the Austrian and the American Constitution', *The Journal of Politics*, Vol. 4, No. 2 (May), p. 185.

> another norm of this order, is called the principal of legitimacy. The principal is applicable to a legal order with one important limitation only: It does not apply in case of a revolution... From the point of view of legal science, it is irrelevant whether this change of the legal situation has been brought about by the application of force against the legitimate government, or by members of the government themselves.[19]

Thus it seems that the internal complexity of a given legal system does not only change the character of legal order from a simple one to a complex one. Additionally it also means that political change has occurred and that an institutional practice of judges and officials may lead to evolutionary or even revolutionary change of legal and political order. This change may also refer to an external complexity of a given legal system.

As far as political and legal development in European integration is concerned, the process of integration could be perceived as a state of transition, where dogmatic concepts can no longer be adequate to the changing reality of legal and political institutions. The idea of 'Stateless law' requires the acceptance of the condition that the authorities which are external to national authorities may in a binding way make decisions concerning the application and interpretation of law. Moreover, the civic sovereignty of people within a state has been directed into institutionalized legal proceedings and informal processes. Those instruments enable discursive formation of opinion and will. Therefore, there exists a network of communication forms (anonymously linked discourses) that should be organized, so that the actions of governmental authorities could regulate the economic system within the social and ecological sphere, while respecting its internal logic. The advocates of stateless law underline that the linear relations among rules have been replaced by circular or looped hierarchy of law.[20] A looped hierarchy is defined as an interaction among various levels (which are discerned within the hierarchical order) in which the highest level directs back to the lowest level and influences it while at the same time the highest level is determined itself by the lowest one.[21] The stateless law is thus understood as a set of pluralist concepts of law within which various systems of law co-exist at the same moment.[22] At the same time the concept of state becomes redundant, since the national, traditional state is not able to unify legal rules and to transform them into one,

19 H. Kelsen, *'Introduction to the Problems of Legal Theory': A Translation of the First Edition of The Reine Rechtslehre or Pure Theory of Law* (B. Litschewski Paulson & S.L. Paulson trans.), pp. 208-209.

20 M. van de Kerchove & F. Ost, *Legal System. Between Order and Disorder*, London 1994, *passim*; R. Voigt, 'Globalisierung des Rechts, Entsteht eine "dritte Rechtsordnung"?' *in Globalisierung des Rechts*, R. Voigt (Ed.), Baden-Baden 1999, p. 13.

21 Raz (1980), p. 139-140.

22 N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford 1999, *passim*.

national legal system. Legal systems of Member States lose the attribute of sovereignty and homogeneity, being transformed into normative networks.[23]

These phenomena influence the process of application of law by courts in a particular way. It seems that within this sphere the most serious problems are linked to the obligation of a national judge to apply legal rules of a national, community and international origin, to use standards, rules and principles of supranational and international character. Hence, the judge should be able to identify a required standard, according to which it is necessary to decide a given case. Moreover, he or she should be able to solve a conflict among the conflicting rules or standards, which might be perceived as a form of discretional 'metaregulation'. If the dynamics of the integration process leads to the acceptance of the 'Stateless law' hypothesis, then the traditional concepts such as sovereignty and the national citizenship begin to lose their traditional meanings.

Complexity pertaining to the application of international or regional law within a particular jurisdiction seems to be external from the perspective of that jurisdiction. These kind of interrelations between legal rules enacted by external actors, operating outside a given jurisdiction, could be associated with the operational features of interrelations and mutual impact of national courts of a given country and supranational authorities. This kind of complexity could easily be identified with the European Court for Human Rights and the Court of Justice of the European Union. The mutual impact of the two leading regional European judicial bodies has been regulated by judicial rulings.[24] Since the establishment of the principle of superiority by the ECJ, the EU legal system may be perceived as an autonomous legal system superior over any national legal order. Additionally the need of the autonomy and integrity of the EU law in relation to international law has been recently emphasized in judgments of the European Court of Justice.[25]

The question arises whether the efficacy of the EU law in Member States leads to the creation of a single complex legal system or to the interactions of the national legal systems. This problem has been accurately analysed by J. Raz, who distinguished between two different situations - an integrity of legal orders leading to the creation of a single complex legal system and the exceptional operation of one system within a jurisdiction of the other system, which does not lead to a creation of a single complex system. In discussing the issue of the criteria of membership of a legal system, J. Raz takes the approach according to which a legal system contains such norms which should be applied by norm applying

23 MacCormick (1999), Chapters VII and IX; N. MacCormick, *The New European Constitution. Legal and Philosophical Perspective*, Lecture in Honour of Leon Petrażycki –'Ius et Lex' Foundation, Warsaw 2003, pp. 15-19, N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now', *ELJ* 1995,1, p. 259.

24 *Cf.* Case 13258/87 *M v. GER 'Melchers'*, Case 24833/94 *Matthews v. UK,* Case 60350/00 *Canela Santiago v. ESP*, Case 56672/00 *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Case 45036/98 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*.

