

THE EUROPEAN MONETARY UNION WITHIN
THE COASEAN TRANSACTIONAL FRAMEWORK
SOME REMARKS ON LEGAL REMEDIES AS AN
INSTRUMENT OF HARMONIZATION OF THE
EUROPEAN COMMUNITY LAW

by

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The paper concentrates on the possibility of indirect harmonization of compensation awarded for the infringement of the rights protected by the EC law. Within the literature the problem of the influence of the European monetary integration upon the legal harmonization has not been analyzed so far. In the present paper the theory of transactional framework (Calabresi & Melamed 1972, Ayres 2005) has been applied in order to analyze the potential economic consequences of the operation of the multilevel judicial governance structure which has been created in the European Union. The functional framework of the multilevel European judicial governance (Maduro, 2003; Petersmann, 2008) is thus to be analyzed from the perspective of the economic consequences of the European monetary integration (Rogoff, 1996; Rose, 2000).

KEYWORDS

Judicial governance, transactional framework, law and economics, standardization of liability rules, harmonization of the EC law

1. THE PROBLEM

It is commonly agreed that monetary union membership should lead to harmonization of prices in the member states.¹ Additionally, it also may increase a number of transactions and volume of trade. The question arises

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¹ Rogoff, K. (1996). The Purchasing Power Parity Puzzle, *Journal of Economic Literature*, 34, p. 647-668, Rose, A. (2000). One Money, One Market: Estimating the Effect of Common Currencies on Trade, *Economic Policy*, 30, p. 7-33.

whether monetary union may also lead to harmonization of compensations awarded by courts in the member states. According to R. Coase commodities should be defined as bunches of rights transferred between parties.² These transfers may be either voluntary or involuntary. Involuntary exchanges of rights for a given sum of money take the form of compensations awarded by courts within a framework of judicial governance. This model has been extended by G. Calabresi and D. Melamed who proposed the concept of transactional framework.³ The authors distinguished three different types of legal rules: protection oriented property rules, compensation oriented liability rules, and inalienability rules intended to deter both potential parties from transfer of the entitlement. Whereas property rules promote voluntary exchanges, liability rules enable involuntary transfers in case of high transaction costs. Those involuntary transfers play an important role in case of takings and expropriations by the member states as well as in a wider area of tort liability. Such form of judicial governance creates a feasible alternative to the market transactions. Taking into account that the application of liability rules could maximize the number of transfers and the efficiency of allocation, judicial governance plays an increasingly significant economic role.⁴ Against that background judicial governance could be understood as the capacity of the court to engage in regulatory decisions.⁵

The allocative function of judicial governance has been scrutinized by some institutions of the European Union. This issue has specifically been analyzed in two documents prepared by the European Commission: the Green Paper – *Damages actions for breach of the EC antitrust rules* COM/2005/0672 and the Commission Staff Working Paper SEC/2005/1732. Both documents emphasize “total underdevelopment” and an “astonishing diversity” in the approaches taken by the Member States as far as the private enforcement through damages claims in Europe is concerned. As a response to those deficiencies the European Commission has adopted the White Paper on *Damages Actions for Breach of the EC antitrust rules* COM (2008) 165, having been published on 02.04.2008. The model proposed by the Commission is primarily focused on compensation through single damages for the harm suffered. Additionally, the White Paper encapsulates some recommendations concerning collective redress, disclosure of evid-

² Coase, R.H. (1988). *The Firm, The Market and the Law*, Chicago and London, Chicago University Press, p. 155.

³ Calabresi, G., & Melamed, A. D. (1972). Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*, 85, p. 1089-1128.

⁴ Kaplow, L., & Shavell, S. (1996). Property Rules versus Liability Rules, *Harvard Law Review* 109, 713-790.

⁵ Stone Sweet, A. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies* 31, 147-184.

ence and the effect of final decisions of competition authorities in subsequent damages actions. Those recommendations are intended to balance rights and obligations of the claimant and the defendant. Moreover, some safeguards against abuses of litigation are also taken into account. The Commission proposes to build stronger procedural framework for litigation and claims for compensation in case of infringement of the EC law. Those means are believed to broaden the access to judicial system and to enhance the quality of judicial governance. They are however not sufficient as far as the assessment of damages and the principle of equality in different Member States are concerned. The question arises, whether and under which conditions harmonization of prices resulting from monetary integration may also affect the amount of compensations awarded by courts in case of state liability for damages.

2. THE STANDARDIZATION OF LIABILITY RULES IN THE EC LAW AS A PRECONDITION OF HARMONIZATION OF COMPENSATION

The judicial activity of domestic courts encapsulates the strategy of national judges adopted within a framework of the wider multilevel judicial governance.⁶ This complex judicial governance structure can be characterized by the capacity of the court to engage in regulatory decisions.⁷ The model of multilevel judicial governance is thus based on the assumption that judges could directly influence both allocative and distributive consequences due to the process of proportionality analysis based on the so called balancing of the conflicting rights and principles.⁸ This approach seems to be typical for the recent development of the judicial governance.⁹ In the context of the European Union such judicial governance structure is based on the cooperation between national courts in member states and the ECJ.¹⁰ The form of judicial governance strategy varies depending on the complexity of a given

⁶ Petersmann, E-U. (2008). Judging judges: from 'principal-agent theory' to 'constitutional justice' in multilevel 'judicial governance' of economic cooperation among citizens, *Journal of International Economic Law*, 11, p. 827-830.

⁷ Stone Sweet, A. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies* 31: 147-184; Stone Sweet, A. (2000). *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford; Hirshl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cam. Mass, *passim*.

⁸ Stone Sweet, A. (2000). *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford, *passim*; Hirshl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cam. Mass, p. 22-38.

⁹ Hirshl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cam. Mass, pp. 12-18; Petersmann, E-U. (2008). Judging judges: from 'principal-agent theory' to 'constitutional justice' in multilevel 'judicial governance' of economic cooperation among citizens, *Journal of International Economic Law*, 11, p. 827-831.

case and the probability of correct application of the EC law and its costs. This assumption could be derived from the normative standard adopted by the ECJ in the Case C-283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982]. In this case the ECJ proposed the principle according to which domestic court is obliged to examine whether the application of the Community law is so obvious as not to create any doubts ('acte claire'). The Court suggested that the examination of the EC law by the domestic courts should take into account the fact of the existence of many equivalent linguistic versions and should compare them. Additionally, according to the ECJ domestic court should establish the meaning of legal terms used in the Community law. Moreover, the court should perform an integral interpretation of the norms of the Community law in a proper context, in relation to the aims realized by the Community law, in the light of the dynamism of the integration, and also taking into account a specific stage of integration in a particular moment of law-application. Hence domestic court should perform a deep analysis of a given norm, taking into account also some possible interpretative divergences within the Community. Before passing a judgement or before passing a preliminary ruling the court should examine thoroughly and interpret properly the norms of the Community law as well as adjudication of the ECJ (according to the doctrine of 'acte eclairé'). This possibility is also used in case when the domestic court first passes and then withdraws preliminary question to the ECJ.

Concurringly, let SC denote the social cost of judicial ruling, including: the costs of prolonged proceedings (delays) denoted as C_d , the costs of detailed analysis of the Community law denoted as C_i , the cost of judicial error denoted as C_e . The economic aim of the process of application of law is minimization of the total costs of the application of law, which include the administrative costs as well as the costs of judicial mistakes: $\min SC = C_d + C_i + C_e$

The level of costs of judicial errors should equal the sum of loss resulting from the improper application of the Community law. Therefore, when a domestic court makes a mistake in the process of application of the Community law this may result (but not always should result) with the necessity of paying by a Member State compensation D . The amount of compensation will be dependent upon the regime of state liability accepted on the level of the Community law. Under the assumption of full compensation from the court's budget under strict liability rule the sum of loss $C_e = D$. This loss

¹⁰ Maduro, M. (2003). Contrapunctual Law: Europe's Constitutional Pluralism in Action. [in:] Walker N. (Ed.). *Sovereignty in Transition*, Hart Publishing, Oxford, p. 21-25, Komárek J (2007), European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles, *Common Market Law Rev.* 44, p 30-39 (2007).