25 Joined Cases C-402/05P & C-415/05 *P. Kadi and Al Barakaat v. Council, Judgment of the Court* (Grand Chamber) of 3 September 2008, par. 282.

institutions such as courts.[26] His concentration on law applying rather than on law making institutions results from the fact that the judicial organs ultimately decide on the adopted criteria of validity and the institutionalized practice could be reconstructed in form of the rule of recognition adopted by a given legal system. Additionally Raz distinguishes two different situations or reasons for application of some legal rules within a legal system. Firstly, those rules may belong to a given legal system and create a part of it. Secondly, some legal rules may operate within a legal system and do not necessarily belong to such a system.[27] The latter operation of legal rules is based on permission of a legal system in which those rules operate as effective but external norms. If rules could operate either as a part of a legal system or without becoming a part of a system, just due to the permission to operate as an external norm within a given system, then the question arises about the criteria or conditions for distinguishing between internal and external efficacy of rules. This could be explained in following way: "Ultimately the problem turns on an accumulation of evidence justifying a judgement whether a norm is enforced on the grounds that it is part of the law's function to support other social systems or because it is part of the law itself."[28]

Certainly the evidence justifying external or internal operation of a given legal rule should be referred to the practice of adjudicating bodies and the justifications provided by them. In other words whether the EU creates one complex legal system or a set of independent legal systems depends on the practice of the EU courts, the courts in Member States and on the justification of these practices. What if however the practices of different courts in different Member States are not coherent?

It seems that such is the reality of the EU law. On the one hand the European Court of Justice recognized the independent, autonomous and superior character of the EU law in relation to national legal systems of Member States.[29] On the other, the highest judicial authorities of some of these national legal orders deny the superiority of the EU law. Such is the position of the Polish Constitutional Tribunal, according to which the relation between the EU law and the Polish legal system are based on the assumption about the "…coexistence of different legal rules produced by different law-making bodies and applied by various courts' structures". However such a coexistence "…in no event may [it] lead to results contradicting the explicit wording of constitutional norms".[30]

In striking opposition to this view the Spanish Constitutional Tribunal held that the principle of superiority of the EU law includes even constitutional law, since "primacy and supremacy … operate in different areas of law".[31] Moreover,

26 Raz , p. 102.
27 J. Raz, *The Authority of Law,* Oxford 1979, pp. 87-88, Raz (1980), pp. 189-197.
28 Raz (1979), p. 102.
29 Cf. the ECJ Judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 6/64 *Costa v. ENEL* [1964] ECR 585, Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, Joined Cases C-6/90 & C-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.
30 *Polish CT* K18/04, (2005).
31 *Spanish CT* [2005] 1 *CMLR* 981.

the Spanish Constitutional Tribunal held that Article 93 of the Spanish Constitution enabled the transfer of constitutional powers to external institutions. The divergence between two rulings on the superiority of the EU law in Poland and in Spain means that the operation of the EU law in these systems as reflected in judgments of relevant judicial bodies seems to be of different character. The divergence in application of the principle of superiority in different Member States leads to the conclusion that the system as a whole could rightly be perceived as a complex one.

Certainly such a legal system could remain a simple one since the practice of the Court of Justice of the European Union (CJEU) would constitute single and sufficiently coherent Rule of Recognition. This however is not the case at least at the present stage of the European integration. The question remains how the complex legal system of this kind would be changed in the long run if there were many courts formally independent from the CJEU and at the same time belonging to different judicial structures. Certainly without any instruments it could be impossible for the CJEU to coordinate the operation of the system and consequently some heterodoxical practices of the other courts would possibly create other rules of recognition. Therefore, it is crucial to emphasize that the efficacy of the CJEU's coordinating instruments would directly influence the homogeneity of a given complex system, where the CJEU has to coordinate not only its own operations but also the operations of other legal institutions thus mediating between the Rule of Recognition ultimately characterizing the EU law (and the other components of the EU law) and the rules of recognition shaping the ultimate criteria of validity of the Member States.

The relationship between the concept of the simple legal system founded on the single hierarchy of courts and complex legal system composed on different horizontal levels of judicial institutions and imbued with the operation of different, randomly overlapping rules of recognition has been exposed by the CJEU's decision in *Köbler v. Republic of Austria* (Case C-224/01, [2003] E.C.R. I-10239). The CJEU has endorsed that a Member State may be liable in damages for a national court's serious misapplication of the EU law. The approach presented in *Köbler* has been repeated and reinforced in case C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] where the CJEU stated that any limitation of state liability on the part of the court has been found as contrary to Community law if such limitations were to lead to exclusion of liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed.[32] The strategy adopted by the CJEU in the *Köbler* and *Traghetti* cases in a form

32 The CJEU held that: "Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in (...) the judgment in Case C-224/01 *Köbler* [2003] EUR I-10239."

adopted by the CJEU induced serious debate in literature.[33] Many commentators emphasize the threat of uncertainty and instability of legal position. Some of them express many doubts concerning potential distortions resulting from those rulings and the application of doctrine of state liability to judicial errors. It is commonly agreed that the EU legal system after *Köbler* might be characterized as being transformed from hierarchical structure into three levels or layers of judiciary composed out of: constitutional courts - first level, highest courts (courts of last instance, ending the procedure, so the structure is fluid, because they vary from case to case) – second level, lower courts – third level.[34] The fact that the national legal procedure enables parties to ask a first instance court to sit in judgment on a verdict of the court of last instance could weaken and in the long run even thoroughly destroy the traditional linear hierarchy of courts.

Accordingly if traditional, hierarchical structure of national courts within Member States is being weakened by the judicature of the CJEU the question arises about the meaning of such a process and its impact upon the relevant rule of recognition reflecting the actual behaviour of judges in national courts. Imposition of state liability for judicial acts would be likely to lead to the CJEU being called upon to decide whether a national Supreme Court had acted manifestly wrongly. The lower level national courts may be unwilling to find that superior national courts have acted manifestly wrongly. They might therefore look to the CJEU to make the final judgment. This may lead to the conclusion that the idea of the objectivity of law in Community law cases, whilst not only intellectually attractive, but undoubtedly derived from the concept of the Rule of Law, raises serious practical doubts.

Part II

Within a hierarchical judicial system the coherence of adjudication is preserved by virtue of appeals and by the same token by the control of cases exerted by higher

33 A. Albors-Llorens, 'The Principle of State Liability in EU Law and the Supreme Courts of the Member States', *The Cambridge Law Journal* (2007) 66, pp. 270-273; G. Bertolino, 'The Traghetti Case: a New CJEU Decision on State Liability for Judicial Acts- National Legislation under Examination', *Civil Justice Quarterly* (2008) 27, pp. 448-453; M. Breuer, 'State Liability for Judicial Wrongs and Community Law: the Case of *Gerhard Köbler v. Austria*', *European Law Review* (2004) 29, pp. 243-254; M. Ruffert, 'Case C-173/03 *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*, Judgment of The Court (Great Chamber) of 13 June 2006', *Common Market Law Review* (2007) 44, pp. 479-500.

34 M. Breuer, 'State Liability for Judicial Wrongs and Community Law: the Case of *Gerhard Köbler v. Austria*', *European Law Review* (2004) 29, pp. 252-254; D. Chalmers, C. Hadjiemmanuil, G. Monti & A. Tomkins, *European Union Law*, Cambridge, Cambridge University Press 2006, pp. 498-502; M. Golecki & B. Wojciechowski, 'The Application of Law within a Multicentric Legal System. Economic Analysis of Köbler and Traghetti', *in* M. Zirk-Sadowski, M.J. Golecki & B. Wojciechowski (Eds.), *Multicentrism as an Emerging Paradigm in Legal Theory. DIA-LOGOS. Schriften zu Philosophie und Sozialwissenschaften - Studies in Philosophy and Social Sciences*, Vol. XI, p. 171-174, Peter Lang Publishing Group, Frankfurt am Main 2009; M. Golecki& B. Wojciechowski, 'Cyberspace as a Precondition of Application of Law within a Multicentric Legal Area', *Masaryk University Journal of Law and Technology* (2007) 1, p. 9-17.

courts such as the court of appeal or the Supreme Court. Since each judge tends to avoid overruling, the judicial system usually sustains the cohesion and diminishes the number of judicial errors. Nevertheless, the question arises what would happen if the Supreme Court within some jurisdiction had no virtual possibility to review cases from lower instances alternatively what would happen if instead of one court on the top of the centralized hierarchical structure there would be many different courts and each of them would have the power to review the cases and all of them would be allowed to rely on the preliminary reference set out by the specialized court responsible for the efficacy and coherency of the whole adjudicative practice. Such a situation takes place in the EU law.

The relationship between the CJEU and national courts, especially in regard to the courts of last instance cannot be described as a hierarchical structure. The CJEU does not revise or control verdicts of national courts. Concurringly, the European courts do not have power to overrule judgments given by national courts. This situation is somehow puzzling for many commentators for it requires a completely new approach to standardization and unification of judicial activity. In case of a conflict between the approach adopted by the CJEU and a ruling given by a national court of last instance two strategies are *prima facie* possible.

The first strategy may be called a *public strategy* and it finds its normative ground in Article 258 of the Treaty on the Functioning of the European Union (TFEU).[35] According to this provision, the Commission has the power to initiate the procedure leading to the application of sanctions against the Member State violating the EU law. The application of relevant sanctions has been regulated according to Article 260 of the Treaty on the Functioning of the European Union (TFEU) [ex Art. 228 of the European Communities Treaty].[36]

35 Art. 258 TFEU (ex Art. 226 of the EC Treaty): "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

36 Art. 260 TFEU (ex Art. 228 of the EC Treaty): "1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 259. 3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment."