might but not necessarily has to be covered. It depends on the standard of liability for judicial error. On the other hand the cost of judicial error for a given court additionally depends on the link between the potential compensation and the court. The problem of potential distortion of judges' behaviour in case liability for judicial error has already been signalled in law and economics literature.¹¹ It has been suggested that the liability for judicial error should be placed on a state agency relatively far from the court. This would minimize potential distortions of judges' behavior at least in criminal cases. The EC cases have different characteristics and the potential liability would not result with the jeopardy for judicial independence. If optimal it would rather strengthen the rule of law, since the effectiveness of the EC law depends on the character of incentives influencing judges' behaviour. The strength of this 'incentive effect' is to be reflected by the γ parameter. The value of the parameter varies between 0 to 1. Under $\gamma=1$ we assume the full compensation under strict liability rule with the assumption that the liability for judicial error is effectively placed on the court.

Let α be the probability that the correct decision taken by the domestic court is mistakenly taken by that court to be *prima facie* improper (type 1 error). Let β be the probability that the erroneous decision taken by the domestic court is mistakenly taken by that court to be proper (type 2 error). This later error results with the ruling set up independently by the national court. Type 2 error can only be detected by other national court which supervises the decision on basis of breach of the EC law or by the European Commission monitoring the application of the EC law in Member States. Every case is linked to some level of probability p that it may be solved properly by domestic court where p has a given function of density $f(p)$ (probability density function).

The complexity of every potential case has a contingent and exogenous character. The court may engage in three potential actions: a) pass a preliminary question b) pass an 'independent ruling', c) examine the state of affairs using the criteria developed by the ECJ.

a) The first option is linked to the preliminary question: the domestic court may ask the ECJ without examination whether in a given case there is a necessity to pass the question according to the rule accepted in case 283/81 *CILFIT Srl i Lanificio Galardo SpA v. Ministry of Health* [1982]. This strategy may be described as costly and strong standardization of application of the EC law. Let V_1 denote the total value of the case under the strategy of costly and strong standardization of application of the EC law.

¹¹ Fon, V., & Schaefer H.-B. (2007). *State Liability for Wrongful Conviction: Incentive Effects on Crime Levels*, available at SSRN: <http://ssrn.com/abstract=942691>.

b) Domestic court may pass the ruling in a way which is not consistent with the assumptions of the doctrine of 'acte claire', hence not taking into account the specific features of the Community law. Such an action may be regarded as a rational one, only under the assumption that the court is minimizing the costs of the application of the Community law C_i . Such a strategy of domestic courts' action, which in a way ignores the Community law, may be described as cheap and weak standardization of application of the EC law. Consecutively let V_2 be the total value of the case under the strategy of cheap and weak standardization of application of the EC law.

c) The domestic court may examine whether in a given case there is a necessity of passing a preliminary question. In this case it is the national court who bears the cost C_i . Finally let V_3 denote the total value of the case under the strategy of the optimal standardization of application of the EC law.

According to the assumption, broadly accepted within the economic analysis of law, individuals tend to maximize their utility.¹² This fundamental assumption in regard to the economic analysis of state liability for the breach of the EC law by national courts means that judges also tend to the maximize their satisfaction U_j – they behave as if they were 'rational utility maximizers'. This activity of judges results in the increase of the number of correct decisions, therefore in the maximization of the number of judgments or rulings that would not be reversed in the appeal proceedings, so they would not result in diminishing of the courts' prestige and in excessive costs of litigation.¹³ Maximization of utility by judges results with their inclination to force their own preferences through the increase of influence of judicial decisions, broadening the scope of their factual competences as well as maximization of given decisions (by creating the whole lines of cases). The judges' motive may be described as the tendency towards the maximization of the value of the case.¹⁴ The attempts to describe in a more precise characteristics the judges' behaviour, and in particular their preferences, lead to the conclusion that judges tend to minimize the number of revised or annulled decisions, to minimize arrears linked to the examination of cases (particularly within the context of the requirement of case examina-

¹² Becker, G.S. (1976). *The Economic Approach to Human Behavior*, Chicago, Chicago University Press, p. 14.

¹³ Chalmers, D. (1997). Judicial Preferences and the Community Legal Order, *The Modern Law Review*, 60, 164-199.

¹⁴ Posner, R.A. (1973). An Economic Approach to Legal Procedure and Judicial Administration. *Journal of Legal Studies*, 2, p. 399 ; Landes, W.M. & Posner, R.A. (1980). Legal Change, Judicial Behavior and the Diversity Jurisdiction, *Journal of Legal Studies*, 9, p. 367.

tion in reasonable time) and to minimize the costs linked to setting out a single judgement.¹⁵

The judges objective function may be thus characterized in the following way: let V be the value of a case. It is assumed that judges tend to maximize this value: $U_j = \max V$. In case of a proper decision these benefits have a positive value $V > 0$, while in case of a wrong decision (judicial mistake) they take a negative value $V < 0$. The court tends to maximize expected benefits stemming from the ruling (V) taking into account the existing standard of liability in case of a breach of the Community law. The court maximizes benefit as a result of verdicts consistent with the Community law, while the passing of a judgement with mistakes results in state liability. Therefore, the expected value of each case solved by the domestic court (V_1, V_2, V_3) is a function of standard liability, probability that the passed verdict is a proper one, and actions of the court such as passing judgments, asking a preliminary question or making detailed examination of a case from the Community law perspective. The model of domestic courts' action is based on the estimation of expected benefits (gains) or costs of every of the above-mentioned strategies, taking into account various probabilities linked to different factors in the process of delimiting the sphere of probability, where the court will choose a given path. Therefore the total values of a given cases under those strategies are following:

a) When domestic court asks a preliminary question to the ECJ, without performing detailed examination, (costly and strong standardization of application of the EC law), then:

$$V_1 = pv - C_d - C_i$$

where $C_d > 0, C_i = 0, p = 1$, then $V_1 = v - C_d$ (I)

We assume that in case of asking a preliminary question the potential benefits of solving the case as well as the costs of prolonged litigation balance each other, $V_1 = C_d$

$$\text{and hence: } V_1 = 0.$$

b) When domestic court passes a judgement independently, without performing detailed examination of the EC law (cheap and weak standardization of application of EC law), then:

$$V_2 = pv - (1 - p)D \quad \text{(II)}$$

¹⁵ Higgins, R.A., & Rubin, P. H. (1980). Judicial Discretion. *Journal of Legal Studies*, 9, p. 129 ; Greenberg, P.E., & Haley, J.A. (1986). The Role of the Compensation Structure in Enhancing Judicial Quality. *Journal of Legal Studies*, 15, p. 417; Posner, R.A. (1992). *Economic Analysis of Law*, 4th. ed., Boston-Toronto-London: Little Brown and Company, p. 14.

c) In cases where the domestic court before passing a judgement or before passing a preliminary ruling examines thoroughly and interprets properly the relevant part of the EC law according to the *CILFIT* standard (optimal standardization of application of the EC law), then value of case (V_3) holds as follows:

$$V_3 = p(1 - \alpha)v - [(1 - p)\beta\gamma D] - C_i \quad (\text{III})$$

Let us assume that the standard liability adopted within the Community law is based on no liability rule, which means that $\gamma=0$, then:

$$pv > p(1 - \alpha)v - C_i, \text{ consecutively } V_2 > V_3 \quad (\text{IV})$$

and

$$pv > v - C_d, \text{ hence } V_2 > V_1 \quad (\text{V})$$

The potential cost of judicial error does not influence the expected value of a ruling in case when the national court initiates preliminary reference procedure and also when the judgement is given independently by the court without examining it using the *CILFIT* standard. According to the assumption about the judicial behaviour, the court will tend to adopt the strategy b), which means that courts will avoid any preliminary references in any forms; with or without detailed examination of the EC law. Thus, the national court would adopt cheap and weak standardization (strategy c). This might be the best justification for the adoption of the principle of state liability in case of judicial error in a form adopted by the ECJ in *Köbler* and *Traghetti* cases, where $\gamma > 0$ and $\gamma < 1$. According to the ECJ's decision in *Köbler v. Republic of Austria*, (Case C-224/01, [2003] E.C.R. I-10239) a Member State may be liable in damages for a national court's serious misapplication of the EC 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 ECJ 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. Those decisions create the normative background for the standardization of damages awarded in case of the infringement of the individual rights protected by the EC law.