It was only in 2005 that the European Commission issued its *Communication of 13 December*, providing with the precise rules on the application of the sanctions mentioned in Article 228. The Communication has been set out in order to "enhance legal certainty and the effective application of Community law".[37] According to the Communication the Commission could simultaneously deploy two kinds of sanctions, namely "the penalty by day of delay after the delivery of the judgment under Article 228" and "a lump sum (of money) penalizing the continuation of the infringement between the judgment on non-compliance and the judgment delivered under Article 228". Both types of sanction operate in a way very similar to the criminal or administrative penalty. Additionally the Commission has provided with a new methodology of calculating periodic penalty payments and lump sum fines. The daily penalties are to be calculated according the following formula:

$$D_p=(Bfrap \times Cs \times Cd) \times n,$$

where: *Dp* denotes daily penalty payment, *Bfrap* denotes basic flat-rate amount 'penalty payment' which equals € 600, *Cs* denotes coefficient for seriousness ranging from 1 to 20, *Cd* denotes coefficient for duration ranging from 1 to 3 and *n* denotes the capacity to pay of the relevant Member State factor, based on the amount of GDP, the number of voting rights in the Council.

Those sanctions are to be regarded as a kind of punishment in form of the fine sentenced by the CJEU. Nevertheless it is not clear to what extend the procedure based on Arts. 258 and 260 could be applied in case of infringement of the EU law by the highest court within the Member State. Only recently has the CJEU admitted that the well-established judicial practice being contradictory with the EU law could be treated as breach of the EU law by the given Member State.[38] The case *Commission v. Italy* [2003] concerned the problem of the notorious practice of the Italian *Corte di Cassazione* which had been alleged to be contradictory with the EU law. The Italian court in many decisions had relied on its interpretation of the EU law in cases of custom duties. Some commentators observed that the ruling of the CJEU had been based on vague assumptions according to which the main reason for breach of the EU law stems rather from the bad quality of statutory law having been enacted by the Italian parliament than from direct actions of the Italian court.[39] The CJEU was not apt to admit openly that the interpretative practice of the Italian Supreme Court led directly to infringement of individual's rights protected by the European law. The application of the procedure based on Article 258 TFEU [ex. Art. 226 of the European Communities Treaty] seems to have been recently reaffirmed in the case *Commission v. Spain* [2009].[40] In this ruling the CJEU expressed the view according to which an error in law made by a

37 *Commission Communication of 14.12.2005 on Financial Penalties for Member States who fail to comply with Judgments of the European Court of Justice,* MEMO/05/482, p. 4.

38 Case C-129/00 *Commission v. Italy* [2003] EUR I-14637.

39 Chalmers, Hadjiemmanuil, Monti & Tomkins (2006), pp. 359-360.

40 Case C-154/08 *Commission v. Spain* [2009] 2010/C 11/03.

national Supreme Court can constitute the infringement of European law. Consequently, the Commission can institute proceedings against such a Member State. In this case, the CJEU explicitly stated that Spain was in breach of the EU law because of the ruling of its Supreme Court. Thus, the judgment clarifies the doctrine established by the ECJ in *Commission v. Italy* [2003] and makes it absolutely clear that a judgment of a Supreme Court can constitute a breach of the EU law, whereas some decisions of lower courts may not necessarily be sufficient. Some limits of the *public strategy* thus understood are albeit quite obvious. The first concerns the involvement of the Commission. It seems that the monitoring of the application of the EU law by national courts is generally limited to the most notorious and significant cases. The *public strategy* seems to be implemented as an indicator of the way in which the EU law should be generally applied. The fact that the Commission is necessarily engaged in the procedure has an additional drawback, since the Commissions' ability to monitor the application of the EU law in the Member States seems to be quite limited for practical and institutional reasons. Additionally in case of the most sensitive decisions the Commission is acting as a political actor rather than as a guardian of the principles of the EU law. For all these reasons the *public strategy* should be accompanied by some other institutional and procedural devices operating on the basis of the Treaty law as well as on the level of the legal principles of the EU law. The obvious candidate for such an appliance could be the so-called judicial cooperation and judicial dialogue between the CJEU and the national courts of the Member States. This could be developed on the basis of the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) [ex Art. 234 of the European Communities Treaty].[41]

The other strategy which may be called a *privatization strategy* is based on the assumption that under Article 267 the TFEU imposes a duty on the court of last instance to make references to the CJEU. This means that "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" shall bring also questions of mere interpretation of European law before the CJEU. Thus, there are precise obligations for supreme national courts flowing from primary European law as interpreted by the CJEU. This approach is additionally supported by the recognition of the principle of state liability and might be derived from Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italy*, where the CJEU held that a Member State was liable to make good the loss and

41 Art. 267 (ex Art. 234 TEC). The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

damage caused to individuals as a result of breaches of Community law for which it was responsible.[42] The rulings of the CJEU in the *Köbler* and *Traghetti* cases have created the normative framework for the application of the improved *strategy of privatization*, as neatly described by Alexander Somek, who states that:

> ...there is also a private law response to bad law. It leaves the validity of the act unaffected and instead imposes a liability on the body responsible for its creation. From the perspective of the private law track, the creation of bad law is a tort or, cast in the language of law and economics, its enforcement comes at a certain cost to public authority. It may be sustained, but only at a certain price. The final decision can still be wrong on its merits. The losing party may be harmed by it and deserving of compensation. I should like to refer to the pursuit of this second track as the strategy of privatization.[43]

The *privatization strategy* thus relies upon the fact that private individuals may bring suits against their states in case of infringement of the EU law because, according to the assumptions commonly accepted by the adherents of the law and economics movement, adjudication should be treated in an analogous way to production activity.[44] The single effect of this activity is encapsulated within the national court's decision. The suit should be brought in front of the national court which in the majority of cases has the obligation to make a preliminary reference. Thus, the activity of national courts throughout the European Union should be standardized, leading to a greater homogeneity of judicial rulings concerning the application of the EU law in different Member States.[45] But the strategy of privatization does much more than that. As A. Somek once again observes:

> ...the *strategy of privatization* has a different thrust. Its application does not presuppose any inquiry into the concept of law. On the contrary, a legal decision is subjected to the application of another legal norm, that is, some private law rule of liability. No recourse to legal theory is needed here; all that are needed are merely the ordinary principles of tort law: existence of harm, causality, and where applicable, some standard of fault. The contrast to the public strategy is indeed a stark one.[46]

Thus, A. Somek seems to express the view according to which the application of the *privatization strategy* somehow converts the logic of the application of the EU law. The private instruments in form of liability rules will compete with the public instruments such as the sanctions imposed by the CJEU according to Article 238 of the EU Treaty. At least it seems to be suggested by Somek, that the *privatiza-*

42 Golecki & Wojciechowski (2009), p. 171-174; Golecki & Wojciechowski (2007), p. 9-17.
43 A. Somek, 'Inexplicable Law. Legality's Adventure in Europe', *Transnational Law & Contemporary Problems* (2006) Vol. 15: XXX, p. 108.
44 W.M. Landes & R.A. Posner, 'Adjudication as a Private Good', *Journal of Legal Studies* (1979) 8, pp. 235-284.
45 Golecki & Wojciechowski (2009), p. 180-194; Golecki & Wojciechowski (2007), pp. 9-17.
46 Somek (2006), p. 110.

tion strategy will inevitably lead to some deplorable results, namely it will blur the concept of law and will melt the remnants of traditional approach to the activity of the EU legal institutions. It seems, however, that the above subtle analysis is at least based on a serious misunderstanding. In fact the application of the *privatization strategy* will not lead to the deterioration of the Rule of Law in the EU law.

The application of this strategy should rather be treated as an evidence of the demise of the Kelsenian view of simple legal system, which could be derived from the single *Grundnorm*, so vehemently defended by Somek. Certainly the application of the *privatization strategy* calls for new descriptive tools and new methodology of legal theory. It is quite obvious that the operation of the complex legal system such as the EU law as applied by courts in Member States can no longer be explained by purely normative analysis of the relationship between different rules within a legal system. Moreover, the need for a new method concerns not only the *privatization strategy* but the *public strategy* as well. This is quite sure as one would take the functional approach of the European Commission into account.

The approach which has been presented within *the Communication on Financial Penalties from 14 of December 2005*, where the Commission has presented the methodology thoroughly aligned with the economics of deterrence. Thus the methodological challenge consists not so much in the drawing demarcation line between the privatization and the public strategy, but rather in addressing the question of how to capture and compare both underlying strategies altogether. It seems that the economic analysis of remedies could become a potential candidate for such an endeavour. The application of the economic analysis of remedies in order to examine state liability for wrong decisions of domestic courts applying Community law is possible as a result of the acceptance of an additional assumption.[47] According to R. Coase commodities should be defined as bunches of rights transferred between parties.[48] These transfers may be either voluntary or involuntary. Voluntary transfers are carried out in the relevant market and under the condition that rights to commodities are well defined and adequately protected. This could be achieved by the application of the property rules which effectively deter the potential trespasser and thus fully protect the entitlements. The scope of the market exchange is however limited by the fact that in many cases transaction costs are prohibitively high. In those cases the exchange could be channelled through the court system, where involuntary exchanges of rights for a given sum of money take the form of compensations awarded by courts. Involuntary transfers play an important role in case of takings and expropriations by Member States as well as in a wider area of tort liability. This model has been extended by Calabresi and Melamed who proposed the concept of *transactional framework*.[49] This idea dates back to the seminal article of G. Calabresi and A.D. Melamed on *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* where

47 Golecki & Wojciechowski (2009), p. 178-181.

48 R.H. Coase, 'The Problem of Social Cost', *in* R.H. Coase (Ed.), *The Firm, The Market and the Law*, Chicago, The University of Chicago Press 1988, (pp. 95-156).