3. MONETARY INTEGRATION AND HARMONIZATION OF LIABILITY RULES IN THE EC LAW

The above analysis concentrated on the possibility of the indirect harmonization of compensations due to monetary integration and the optimization of state liability for damages in the EU law. The harmonization of the liability rule and the liability standard may be regarded as a precondition for the further unification of compensation. It seems that such unification would be easier if the value of compensation was calculated in a single currency. The issue is especially relevant under the rule derived from the cases of Köbler and Traghetti which states that the court in the Member State has the power to assess the amount of compensation in the case of a breach of the EC law.¹⁶ Even in the case of the preliminary reference procedure being applied in a given trial the ECJ 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 the EC law cannot be attained directly by legal instruments. If, however, the process of monetary integration brings about the cross-border harmonization of prices, with trade being the main vehicle of this process.¹⁷ Such an integration could, under some conditions, have an impact on the practice of the assessment of damages by national courts. Those conditions include at least two factors.

Firstly, the harmonization of damages awarded by the courts could be successful, provided that there is an instrument of the unification of judicial practices in the case of application of the EC law. This condition is satisfied under the assumption that the national courts apply a homogeneous standard of liability for judicial error and additionally, they conform with the homogeneous standard of the selection of cases in which the preliminary reference procedure is to be implemented, involving the ECJ in the process of adjudication.

Secondly, the courts in different Member States should be able to compare different judgments concerning relatively similar circumstances. According to the theory of transactional framework put forward by Coase, Calabresi and Melamed, the alternative between property rules and liability rules may be explained as a choice between two, parallel allocative frameworks.¹⁸ Property rules serve as a precondition for market transaction, in-

¹⁶ Ruffert, M. (2007). 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*, 44, 479-500.

¹⁷ Rogoff, K. (1996). The Purchasing Power Parity Puzzle, *Journal of Economic Literature*, 34, 647-668; Goldberg, P., & Knetter M. (1997). Goods Prices and Exchange Rates: What Have We Learned? *Journal of Economic Literature*, 35, 1243-1272.

cluding international trade.¹⁹ Commodities, prices of which are to be harmonized under the assumption of monetary union, should in fact be treated as bunches of rights, established and protected by property rules. Under those circumstances, monetary union not only leads to the homogeneity of prices in different Member States, but additionally it should lead to an increase in the number of transactions. Actually the empirical findings prove this proposition.²⁰ This observation leads to the conclusion, which generally concurring with the Coasian transaction costs approach. Monetary integration minimizes the level of transaction costs, enhancing trade, and also expands the borders of the market. The question arises about the influence of this process upon non-market allocation in the form of the application of liability rules. Such a situation occurs if the potential defendant infringes the right of the potential plaintiff by virtue of an involuntary taking. Under those circumstances the damages awarded by the court in the course of litigation simply supplement payments. Therefore, the compensation supplements price. If, according to the transactional framework, the market transaction and litigation in tort cases should be treated as institutional alternatives, then the question arises whether monetary integration could lead to the harmonization of damages in a way analogical to the harmonization of prices in the case of market transactions based on contractual liability. The potential effect of monetary integration could be discernible at least on two levels.

The first one 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".²¹ The harmonization of prices should minimize the cost of private information about the value of entitlement. The 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. As Kaplow and Shavell observe: "the virtue of the liability rules is that they allow the state to harness information that the injurer naturally possesses".²² If however the value of the same entitlement is to be

¹⁸ Coase, R.H. (1988). *The Firm, The Market and the Law*, Chicago and London, Chicago University Press. p. 133; Calabresi, G., & Melamed, A. D. (1972). Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*, 85, p. 1093.