49 Calabresi & Melamed (1972), pp. 1089-1128.

the authors distinguished three different types of legal rules.[50] Property rules are protection oriented, for they exclude everybody except the holder from interfering with entitlement. Liability rules are compensation oriented, rewarding the owner with the value of an entitlement, determined by the state. Inalienability rules are intended to deter both potential parties from the transfer of entitlement, regardless of the consent of the holder of entitlement. There is no cost to be determined between parties or damage to be assessed. These three types of rules have evolved creating a characteristic framework for legal institutions across different branches of any legal system.[51] The detailed shape of this framework is however determined by specific national traditions or the peculiarities of civil law and common law systems. It is important that the distinction between different types of legal rules as originally proposed by Calabresi and Melamed rests upon the assumption that property and liability rules are protected by different sanctions.[52] On the one hand property rules are deterrence oriented. The application of such a rule has to make the infringement of the right protected by a given property rule unprofitable. In a simple formula, costs faced by the potential defendant for the infringement of the protected entitlement should be set at $D>vD$ so that the defendant has no incentive to infringe a given right as the sum he has to pay always exceeds his own valuation of the entitlement. On the other hand liability rules operate by rewarding the owner with some externally determined compensation that is usually set by a court, a legislator, or an administrative agency. In case of the infringement of the EU law the amount of compensation is to be determined by the national court according to the national rules. Under a liability rule, the goal is to compensate the entitlement's holder while allowing a non-consensual taking. The defendant would appropriate the entitlement if its own valuation was higher than the compensation determined by the court, it is if $vD>D$, where vD denotes the defendants valuation of an entitlement and D denotes amount of damages awarded by the court. Concurringly the goal of liability remedies is quite complex: they compensate the entitled party through the officially determined payment of compensation usually in form of damages and additionally they somehow allow a non-consensual access to the entitlement for the potential defendants who have a valuation of it relatively higher, at least, than the amount of damages. In the context of the EU law if the Member State decides to infringe the individuals' entitlement protected by the EU law, then it has to pay damages. Accordingly damages should equalize individual's (i.e. plaintiffs) valuation according to the equation: $D=Pv$. where D denotes amount of damages awarded by the court and Pv denotes the defendants valuation of the entitlement.

Given the universal application of the remedies it is striking that among sanctions listed by Calabresi and Melamed the sanction of invalidity or voidness has not been taken into account. It seems that that kind of sanction is all but a provisional one leading to the application of one of virtually two sanctions: compensa-

50 *Ibid.*, pp. 1106-1115.
51 *Ibid.*, pp. 1108-1109.
52 *Ibid.*, pp. 1123-1125.

Table 1 *Property rules Liability rules (based on Calabresi & Melamed 1972, p. 1111-1115)*

Initial Entitlement	Property Rule	Liability Rule
Individual A	Rule 1	Rule 2
Member State B	Rule 3	Rule 4 (?)

tion or punishment.[53] The alleged deficiency of the Calabresian scheme of remedies does not however play any important role as far as the application of the scheme to the EU law is concerned. Since it is impossible for the CJEU or The Court of First Instance to reverse the verdict of the national court, the choice of the remedy concerns the punishment or the compensation exclusively, which means that depending on the strategy deployed in a given case, the wrongful misapplication of the EU law could be sanctioned by property or liability rule.

The first is the case if the procedure of Arts. 258 and 260 TFEU is being implemented by the EU Commission or the Member State. The second holds in case of the individual's claim against the state, according to the rule set out in *Francovich* and developed in *Köbler*. It could accordingly be stated that the *public strategy* based on Article 250 TFEU implements the property rule, whereas the *privatization strategy* expressly adopted in *Köbler*, deploys the *liability rule*.

Nevertheless, the possibility of application of liability rules in the EU law goes far beyond that if the recent development of the theory of *transactional framework* is to be taken into account.[54] According to the theory of optional law the number of liability rules could be increased. The theory suggests that the liability rule rewarding damages to the potential injured party might be interpreted through the lenses of option theory as a rule granting the injurer the right to acquire an entitlement for a given price equal to the damage assessed by the court. Such a state of affairs resembles a situation in which the injurer (defendant) owns a *call option* over the entitlement. Such an option can be exercised at the price set equal to damage. Concurringly two different liability rules are to be discernible. The rule according to which the holder keeps the entitlement subject to the condition, that the defendant would not exercise the option to acquire the entitlement, and the opposite rule giving the entitlement to the defendant subject to the fact that the plaintiff would not exercise the *call option*. Additionally, property rules may also be incorporated into this optional scheme. One may say that the difference between liability and property rules is a quantitative instead of qualitative one. In case of property rules the price of the option is so high that the option is very unlikely to be exercised and this could be regarded as an equivalent of the sanction whose main purpose is deterrence. Under this perspective, property rules could be regarded as a special kind of liability rules with an exuberant price for

53 R. Cooter, 'Prices and Sanctions', (1984) 84 *Columbia Law Rev*., pp. 1537-1550.

54 I. Ayres, *Optional Law: The Structure of Legal Entitlements*, Chicago, Chicago University Press 2005, pp. 16-21.

the option. Additionally the optional theory of remedies has enabled scholars to multiply the framework of remedies. Assuming that liability rule may be stylized as a *call option* (granted to plaintiff or defendant, hence, there are two rules), it is possible to propose an option to sell, namely the *put-option*. The *put option* rule would grant an entitlement to one party and at the same time, it would confer the conditional right to sell the entitlement to the other party, the other party being under obligation to acquire the entitlement at will of the option holder. The extended matrix of the optional law remedies can be illustrated by Table 2:

Table 2 ***Possible combinations of different optional rules (based on I. Ayres 2005, p. 17)***

Type of rule	Individuals' options	Member State's options
Rule 1	Asset	0
Rule 2	Asset-Call	Call
Rule 3	0	Asset
Rule 4	Call	Asset-Call
Rule 5	-Put	Asset+Put
Rule 6	Asset+Put	-Put

Thus one can consider the possibility of styling the liability rule set out against the background of the optional theory of law. Referring to the other table (Table 1) one should remark that the set of remedies could be much extended as illustrated on Table 2. The liability rules of Type 1 (pro plaintiff) and 2 (pro defendant) could now be divided into four types; call pro defendant, put pro defendant, call pro plaintiff and put pro plaintiff.

The main normative hypothesis presented by the theory of optional law concerns the choice between property and liability rules. There is no unanimity as far as such a choice between two types of rules is concerned. Additionally, there is no *opinio communis* about the set of factors that should determine the choice of the appropriate type of rule. For G. Calabresi and D. Melamed it seemed to be obvious that property rules were superior in low transaction cost settings while liability rules were more efficient in high transaction cost settings. This initial position has given way to many contradictory theories and hypotheses. L. Kaplow and S. Shavell, for example, focus on the costs of administering litigation and conclude that liability rules are superior in many circumstances.[55] L. Bebchuk focuses on the incentive to invest *ex-ante* in front of property or liability rules.[56] He comes to the conclusion that property rules give a stronger *ex ante* incentive to invest and are more efficient in this respect. I. Ayres presents the opposite solution. He claims that liability rules mitigate the risk of strategic behaviour and

55 L. Kaplow & S. Shavell, 'Property Rules Versus Liability Rules', *Harvard Law Review* (1996) 109, p. 713.

56 L.A. Bebchuk, 'Property Rights and Liability Rules: The Ex Ante View of the Cathedral', *Michigan Law Review* (2001), 100, p. 601.

information asymmetry due to their 'harnessing effect'.[57] H. Smith occupies a contrary position when he supports the relative efficiency of property rules based on their intelligibility and respect for parties' 'idiosyncratic valuations'.[58]

Part III

In summarizing one may state that whereas property rules promote voluntary exchanges, liability rules enable involuntary transfers in cases of high transaction costs. Those involuntary transfers play an important role in cases of appropriations and expropriations by Member States as well as in a wider area of tort liability. Empirical surveys show that the average compensation in the EU varies greatly from state to state. If liability rules are superior and *privatization strategy* expressed in deployment of the liability rules is going to supersede the *public strategy* based on protection of property rules a couple of questions arise.

Firstly what would be the actual reason for the superiority of the liability rules and what would be the potential result of that? According to the theory of optional law in a form proposed by I. Ayres, the main argument for liability rules and against property rules relies heavily on the concept of harnessing effect and the alleged information asymmetry. The liability regime is virtually more effective because it forces the potential plaintiff to reveal private information about the valuation of the entitlement. The courts may also more accurately divide the costs of application of the EU law, relying on the doctrine of the manifest infringement. Thus the court in place may still have a choice between the application of the pro liability or pro plaintiff remedies, which would be very difficult in case of property rules and *public strategy*.

The choice between property and liability rules reveals also some deeper relevant considerations. It is quite obvious that the application of the property rule enhances the protection of the entitlement. The application of the liability rules provides with much a weaker remedy although of a much more flexible and discretional character. If this the line of reasoning is a proper one then it seems that the protection of individual's rights bestowed by the EU law is not regarded as a fundamental aim of the CJEU. The much more convincing explanation is that the CJEU tends to strengthen the efficacy of the EU law, applying the concept of the protection of the rights of the individuals as a kind of pretext. If this allegation is correct the future of the EU court system will heavily depend on the level of administrative costs and a coherency of judicial practice in different national courts. Some recent developments of the application of the EU law by national courts are symptomatic in this respect. Quite recently the English Court of Appeal applied the *Köbler* doctrine in a way strikingly different from what could be expected from a well-informed national court. In *Cooper v. Attorney General* the court decided that although in general domestic law could not excuse a breach of Community law, however in a given case the standard of *Köbler* has not been met,

57 Ayres (2005), pp. 152-165.

58 H.E. Smith, 'Exclusion Versus Governance: Two Strategies for Delineating Property Rights', *Journal of Legal Studies* (2002), 31, p. 453.

since the plaintiff has been unsuccessful in demonstrating that the court acted in breach of the EU law in such a way the breach was manifest or sufficiently serious.[59] In deciding on the issue the court referred to the necessity of taking all relevant considerations into account including whether the national court was deliberately intended to cause a breach of Community law and whether the court's decision was in accordance with other decisions in its domestic law. Certainly the additional conditions narrowing the *Köbler* doctrine to its application to the cases in which the national court would have intentionally violated or misapplied the EU law, constitutes in itself a manifest infringement of the EU law, since it is thoroughly obvious from the ECJ's ruling in *Köbler,* that a state liability in case of judicial error cannot be limited to cases of intentional misapplication of the EC law. Actually it seems that the state liability in *Köbler* must at least to some extent correspond with a general principle of state liability in the EU law as established in *Francovich and Bonifaci v. Italy*. This kind of liability could be either strict or based on negligence. Certainly it could be inadmissible to narrow the state liability in the EC law to cases of intentional torts, even if it could be acceptable in reference to English law. Moreover, the reference to the well-established practice of domestic courts seems to be based on misunderstanding of the EC law.[60] Actually the practice of national courts in this respect has not much to do with the evaluation of the application of the EU law. The case law of the CJEU could be regarded as a point of reference and certainly in case of any doubt the national court could initiate the preliminary reference procedure.

The practice of domestic courts such as this reflected in *Cooper v. Attorney General* proves the need of the existence of the *public strategy* based on the activity of the Commission rather than on the practice of the domestic courts. It seems that the application of liability rules could enhance the coherence of the application of the EU law, since the national courts would adjudicate under the shadow of the appropriate property rule. Nevertheless this result is not obvious and it would be attained only in a case of coherent application of the liability rule as proposed in *Köbler* in different Member States. Even in the case of the preliminary reference procedure being applied in a given trial the CJEU has no power to decide on the amount of compensation. This means that the harmonization of compensation awarded in the case of judicial error in EU law cannot be attained directly by legal instruments. The harmonization of damages awarded by the courts could however be successful, provided that there is an instrument of the unification of judicial practices in the case of application of EU law. This concerns the level of administrative (or litigation) costs incurred by the court. As Ayres points out, "… the costs of determining liability rule damages and securing payment are far from trivial".[61] Hence, the harmonization of the EU law should minimize the cost of private information about the value of a given entitlement. The

59 *Cooper v. Attorney General* [2010] WLR (D) 122.

60 Actually the practice of domestic courts could also constitute a breach of the EU law, as it has been held in case C-129/00 *Commission v. Italy* [2003] and Case C-154/08 *Commission v. Spain* [2009].

61 Ayres (2005), p. 197.

problem of the evaluation of entitlement means that the society has to cover the cost of evaluation, being the equivalent of transaction cost in the case of the voluntary transfer of entitlement through the market. Kaplow and Shavell observe: "the virtue of the liability rules is that they allow the state to harness information that the injurer naturally possesses".[62]

The problem however arises if the injurer turns out to be the state itself and especially the other court within the same legal system of the Member State. This means that the court which tends to minimize the administrative costs will not spend resources on a thorough investigation concerning the evaluation of entitlement. In the case of rights protected by EU law, such as the right to a retirement bonus in *Köbler* or the right not to be discriminated with respect to state aid for some entrepreneurs as in *Traghetti*, the breach of EU law by Member State, be it administration, administrative or any other court depriving the individual of his or her right, could be interpreted through the lens of *transactional framework* theory, as an attempt at an involuntary taking. In other words the infringement of EU law could be interpreted as if the Member State attempted to carry out an involuntary taking of a given right. The compensation awarded due to the fact, that the illegal action of the Member State constituted an infringement of a right resulting with a loss, might therefore be interpreted as the price of such an entitlement. Hence the question arises how should the court asses this value? Intuitively, the same right established and protected by the EU law throughout all Europe should have at least similar, if not equal value, in all Member States.[63] It is however not the case, since different national courts estimate the amount of damages according to national rules and use different indexes as potential points of reference. This practice stands in sharp opposition to both the EU law and the assumptions of the *transactional framework* as proposed by law and economics scholars.

Conclusion

At this stage a haphazard conclusion could be reached according to which virtually all legal systems are complex. It is not my intention to contemplate that claim which would inevitably lead to the question about the nature of law. I must admit however that I can see nothing *prima facie* misleading in the allegation that all legal systems are complex in a sense that their legitimacy is based on circularity. I simply follow Joseph Raz and his suggestion that circularity might be the better option if we compare it to the mysterious Kelsenian foundationalism founded on the ultimate source of a legal system operating from the outside of that system. Does such complexity lead to chaos? The answer is negative if a different concept of a legal system were adopted. This would include the assumption according to which courts act as a kind of interstitial legislator, providing with the necessary justification for a legitimacy of a legal system and closing the connection between

62 Kaplow & Shavell (1996), p. 713.

63 W. van Gerven, 'Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies', *Common Market Law Review* (1995) 32, p. 679.

all relevant rules of a given system (the A-D connection). In order to prove that this conclusion is sound one could address three fundamental and practical questions, especially taking the complexity of the EU law into account. Why do lawyers engage in a close and careful scrutiny the jurisprudence of relevant courts both in common and civil law countries? Why do we await, with hope or anxiety, the verdicts of CJEU in Europe? Finally, why does the Commission carefully and sensitively monitor the jurisprudence of the National Courts, especially Supreme Courts within the Member States? The importance of the courts' activity seems to be unquestionable. Nonetheless the soundness of the so-called 'judicial dialogue and cooperation' should be subdued to the judicial control exerted by the potential victims of the judicial fantasy. These are serious reasons for which the establishment of the principle of liability of the Member States for breach of the Community law does not lead to chaos. Moreover, the doctrine of state liability operates in the opposite direction as it provides with a necessary remedy, transforming the 'lack of democratic control' and the alleged deficit of democracy in the EU into a form of the 'judiciocracy', an institutional practice characterized as the control of the courts exerted by the courts on behalf of the citizenry, whose rights have been infringed by misapplication of the EU law.