¹⁹ Coase, R.H. (1988). *The Firm, The Market and the Law*, Chicago and London, Chicago University Press, p. 104.

²⁰ Rose, A. (2000). One Money, One Market: Estimating the Effect of Common Currencies on Trade, *Economic Policy*, 30, 7-33.

²¹ Ayres, I. (2005). *Optional Law: The Structure of Legal Entitlements*, Chicago and London, Chicago University Press.

²² Kaplow, L., & Shavell, S. (1996). Property Rules versus Liability Rules, *Harvard Law Review* 109, p. 713-716.

expressed in different monetary units, the cost of the application of liability rules obviously rises. This finding is particularly important within the context of judicial practices in the Member States. In the majority of European jurisdictions, the market price or other indexes such as average salary, the standardized price of service or the value of goods *in genere* in fact supplement the more exhaustive methods of inquiry about the value of loss resulting from the infringement of rights. 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 by both parties. Both parties possess private information and both of them usually behave strategically; the potential 'sellers' – plaintiffs, tend to overestimate the value, whereas the potential 'buyers' – defendants underestimate the value of a given entitlement. Under those circumstances the court usually refers to an index of value at hand, usually the market price. Thus, the harmonization of prices in different Member States due to monetary integration will inevitably lead to the minimization of the costs of the application of liability rules in EC law.

The second level concerns the effect analogous to the harmonization of prices, namely the harmonization of damages awarded by different courts in the case of a similar infringement of the EC law. In the case of rights protected by the EC 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 the EC law by a Member State, be it administration, administrative or any other court depriving the subject of his or her right, could be interpreted through the lens of transactional framework, as an attempt at an involuntary taking. In other words the infringement of the EC 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. The question arises, how should the court assess this value? Intuitively, the same right established and protected by the EC law throughout all Europe should have at least similar, if not equal, value in all Member States.²³ 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.²⁴ This practice

²³ van Gerven, W. (1995). Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies. *Common Market Law Review*, 32, 679-702.

²⁴ Chalmers, D. Hadjiemmanuil, C., Monti, G., Tomkins, A. (2006). *European Union Law*. Cambridge, Cambridge University Press.

stands in sharp opposition to both the EC law and the assumptions of the transactional framework as proposed by law and economics scholars. It does not mean however that monetary integration could not be effective on this second level. Hence, the opposite seems to be true. The theory of the transactional framework states that the parallel character of market and non market transfer must lead to the harmonization of damages if the harmonization of prices takes place. Since the market value and thus the price of a given entitlement serves as a basic point of reference for national courts awarding damages, monetary integration will affect the amount of compensation in the long run, under the condition that the judges are able to inquire about the verdicts of other courts in other jurisdictions. This process seems to be inevitable if the courts lean towards avoiding the infringement of the EC law, because the application of the EC law in other Member States play an important role, especially within the context of the *CILFIT* standard and the principle of 'acte claire' and 'acte eclairé' in the EC law, according to which the domestic court should be familiar with the verdicts of other national courts.

4. CONCLUDING REMARKS

In this paper the theory of transactional framework has been reconstructed within the light of the theory of monetary integration and applied to the analysis of the economic and legal consequences of the development of the European system of judicial governance. It seems that the principle of state liability for judicial error in the EC law creates institutional background for the harmonization of damages awarded by national courts throughout the European Union. Under the assumption that the process of the European monetary integration brings about cross-border harmonization of prices, with the trade being the main vehicle of the process, such an integration could, under some conditions, have an impact on the practice of assessment of damages awarded by national courts. Those conditions include two factors. Firstly, the harmonization of damages awarded by the courts could be successful, provided that there is an instrument of unification of judicial practices in case of application of the EC law. Secondly, the courts in different Member States should be able to compare different judgments concerning the relatively similar circumstances. The theory of the transactional framework stipulates that under those assumptions the parallel character of the market and non market transfer must in the long run lead to the harmonization of damages awarded by the national courts if the harmonization of prices takes place. Those findings could be implemented to the evaluation of the present development of the EU law. It seems that the policy dir-

ection adopted by the European Commission in the recently adopted White Paper on *Damages Actions for Breach of the EC antitrust rules* COM (2008) and the judgments of the ECJ in *Köbler v. Republic of Austria* and *Traghetti del Mediterraneo SpA v. Italy* cases comply with the assumptions of the transactional framework theory and facilitate the influence of the monetary integration upon the EU legal framework.

REFERENCES

- [1] Ayres, I. (2005). *Optional Law: The Structure of Legal Entitlements*, Chicago and London, Chicago University Press.
- [2] Becker, G.S. (1976). *The Economic Approach to Human Behavior*, Chicago, Chicago University Press.
- [3] Calabresi, G., & Melamed, A. D. (1972). Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*, 85, 1089-1128.
- [4] Chalmers, D. (1997). Judicial Preferences and the Community Legal Order, *The Modern Law Review*, 60, 164-199.
- [5] Chalmers, D. Hadjiemmanuil, C., Monti, G., Tomkins, A. (2006). *European Union Law*. Cambridge, Cambridge University Press.
- [6] Coase, R.H. (1988). *The Firm, The Market and the Law*, Chicago and London, Chicago University Press.

- [7] Cooter, R., & Ginsburg T. (1996). Comparative Judicial Discretion: An Empirical Test of Economic Models. *International Review of Law and Economics*, 16, 245-313.
- [8] Fon, V., & Schaefer H.-B. (2007). *State Liability for Wrongful Conviction: Incentive Effects on Crime Levels*, available at SSRN: <http://ssrn.com/abstract=942691>.
- [9] van Gerven, W. (1995). Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies. *Common Market Law Review*, 32, 679-702.
- [10] Goldberg, P., & Knetter M. (1997). Goods Prices and Exchange Rates: What Have We Learned? *Journal of Economic Literature*, 35, p. 1243-1272.
- [11] Greenberg, P.E., & Haley, J.A. (1986). The Role of the Compensation Structure in Enhancing Judicial Quality. *Journal of Legal Studies*, 15, 417-426.
- [12] Higgins, R.A., & Rubin, P. H. (1980). Judicial Discretion. *Journal of Legal Studies*, 9, 129-138.
- [13] Hirshl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cam. Mass.
- [14] Kaplow, L., & Shavell, S. (1996). Property Rules versus Liability Rules, *Harvard Law Review* 109, p. 713-790.
- [15] Komárek J (2007), "European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles", *Common Market Law Rev.* 44, p 30-39.
- [16] Landes, W.M. (1971). An Economic Analysis of the Courts. *Journal of Law and Economics*, 14, 61-107.
- [17] Landes, W.M., & Posner, R.A. (1979). Adjudication as a Private Good. *Journal of Legal Studies*, 8, 235-284.
- [18] Landes, W.M. & Posner, R.A. (1980). Legal Change, Judicial Behavior and the Diversity Jurisdiction, *Journal of Legal Studies*, 9, 367-386.
- [19] Maduro, M. (2003). Contrapunctual Law: Europe's Constitutional Pluralism in Action. In Walker N. (Ed.). *Sovereignty in Transition*, Hart Publishing, Oxford.
- [20] Petersmann, E-U. (2008). Judging judges: from 'principal-agent theory' to 'constitutional justice' in multilevel 'judicial governance' of economic cooperation among citizens, *Journal of International Economic Law*, 11, p. 827-884.
- [21] Posner, R.A. (1973). An Economic Approach to Legal Procedure and Judicial Administration. *Journal of Legal Studies*, 2, 399-458.
- [22] Posner, R.A. (1992). *Economic Analysis of Law*, 4th. ed., Boston-Toronto-London: Little Brown and Company.
- [23] Rogoff, K. (1996). The Purchasing Power Parity Puzzle, *Journal of Economic Literature*, 34, p. 647-668.
- [24] Rose, A. (2000). One Money, One Market: Estimating the Effect of Common Currencies on Trade, *Economic Policy*, 30, p. 7-33.
- [25] Ruffert, M. (2007). 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*, 44, 479-500.
- [26] Stone Sweet. A. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies* 31: 147-184.
- [27] Stone Sweet. A. (2000). *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford.