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FAILURE OR IDEOLOGICAL PRECONCEPTIONS –
THOUGHTS ON TWO GRAND PROJECTS: THE EUROPEAN
CONSTITUTION AND THE EUROPEAN CIVIL CODE

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*Failure or Ideological Preconceptions –
Thoughts on Two Grand Projects:
The European Constitution and the European Civil Code*

HANS-W. MICKLITZ

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Abstract

I am interested in the relationship between constitutional and private law. The two Grand Projects, the European Constitution and the European Civil Code, serve as a catalyst to develop my argument. I will first look at the link between the two Grand Projects by placing emphasis on parameters which may help to explain and to analyse the reasons why both ended or seem to have ended in deadlock. I use the metaphor of 'failure', meaning the political 'failure', the non realisation of the European Constitution which has now been replaced by the Lisbon Treaty and the predictable 'failure' of the European Civil Code project, called the Common Frame of Reference, which obviously does not have the support of the European Commission, the Council or the Member States. Ideological preconceptions refer to implicit assumptions which united the elaboration of the two Grand Projects despite their conceptual differences. It will have to be shown that the idea of a European Constitution is at least based on a mandate from the Member States, whereas such a mandate does not exist in the European Civil Code project. So there is an inherent deep difference between the Grand Projects. Seeking deeper links via implicit assumptions, however, suggests that the two Grand Projects are politically and legally connected despite their different origins and functions. Only by understanding the linkage may we create an opportunity to put private law into a constitutional perspective.

Keywords

Constitutionalisation of private law, European Constitution, Draft Common Frame of Reference, European Integration and National Disintegration, Mechanic and Organic Solidarity.

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I. Failures or Ideological Preconceptions

This topic is inspired by three different intellectual environments. First, my home university in Bamberg, where we are running a graduate school on ‘Öffnung und Schließung von Märkten und Sozialräumen’ (Markets and Social Systems in Europe – Between Global Orders, European Decision Making and National Traditions).¹ The graduate school is an interdisciplinary project, led by sociologists, political scientists, economists and lawyers. Secondly, my current home, the European University Institute, where Constitutional Lawyers and Human Rights Lawyers set the agenda. So not only intellectually but also institutionally I am, as a private lawyer, confronted with two broad issues – firstly, the relationship between EU Private Law and European Constitutional Law and secondly, EU Private Law and Human Rights. My third inspiration emanates from the Centre of Excellence of the University of Helsinki which purports that Constitutional and Private Law should be analysed in a joint perspective. The CoE project is very much guided by the idea of multi-constitutionalism, of plurality of private legal orders and of multi culturalism,² which, however, does not exclude the development of a genuine European legal order.³

The three projects have one thing in common – private law seems to be at the borderline of the agenda. I take this perception as a challenge and an opportunity to insist on the possible contribution of private law to the well-established and widely recognised European constitutionalisation process. There doesn’t seem to be any agreement on whether and to what extent private law forms an integral part of the constitutionalisation process.⁴ I am interested in the relationship between constitutional and private law. The two Grand Projects serve as a catalyst to develop my argument. I will first look at the link between the two Grand Projects by placing emphasis on six parameters which may help to explain and to analyse the reasons why both ended or seem to have ended in deadlock. In my oral presentation I used the metaphor of ‘failure’, meaning the political ‘failure’, the non realisation of the European Constitution which has now been replaced by the Lisbon Treaty and the predictable ‘failure’ of the European Civil Code project, called the Common Frame of Reference, which obviously does not have the support of the European Commission, the Council or the Member States. On further reflection triggered by *N. Reich* I think ‘failure’ may not fully cover the parameters which I intend to analyse as tentative explanations for the deeper reasons lying behind the ‘failure’. ‘Failure’ is too dramatic and too superficial. Too dramatic, since it is conceivable that both projects might survive in one form or another and in fact impact the further European integration process, too superficial since ‘failure’ suggests that the two Grand Projects were terminated via a formal act, like the French and Dutch veto to the constitution. A similar political vote on the European Civil Code project is hard to imagine. Whilst I will not deny that I had originally such a rather formal scenario at least *sotto voce* in mind, I equally wanted to identify the reasons why the projects ‘failed’. To this end, ‘failure’ falls short in realising my original intentions. The term ‘ideological preconceptions’ seems to capture my concern more precisely. ‘Ideological preconceptions’ refer to implicit assumptions which united the elaboration of the two Grand Projects despite their conceptual differences. It will have to be shown that the idea of a European Constitution is at least based on a mandate from the Member States,

¹ http://www.uni-bamberg.de/fileadmin/uni/wissenschaft_einricht/gk_mse/Paper/research.pdf

² C. van Dam, Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law, (2009) 20 KLJ 281.

³ This has been the ‘result of a conference’ which took place here in Helsinki in 2006, the results of which are published by Th. Wilhelmsson/E. Paunio/A. Phjolainen (eds), Private Law and the Many Cultures of Europe, 2007.

⁴ See O. O. Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party, A Comparative Analysis of the Constitutionalisation of Contract Law with Emphasis on Risky Financial Transactions, 2008; Ch. Mak, Fundamental Rights in European Contract Law, A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England, 2008; St. Grundmann (ed.), Constitutional Values and European Contract Law, 2008; for a critical perspective see C.-W. Canaris, Wandlung des Schuldvertragsrechts – Tendenz zu seiner Materialisierung AcP 200 (2000), 273.

whereas such a mandate does not exist in the European Civil Code project. So there is an inherent deep difference between the Grand Projects. Seeking deeper links via implicit assumptions, however, suggests that the two Grand Projects are politically and legally connected despite their different origins and functions. Only by understanding the linkage may we create an opportunity to put private law into a constitutional perspective.

II. Six Parameters Linking the Ideological Preconceptions

I. Feasibility of the Two Grand Projects

Is it timely, possible and feasible to establish, in the beginning of the 21st Century, a European identity via a European Constitution and a European Civil Code and to ‘develop’ a European demos?⁵ Are the two Grand Projects reflecting 19th Century ideologies? These issues have indeed been debated with regard to the European Civil Code Project.⁶ There are proponents and opponents to the Grand Projects, both at the political and the academic level, and numerous contributions have been written on the feasibility of the European Constitution as well as on the feasibility of a European Civil Code. From the constitutional law side emphasis is put on constitutional pluralism⁷ against any explicit or implicit attempt to replace the national constitutions via a European Constitution. This corresponds to the plea for private law pluralism – bearing different headings in the private law discourse – ‘Private Law and the Many Cultures of Europe’⁸ – or ‘Private Law Beyond the State’.⁹ I have expressed elsewhere my reservations against the need for a European private law codification project superseding national private legal orders, against the chosen methodology which governs the work of the *acquis* group and the study group and last but not least against its shaky democratic legitimacy.¹⁰

In seeking an answer to these questions one should not only investigate the deeper reasons behind the idea of the Grand Projects and the historical, economic, political and social feasibility in a globalised world where the nation state is on the decline. Constitution making and Private Law code making bears an inherently political dimension. People like *Prof. Christian von Bar* or *EP Diana Wallis* share a common vision on the role and function of a European Civil Code, a vision which might be inspired by personal experience of the post-war period. A European Constitution and a European Civil Code form an integral part of a harmonic perspective of United Europe with a common legal order. The sceptics who favour multi-constitutionalism and a multi-faceted European legal order, often find themselves in a more defensive position. The ‘vision’ of a multi-faceted European legal order, however, is gaining ground in Europe, particularly bolstered by the current economic crisis which has

⁵ See in the aftermath of the Maastricht decision of the German Constitutional Court, J.H.H. Weiler, *Western European Politics, European Democracy and Its Critique*, West European Politics, Summer, 1995, p. 4; on the controversy between J. Habermas and D. Grimm, see P. Kraus, *Europäische Kulturpolitik und Sprachproblematik*, 2004.

⁶ R. Schulze (ed.), *Common Frame of Reference and Existing EC Private Law*, 2008.

⁷ J. Baquero-Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, EUI Working paper RSCAS, 2007/13; M. Kumm, *The Jurisprudence of Constitutional Conflict Constitutional Supremacy before and after the Constitutional Treaty*, *European Law Journal*, 2005, p. 262; N. Walker, *Post-constituent Constitutionalism: The Case of the European Union*, in N. Walker/M. Loughlin, *Constituent Power and Constitutional Form*, 2007, pp. 247-268; M. Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, in J.H.H. Weiler/M. Wind (eds.) *European Constitutionalism – Beyond the State*, 2003, p. 74.

⁸ Th. Wilhelmsson, *Varieties of Welfarism in European Contract Law*, *European Law Journal* 10 (2004), p. 712; the same, *Introduction* in Th. Wilhelmsson et al (eds.), *Private Law and the Many Cultures of Europe* (ed.), 2007, p. 3.

⁹ R. Michaels/N. Jansen, *Private Law Beyond the State? Europeanization, Globalisation, Privatization*, *AJCL* 2006, p. 843; N. Jansen/R. Michaels (eds.), *Beyond the State Rethinking Private Law*, 2008.

¹⁰ H.-W. Micklitz, *Review of Academic Approaches on the European Contract Law Codification Project*, in *Liber Amicorum Guido Alpa Private Law Beyond the National Systems* (eds.), M. Andenas/S. Diaz Alabart/Sir B. Markesinis/H.-W. Micklitz/N. Pasquino, 2007, p. 699 and the contributions in H.-W. Micklitz/F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, 2010.

strengthened the position of the Member States¹¹ and perhaps also due to the fact that the coming political and academic generation is not at all afraid of legal diversity,¹² understanding different legal orders as a useful and helpful level-playing field. We the lawyers form part of the European elite, which works at the forefront of the European integration process with or without the two Grand Projects. I will come back to this aspect latter.

The link then could be that the two projects started out with mistaken premises in that they intended to realise a model of a homogenous European society, united in a European demos and bound together by a European Constitution and a European Civil Code. What has not taken place is a true public debate on European unity and European diversity, on where unity is needed, but also where unity should not be achieved. This implies that a new round of research should open up on pluralism within the constitutional and the private law frame.¹³

2. *The Social in the Two Grand Projects*

I start from the premise that the current EU legal order is unbalanced in that the economy enjoys primacy over social concerns. The European Community was and still is a liberal project meant to open up markets with a touch of social oil.¹⁴ The European Court of Justice is testing ever more strongly national social regulations against the four freedoms,¹⁵ a process which was and is not counterbalanced by corresponding positive European regulation, not even within the European Constitution project. As a matter of fact the European Constitution did not bring about new rules of what *D. Kennedy*¹⁶ termed 'The Social'. This is particularly true with regard to consumer protection where the European Constitution did not tackle any of the difficult questions which result from the side by side of the competence rules, Art. 95 on the Internal Market which shall ensure a high level of consumer protection and the role and function of Art. 153 which grants the European Community a set of competences reaching beyond Art. 95 EC.¹⁷ This is likewise true with regard to social and labour law, where the rules have remained more or less the same since the adoption of the Treaty of Amsterdam. The European Constitution did not foresee any major shift in competence away from the Member States to the European level. There is even a correlation between the limited scope of EU competence and its societal relevance. The greater the social relevance, the less developed the EU competences. This does not mean that the European Constitution does not deal with 'The Social' at all. Since the adoption of the Single European Act 'The Social' belongs to the European integration project. The gradual shift in competence since 1986 is perceived as either deconstruction or modernisation of the national social welfare state via Community law, resulting in quite different perceptions of the role and importance of 'The Social' at the European level.¹⁸

¹¹ H. James, *Die Finanzkrise und ihre Herausforderung für Europa*, TranState Working Papers, No. 105/2009.

¹² To paraphrase the heading of C. van Dam's article, loc.cit. Fn. 2.

¹³ See on pluralism, E. Christodoulidis in this volume.

¹⁴ A. Fischer Lescano/F. Rödl/Ch. Schmid, *Europäische Gesellschaftsverfassung*, 2009.

¹⁵ N. Reich, How proportionate is the proportionality principle in the internal market case law of the ECJ, in B. de Witte/H.-W. Micklitz (eds.), *The ECJ and the autonomy of the Member States*, forthcoming 2010, who argues, however, that the ECJ restricts the negative impact in its more recent judgments via the proportionality principle.

¹⁶ D. Kennedy, *Three Globalizations of Law & Legal Thought*, in D. Trubek/A. Santos (eds.), *The New Law and Economic Development*, 2006, pp. 19-73.

¹⁷ H.-W. Micklitz/N. Reich/St. Weatherill, *EU Treaty Revision and Consumer Protection*, JCP 27 (2004), pp. 367-399.

¹⁸ St. Leibfried/St. Mau (eds.), *Welfare States: Construction, Deconstruction, Reconstruction*, 3 Volumes, 2008.

Substantial changes, however, may be reported from what *F. Rödl*¹⁹ calls ‘Leitnormen’, which have been proposed in the European Constitution and even elaborated on in the Lisbon Treaty. The latter neither grant rights nor competence but they yield legal effects in the development of EU social and labour law.

Art. 3 (3). The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, *a highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote *social justice* and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

Art. 2 (new) The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality between women and men prevail.

Of particular importance might be Art. 3 (3) which introduces the concept of a highly competitive *social market economy*. The key question is whether the reference to ‘The Social’ will have a long standing impact on the future outlook of the European legal order. *Ch. Joerges*²⁰ argues that this will not be the case for two reasons, first the concept and the success of the social market economy was due to particular post war circumstances in Germany which cannot be transposed to the making of *social market economy* in the EU at the beginning of the 21st Century and that a true change from a market driven European legal order to a more social outlook would entail a massive shift of competences from the Member States to the EU level which is politically inconceivable and, if it would take place, would have to resolve problems of high complexity.²¹ *D. Damjanovic* and *B. de Witte*²² offer a more optimistic reading of the future of ‘The Social’, in particular due to the fact that the European Court of Justice is ready to randomly uncouple social rights from the market logic of the integration process. However, the only delegation of competence foreseen in the European Constitution Art. I-14 (4), where the EU should get competences ‘to promote and co-ordinate the economic and employment policies of the Member States’, has been repealed.

¹⁹ F. Rödl, *Europäische Arbeitsverfassung*, to be published in A.v. Bogdandy (Hrsg.), *Europäisches Verfassungsrecht*, 2. Auflage, 2009, will also be published in English by the same editor in the course of the year.

²⁰ Ch. Joerges, *A Renaissance of the European Economic Constitution*, in U. Neergard/R. Nielsen/L. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, 2009, p. 29, in particular at p. 42.

²¹ F. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, *Journal of Common Market Studies*, 2002, p. 645; F. Scharpf, H. Obinger/St. Leibfried, *Beipässe für ein soziales Europa: Lehren aus der Geschichte des westlichen Föderalismus*, *Der Staat* 2005, p. 505.

²² D. Damjanovic/B. de Witte, *Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty*, in U. Neergard/R. Nielsen/L. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, 2009, p. 53.

Solidarity is another ‘Leitnorm’ which has been subject to attempts to legal scrutiny, so far, however, with little consistency.²³ The upgrading in the European Constitution and the Lisbon Treaty might pave the way for a reconsideration of this concept, perhaps in a new light. European solidarity differs from national solidarity. Constructing solidarity in categories of national stagnancy in law simply overlooks the ongoing transformation of the national welfare states. European solidarity requires an autonomous interpretation. This requires an understanding of what is behind the concept of solidarity at the European level and to what extent it complies with the particular national understanding. Solidarity will play a crucial role when I look at the dialectic of European integration and national disintegration.

This rather negative account of the European Social Model is somewhat outbalanced by the massive expansion of *social rights* since the Treaty of Maastricht. Social rights, the idea emanating since the development of the European Social Charter in 1989, were meant to compensate for the competence deficiencies in the European legal order. In *Laval*²⁴ and *Viking*²⁵ the ECJ has contributed to this trend in recognising the right to strike as a fundamental right, but then restricting it against the market freedoms via the proportionality principle. The Lisbon Treaty now cuts back the more ambitious goal of the European Constitution to fully integrate the Charter of Fundamental Rights. This formal shortfall might though be outweighed by an activist European Court of Justice which is ready to integrate the Charter of Fundamental Rights into the interpretation of EU law.²⁶ *Küçükdeveci*²⁷ speaks for itself. However, even the full integration of the Charter in the Lisbon Treaty would and could not have helped to solve conflicts between market freedoms and social rights. The expansion of social rights does not help to overcome the narrow boundaries of the EU competence rules on ‘The Social’.²⁸ Rights can function as a substitute for the missing competences in the European Constitution. Similar experiences result from the missing forth dimension in the principle of proportionality which does not allow for shaping competences between the Member States and the EU.²⁹

The picture is not so different with regard to the European Private Law Codification Project, as enshrined in the DCFR. At first hand sight it seems as if the DCFR is meant to realise ‘The Social’ as it merges the European consumer law *acquis* and European anti-discrimination law with the essence of the national private legal orders (of the Western European Democracies). Both areas of the law are commonly associated if not equated with the social dimension in the private legal order. Whether or not such an interpretation of the social character of European consumer law is correct, is subject to a controversial debate.³⁰ What is striking is that the DCFR does not deal with labour law. This side of ‘The Social’ is entirely left aside.

²³ A. Wunder, *The Usage of Solidarity in the Jurisdiction of the ECJ: Symbolism or a European Legal Concept?* LLM Thesis, EUI Florence, 2008; D. Grimm, *Solidarität als Rechtsprinzip*, 1973.

²⁴ Judgment, 18.12.2007, Case 341-05, *Laval and Partneri* ECR 2007, I-11767.

²⁵ Judgment, 11.12.2007, Case 438-05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union* ECR 2007 I-10779.

²⁶ See Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, [2008] ECR I-271 and with regard to private law, V. Kosta, *Internal Market Legislation and the Private Law of the Member States – The Impact of Fundamental Rights*, in S. Gschwandtner/V. Kosta/H. Schebesta/P. Verbruggen, EUI Working Paper 26/2009.

²⁷ ECJ, 19.1.2010, Case C-555/07 nyr.

²⁸ F. Rödl, loc. cit. 31.

²⁹ AG v. Gerven in the *Sunday Trading* cases, in more detail H.-W. Micklitz, *The Politics of Judicial Co-operation*, 2005, p. 119.

³⁰ H.-W. Micklitz, *Jack is out-of the Box – The efficient Consumer-Shopper*, in *Festschrift Th. Wihelmsen* ed. J. Bärlund et. JFT 3–4/2009, p. 417.

The key question is whether and to what extent the DCFR meets the requirements of social justice as foreseen in the European Constitution and implemented in the Lisbon Treaty. The social model enshrined in the DCFR might be regarded as a compromise between those who defend private autonomy as the key principle and starting point of the private legal order³¹ and those who advocate for the restriction of party autonomy to the benefit of the weaker party. *M. Hesselink* concludes in his study which was commissioned by the European Parliament on the question whether the DCFR complies with the needs of social justice:

‘from the point of view of social justice, the DCFR is fairly balanced. ... The level of consumer protection is sufficiently high. However, as an absolute maximum beyond which the member States would not be allowed to go in the case of full harmonisation, it is submitted, the level of protection in the DCFR is insufficient’. However, there is certainly room for improvement.’³²

His critique is mainly devoted to the minimum/maximum debate which is currently dominating the revision of the consumer *acquis*.³³ The DCFR does not, however, meet the standards set in the ‘The Social Justice Manifesto’.³⁴ The whole codification project, this was the major critique voiced by the authors of the ‘Manifesto’, is said to be overwhelmingly designed to guarantee the effective functioning of the Internal Market, without paying tribute to social justice in the meaning of how to protect the weaker party in contractual relationships. It seems as if the worrying scenario of the Manifesto is realising itself, if not in the DCFR then in the attempts of the European Commission to implant, in the revised consumer *acquis*, the consumer shopper as the leading figure, thereby overruling the protective device of consumer law. The social dimension of contract law is then outsourced into the field of universal services, which might contain the nucleus for a ‘true’ social European private law.³⁵

There seems to exist a conceptual bridge which links Constitutional and Private Law and which is built out of a genuine European understanding of ‘justice’. The starting point for such a European model is to be found in the concept of anti-discrimination, laid down in the Treaty and forcefully developed by the European Court of Justice in the field of social and labour law. By way of secondary Community law the anti-discrimination principle has now reached the private law. Perhaps the innovative potential of the DCFR lies in the integration of anti-discrimination into the proposed European Civil Code. However, such a paradigm change is far from being commonly accepted. Quite contrary, there is strong resistance against the intrusion of such a constitutional principle into private law relations.³⁶ I have developed elsewhere that the European concept of justice should not be equated with social justice but can best be understood as ‘access justice’.³⁷ It is for the European Community to grant justice to those who are excluded from the market or to those who face difficulties in making

³¹ J. Basedow, Freedom of contract in the European Union, *European Review of Private Law* 16 (2008), p. 901.

³² M. W. Hesselink, *CRF & Social Justice*, 2008, pp. 85, 86.

³³ S. Whittaker, A Framework of Principles for European Contract law, *The Law Quarterly Review* 125 (2009) p. 616; P. Rott/E. Terryn, The Proposal for a Directive on Consumer Rights, *ZEUP* 2009, p. 456; K. Tonner/M. Tamm, Der Vorschlag einer Richtlinie über Rechte der Verbraucher und seine Auswirkungen auf das nationale Verbraucherrecht, *JZ* 2009, p. 277; H.-W. Micklitz/N. Reich, Crónica de una muerte anunciada: The Commission Proposal for a ‘Directive on Consumer Rights’, *Common Market Law Review*, 47 (2009) pp. 471-519.

³⁴ Social Justice Study Group, *Social Justice in European Contract Law: A Manifesto*, *European Law Journal*, 10 (2004), p. 653.

³⁵ H.-W. Micklitz, *Universal Services: nucleus for a social European private law*, to be published in *Collected Course of the Academy of European Law*, ed. M. Cremona = *EUI Working Paper* 12/2009.

³⁶ J. Basedow, Grundsatz der Nichtdiskriminierung, *ZEUP* 2008, p. 230 and F.-J. Säcker, Europäische Diskriminierungsverbote und deutsches Zivilrecht. Kritische Gedanken zur Ergänzung des BGB durch Antidiskriminierungsvorschriften, *BB Special* 6/2004, p. 16.

³⁷ H.-W. Micklitz, *From Social Justice to Access Justice in Private Law: The European Challenge*, *EUI Working Paper* 2010 forthcoming.

use of the market freedoms.³⁸ European private law rules have to make sure that the weaker parties have and can maintain access to the market – and to the European society as far as it exists. In this way ‘access justice’ corresponds to the Leitmotif of European Social and Labour Law which is guided by the paradigm of ‘Beschäftigungsfähigkeit’ (the capacity to be qualified for a job).³⁹

So the answer then is that the European Constitution and the European Civil Code project do take ‘The Social’ into account – however, to a limited degree only and guided by a different paradigm of justice. The different concepts of ‘The Social’ demonstrate the need for an open political discourse over the chances and the limits of the European Social Model. This has not taken place, neither in the debate on the European Constitution nor amongst within the drafters of the European Civil Code project. A European Union, even via a constitution or via a European Civil Code, can and shall do no more than establish a general framework lead by the paradigm of access justice, whereas it should remain for the Member States to decide whether they are ready to go beyond access justice and guarantee social justice. The newly introduced Art. 2 of the Lisbon Treaty is very much in line with such a concept of shared responsibility. Art. 2 may not and could not be read in the sense that the EU is obliged to establish ‘social justice’, but the EU has to recognise social justice as a guiding principle in a multi-layered EU legal order. I would read into AG *Maduro’s* conclusions in *Viking*⁴⁰ such a going together of the internal market paradigm with social concerns, as long as the ECJ confirms the wide discretion of the Member States in balancing market freedoms against social rights.⁴¹ It implies, and here I can only underline *M. Hesselink’s* argument, that minimum harmonisation should be the general standard of any secondary community law intruding into the social dimension of EU law.

3. *Legitimacy of the Two Grand Projects*

Both grand projects suffer from one major flaw: constitution building and private law making appear as a matter of proper governance and EU citizens as mere stakeholders.

The process of the elaboration of the European Constitution is well documented.⁴² The starting point has been the *Laaken Council* which established the European Convention. Under the presidency of *Giscard d’Estaing* representatives of the head of old and new Member States, members of national parliaments from the old and now new Member States as well as members of the European Parliament and from the European Commission concluded their work in 2003.⁴³ This sounds as if the peoples were well represented – via their national parliaments and via their governments. However, what might have worked after the Second World War, when a constitutive assembly drafted the German ‘Grundgesetz’ (Basic Law) and when similar institutions in the new Member States drafted their constitutions in the late 20th Century, might not be opportune for the development of a European Constitution.

³⁸ In this sense ECJ, 28.4.2009, C-518/06 *Commission v. Italy*, 2009 ECR nyr, no cherry-picking in compulsory insurance law.

³⁹ R. Salais, *Reforming the European Social Policy and the Politics of Indicators*, in: M. Jepsen/A Serrano (eds.), *Unwrapping the European Social Model*, 2006, p. 189; A. Somek, *Concordantia Catholica: Exploring the Context of European Anti-Discrimination Law and Policy*, *Transnational Law and Contemporary Problems* 15 (2003), p. 939.

⁴⁰ AG *Maduro*, Opinion 23.5.2007, Judgment, 11.12.2007, C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union* ECR 2007 I-10779.

⁴¹ In this direction ECJ, 12.6.2003, C-112/00 *Schmidberger* ECR 2003 I-5659 at 79, 81 and ECJ, Judgment 14.10.2004, C-36/02 *Omega* ECR 2004, I-9609 at 36, N. Reich, *Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskampfrecht*, *EuZW* 2008, p. 391.

⁴² http://europa.eu/institutional_reform/chronology/index_en.htm

⁴³ <http://european-convention.eu.int/bienvenue.asp?lang=EN>

What was missing and what should have been organised by the European Community and the Member States is a public process which allows all citizens to participate in the process – and not only via the internet but via local and regional debates. If I may take Germany as a striking example, the whole process since 2001 until the formal signature of the Constitution in 2004 remained largely unnoticed. All that German citizens could learn was that the European Community and the Member States are planning to draft a Constitution for Europe, combined with the enlargement of the EU. However, there was literally no public debate. It is characteristic for Germany that the major player in the debate became the *German* Constitutional Court, which confirmed the constitutionality of the Lisbon Treaty but set high benchmarks for the further integration process.⁴⁴ The major source of information for interested citizens was newspapers, reporting via the media and via the internet. There are, however, more promising experiences to be reported. France initiated a public debate, in preparation of the referendum in which the French rejected the Constitution. There is no overall survey available on the degree to which the European Constitution became a subject of public concern. The majority of citizens might have perceived the process of constitution building as one where the true decisions were taken in the backyards of governmental agreements and talks behind close doors.⁴⁵

The process of the elaboration of the Charter on Fundamental Rights does not fully fit into that scenario.⁴⁶ The Convention which was headed by *Roman Herzog*, the former president of the FRG and of the German Supreme Court, brought together not only the governments and the parliamentarians, but also representatives from the ECJ, from the Committee of the Regions, from the Social and Economic Committee, the Ombudsman and the Council of Europe. NGO's were invited to comment and their contributions were made accessible via the internet.⁴⁷ So the drafting process was definitely more open, although a disclaimer as to the degree to which a true public debate was initiated applies.

If we look into the drafting process of the European Civil Code project, the scenario is completely different. The project was initiated by the European Parliament which pushed the European Commission over a decade before the codification process was launched in 2001.⁴⁸ The European Commission delegated the law making into the hands of two academic circles, the Study Group and the Acquis Group. Without having a mandate, the two groups stretched the codification projects beyond contract law and integrated the law of obligation including security interests. Citizens, members of governments and parliamentarians remained widely excluded from the law making. In fact, the consultation procedure organised by the Study Group and the Acquis Group remained far behind the democratic standards which guided the consultation process of the European Constitution and the European Codification process. Even in between the two groups major differences on the accessibility of the codification process have to be reported. Both worked behind closed doors in working groups which got together numerous times at various places in Europe. The Study Group united two hundred academics. It made every effort to make the elaboration, the shaping and the solution of possible conflicts – via the internet (although addressed to lawyers only) – transparent.⁴⁹ This was not the case with regard to the Acquis Group where the making took place in numerous closed meetings where the members of the group got together. The rather limited accessibility resulted

⁴⁴ Available online in English and German under http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

⁴⁵ See for a deeper analysis in particular of the post failure efforts of the European Union, to establish a bottom-up political discourse, P. Culpepper/E. Fagatto/A. Fung/T. Lee, *Beyond Elections? Deliberations of Democracy in the European Union*, 2010 on file with author, A. Glencross/A. H. Trechsel, *First or Second Order Referendum? Understanding the Votes on the EU Constitutional Treaty in Four Member States*, *Western European Politics*, forthcoming.

⁴⁶ http://www.europarl.europa.eu/charter/composition_en.htm

⁴⁷ http://www.europarl.europa.eu/charter/civil/civil0_en.htm

⁴⁸ http://ec.europa.eu/consumers/rights/contractLaw_en.htm

⁴⁹ See M.-R. McGuire, *Ziel und Methode der Study Group on a European Civil Code*, in U. Ernst (Hrsg.), *Auf halbem Weg – Vertragsrecht und europäische Privatrechtsvereinheitlichung*, *Deutsch-Polnisch-Ukrainisches Seminar in Krakau*, 2007, p. 225.

from the fact that the European Commission did not want information to be disclosed before the results of the Acquis Group were officially made public. Once the European Commission recognised the limited political support from the Member States in the Council, it dropped the codification project like a hot potato and focused its interests on the revision of the consumer acquis.⁵⁰

What matters in our context is the resemblance of the private law-making process to the 19th Century German ‘Professorenmodell’. The question is whether legal academics at the turn of an era – the shift from the second to third globalization of law and legal thought⁵¹ – can and are still the appropriate legal agents to codify the law and if not what their role could and should be in the early 21st century? The DCFR will now be discussed in the European Commission and in the European Parliament. But where are the European citizens? Does it suffice to determine a number of selected stakeholders which are invited to comment on the drafts presented to them by the professors? Is there no more democratic input needed? What should be the role of the European Parliament?⁵²

Relying on *F. Scharpf*'s⁵³ distinction between in-put and out-put legitimacy, both Grand Projects are highly deficient. The input was organised in a way which restricted access to the law making process to an elite circle of persons, less in the development of the Constitution, more in the development of the European Civil Code. Both clearly missed the out-put legitimacy, as is documented in the referenda on the European Constitution⁵⁴ and in the reaction in the wider economic and political environment of the Civil Code. This does not mean that the European Constitution or the DCFR will remain without any, even legal influence. The ECJ has formally no jurisdiction to refer to rules which were not taken over in the Lisbon Treaty, but it cannot be excluded that these rules may inspire the ECJ in its interpretation. The DCFR has already become the benchmark in academic discourse whenever a particular issue in European private law comes to the fore. It remains to be seen whether the DCFR may gain the same or similar status as the PECL not only before the ECJ but also before national courts.

4. Competence Transfer in the Two Grand Projects

The Treaty of Maastricht brought the last substantial competence transfer from the Member States to the European Community. The Treaties of Amsterdam and Nice were much more stamped by the efforts of the Member States to set limits to the expansion of EU law rather than active promotion of the development of EU policies via competence transfers. One of the major purposes behind the Grand Project of the European Constitution was to clearly shape the distribution of competences between the EU and the Member States – which is by the way a typical phenomenon of a federal constitution. Seen this way, it is even more surprising that neither the European Constitution nor the Lisbon Treaty ever openly addressed the constitutional question of whether the European Community needs a particular competence to adopt a European Civil Code. Raising such a question would have paved the way for a discussion over the function of a Civil Code in the envisaged European Constitution.

These findings correspond in an astonishing way to the silence of all those institutions which have been and still are involved in the European Civil Code project. Neither the European Commission, nor the European Parliament, nor the Study Group, nor the Acquis Group have openly addressed the highly sensitive competence issue. It seems as if all parties deliberately avoided getting to grips with the most important question behind the European Civil Code codification project – the question of

⁵⁰ COM (2006) 744 final.

⁵¹ D. Kennedy, *Two Globalisations of Law and Legal Thoughts: 1850-1968*, *Suffolk University Law Review*. 36 (2003), p. 632.

⁵² M. W. Hesselink, *The Politics of a European Civil Code*, 10 *European Law Journal* 2004, pp. 694-697 proposed that the Parliament should raise at the very least a set of key questions.

⁵³ F. W. Scharpf, *Governance in Europe, Effective and Democratic*, 1999.

⁵⁴ A. Glencross/A. H. Trechsel, *First or Second Order Referendum?* loc.cit.

competence.⁵⁵ It is easy to imagine the reactions, in particular of the Member States, if a Community organ would have brought the question to the fore. So far Art. 95 has served as a competence basis in most European regulations and directives dealing with private law issues. The Europeanisation of private law took place via the back door, i.e. coupled with the completion of the Internal Market. The competence issue has been left to the academia, which is divided.⁵⁶ The competence question, however, will come in the European Parliament, even if it advocates only for the adoption of a recommendation that advocates for the application of the DCFR on a voluntary basis.

The question remains – who follows whom – the European Civil Code the European Constitution or vice versa. Historically, there are examples at the national state level to provide evidence in both directions, although it is not easy to define the decisive juncture.⁵⁷ The French Civil Code was adopted after the French Constitution, the German Civil Code before the Constitution of Weimar. Europe does not have a homogeneous political identity. If any, Europe has a cultural identity which rests on national identities and which unites different nation states in Europe. This is the way I understand the results of the 2006 conference in Helsinki on the many cultures of European private law. Whether this suffices to build a constitution is widely discussed in legal and political science. There is, however, a difference between private law and constitutional law building. It is much easier to imagine private law bottom up construction which supports the development of a common European identity than to build a constitution bottom up. We might recall *St. Rodotà*:⁵⁸ ‘we can easily see how the civil codes played an essential role in the development of the nation state, representing the real constitution of social society’. We must not go as far as arguing in the way *F. Böhm* did, when he laid down the ground rules for a ‘Privatrechtsgesellschaft’. *H. Collins*⁵⁹ and *J. Smits*,⁶⁰ although from a different angle, favour such a bottom-up approach of European private law building that might yield one day a common/European cultural identity.

5. *Regulatory Character of the Two Grand Projects*

The European project was designed to establish a Common Market, later an Internal Market. The driving force of the EU project was how to find the correct market design which could best guarantee ‘peace’ and ‘prosperity’. The legal tools meant to realise this were either de-regulation = negative integration or re-regulation = positive integration. The key to the understanding of the singularity of the European legal order may be found in this objective-related regulatory function. This comes close to the regulatory state in the meaning *G. Majone* gave to it.⁶¹

The core of EU law consists of what I would call from my German legal background ‘Wirtschaftsverwaltungsrecht’ (the law used to administer the economy – economic administrative law). It is from here that the ECJ initiated and developed supremacy, direct effect and state liability. Citizenship issues came into play only after the Treaty of Amsterdam. However, the ECJ is using, in this new field of EC law, the same instruments and the same methodology as in the field of negative

⁵⁵ M. W. Hesselink/J.W. Rutgers/T. de Booy, The legal basis for an optional instrument on European Contract Law, Centre for the Study of European Contract Law, Working Paper Series, No. 2007/04.

⁵⁶ J. Basedow, A Common Contract Law for a Common Market, *Common Market Law Review* 33 (1996) p. 1169; St. Weatherill, *European Private Law and the Constitutional Dimension*, in F. Cafaggi (ed.), *The Institutional Framework of European Private Law*, 2006, p. 37.

⁵⁷ H. James, *Monetary and Fiscal Unification in Nineteenth-Century Germany: What Kohl learn from Bismarck*, *Essays in International Finance*, No. 202, March 1997.

⁵⁸ *The Civil Code within the European Constitutional Process* in M. W. Hesselink (ed.), *The Politics of a European Civil Code*, 2006, p. 115.

⁵⁹ H. Collins, *The European Civil Code – The Way Ahead*, 2008.

⁶⁰ *The Draft Common Frame of Reference: how to improve it?* in H.-W. Micklitz/F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, 2010, p. 90.

⁶¹ G. Majone, *Regulating Europe*, 1996.

integration.⁶² The ECJ then developed out of this ‘economic administrative law’ first a ‘genuine European Legal Order’ and later a ‘European Constitution’. This goes very much hand in hand with a wide spread understanding that administrative law at the nation state level yields those innovative elements which later might gain constitutional status.⁶³ Similar phenomena may be observed at the EU level, where principles laid down in secondary law were later upgraded to the constitutional level (eg. affordability). The drafters of the European Constitution went down the same route, in that they presented to the public an extended version of the Treaty as a European Constitution, the basics of which were designed by the various Treaty amendments, the case law of the European Court of Justice and condensed concepts and principles of secondary Community (administrative) law. They did not start from national constitutions in order to find out what should be the content of a European constitution in the light of the existing national constitutions. Therefore, the preparation of the European Constitution was not preceded by a comparative constitutional analysis.⁶⁴ If any, comparative analysis remained erratic.

EU private law is regulatory law per se. Most of European private law rules are mandatory rules. They do leave leeway for deviating Member States’ laws but only within the boundaries of the still prevailing minimum approach. The respective rules may often combine two different substantial purposes: the first, to open up markets via regulation and the second, to set binding standards for the behaviour of the market participants. This is different from national private legal orders, where default rules establish a kind of a reserve order which leaves much room for freedom of contract.⁶⁵ The drafters of the European Civil Code, i.e. the Draft Common Frame of Reference have taken the European regulatory law only to a very limited extent into account, more precisely consumer law and anti-discrimination law. The major basis of the DCFR is national law, more precisely comparative national law (of the old Member States). In this sense, the DCFR is diametrically different from the European Constitution. The whole project of the DCFR suffers from not having looked at the different areas in which the EU has set private law standards, either directly or indirectly, in combination with sector related rules meant to open up regulated markets. Again I feel free to refer to previous research in which I have extensively dealt with the character of European private law and the implications which follow from their genuine regulatory nature.⁶⁶

The differences between the two Grand Projects are obvious: the European Constitution might be understood in its substantial parts largely as an attempt to build out of the ‘Wirtschaftsverwaltungsrecht’ (administrative economic law) a legal order which is then called ‘Constitution’. The European Private Law codification project, quite to the contrary, more or less neglects the regulatory character of EC law. What would have been needed at the very least is a stocktaking of the private law *acquis* and a proposal on how the European regulatory private law *acquis* could be merged with the comparative findings of the different national legal orders. The link would then be that the Constitution builders put much too much emphasis on the ‘Wirtschaftsverwaltungsrecht’, whereas the private law makers overlooked the importance of EU regulatory private law and instead relied on private autonomy as enshrined in the national private legal orders as the starting point.

⁶² L. Azouley, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization*, CMLR 45 (2008), p. 1335.

⁶³ See e.g. with regard to the right to safety, H.-W. Micklitz, *Consumer Rights*, in A. Cassese/A. Clapham/J.H.H. Weiler (eds.) *European Union – the Human Rights Challenge, Human Rights and the European Community: The Substantive Law*, European University Institute, Florence, 1991, pp. 53-110.

⁶⁴ A. Albi/J. Ziller (eds.), *The European Constitution and National Constitutions: Ratification and Beyond*, Wolters Kluwer, 2006; This is now at the core of the EuNaCON, *The European and National Constitutional Project at the University of Tilburg*.

⁶⁵ Default rules too might have a regulatory function, see F. Möslin/K. Riesenhuber, *Contract Governance – A Draft Research Agenda*, *European Review of Contract Law* 5 (2009), pp. 248-289.

⁶⁶ *The Visible Hand of European Private Law*, to be published in the *Yearbook of European Law*, 2009/2010.

6. *Misleading Labelling and Marketing in the Two Grand Projects*

I never understood the European Constitution as a Constitution in the meaning of the French Constitution, the American Constitution, the German ‘Grundgesetz’, or the Constitutions of countries like the Portugal, Spain or Greece in the 80’ies or those of the New Member States. The emerging European Constitution, if we subscribe to the concept invented by the European Court of Justice, is a singular project whose design cannot be easily compared with the nation states constitutions.⁶⁷ By calling the envisaged Grand Project ‘Constitution’ the European Community and the Member States made the citizens believe that the project contains a similar set of rules as the national constitutions and that it is therefore – at least implicitly – aimed to substitute the national constitutions. Is this ‘cosmetic particularity’?⁶⁸ But even if it would have been possible to make clear to the public at large that the European Constitution is complementing national constitutions and that it grants additional rights to those already enshrined in the national constitutions, one might wonder whether such a project would not have required a referendum of all citizens in all Member States at the same day and at the same time. The new clothes of the Constitution project now called ‘Lisbon Treaty’ cannot so easily settle the disputes which have come up not least due to the misleading design.

The situation is somewhat different with regard to the European Civil Code project. The Draft Common Frame of Reference as elaborated by the Study and the Acquis Groups is in fact the European Civil Code, which the European Parliament has been asking for since the early nineties. It is much more than the famous or infamous toolbox the European Commission had in mind. So the DCFR is a European Civil Code in disguise. For the peoples of Europe and European citizens it might be much more difficult to grasp the role and function of a European Civil Code for the unity of Europe. They may not even have a clear understanding of what a national private legal order means.

Why is it that Grand Projects at the European level come in disguise? The Lisbon Treaty realised more or less the core of the original European Constitution – will it then turn into a Constitution? The DCFR reflects the European Civil Code – European Parliament was so heavily fighting for – will it become a European Civil Code despite or because of its misleading labelling? The deeper reasons of this wide spread opacity belongs to a well settled policy which unites all Community organs and the Member States. The European Commission is a master in dressing far reaching legal concepts in harmless clothes. The Member States are using the same strategy though for a different reason. If the integration process brings about positive results, Member States tend to claim ownership, if the result is negative according to the Member State in question, then it is the European Commission which is responsible. Only the ECJ used clear language – a genuine European legal order, built on supremacy and direct effect – even a European Constitution. This, however, remained unnoticed between the early sixties until the ‘November Revolution’ of the ECJ.⁶⁹ Today the ECJ is in the limelight again due to its judicial activism and the Lisbon judgment of the German Constitutional Court. Even the acceptability of the ECJ depends largely on the fact that the Member States and their courts did not fully realise what supremacy and direct effect meant until it showed up in the European Constitution. The half-truths might have been the true reason for the ‘success’ of the European integration process, perhaps not only with regard to the role and function of the ECJ.⁷⁰ In this sense the ‘chameleon character’⁷¹ of the Draft Common Frame of Reference might, in the end, strengthen its legal impact on national private legal orders.

⁶⁷ N. Walker, fn. 6, M. Maduro, *We the Court*, 1998; J.H.H. Weiler, *The Constitution of Europe* 1999.

⁶⁸ See N. Walker, in this volume.

⁶⁹ This is the heading of an article by N. Reich, where he analyses inter alia Keck; “The November Revolution of the European Court”, *CMLR* (1994), p. 459.

⁷⁰ K. Alter, *Establishing the Supremacy of European Law: The Making of the International Rule of Law*, 2001.

⁷¹ I borrow this expression from St. Weatherill.

III. The Dialectic of European Integration and National Disintegration

I would like to come back to the graduate college at the University of Bamberg entitled ‘Öffnung und Schließung von Märkten’. The leading sciences were and are the social sciences, more precisely sociology and political science. *Richard Münch*, who belongs to the intellectual leaders of the college, just published a book which precisely defines and shapes what I had the pleasure to participate in for quite a number of years. The book is called ‘*Die Konstruktion der Europäischen Gesellschaft – Zur Dialektik transnationaler Integration und nationaler Desintegration*’⁷² in English ‘*The Construction of European Society: The Dialectic of Transnational Integration and National Disintegration*’.⁷³ The research on European integration, this is well known, is scientifically speaking in the hands of lawyers and political scientists. *Richard Münch* is a sociologist and takes a different perspective. He focuses, as the title indicates, his research interests on the emerging European society and what it looks like.

I will use the ideas behind the book to try to show that the two Grand Projects the ‘European Constitution’ and the ‘European Civil Code project’ have been overlooking or setting aside the most urgent questions in the further construction of Europe which require an answer from the legal system and which I would equate in a societal perspective with the conflicts resulting from the dialectics of transnational integration and national disintegration. The answer to these questions requires a general look at the further development of the European legal order and European private law. In all modesty, I dare to say that private law – and private lawyers – may provide some useful insights into the new round of academic and political discourse triggered by the two ‘failures’. What should be avoided is consideration of the two Grand Projects as separate from each other. They are indeed closely interlinked. What is missing politically and intellectually is to elaborate the ties.

The second part of my paper is devoted to that task, though from a private law perspective combined with an attempt to demonstrate the constitutional implications. *Münch’s* analysis supports me as he looks into the society as a whole and does not care about distinctions between constitutions and private legal orders. He uses two parameters to explain the tensions between transnational integration and European disintegration: the fading away of mechanic solidarity via the international division of labour and the transnational elites which are accelerating that bifurcation to their own benefit. I will use and dwell on these parameters to point to the effects of the shrinking mechanic solidarity and the potential power of organic solidarity in the European integration process before I attempt to shape the transnational elites, the moral pioneers as *Münch* calls them. Neither of the two Grand Projects nor the existing primary and secondary Community law take the distinction between mechanic and organic solidarity fully into account, thereby enhancing the tension between those who benefit and those who suffer from the European integration process. What is needed is a deeper look into the composition of the European society, which may be broken down into the already mentioned transnational elites, the average citizen and the vulnerable citizen, and the corresponding legal requirements at the constitutional and private law level.

I. *Mechanic/Organic Solidarity (The Process) and Transnational Elites (The Actors)*

The starting point of *Münch’s* analysis of the European integration process is *A. Smith* and *D. Ricardo* and their overall idea that mutual exchange of goods and services between nations may create wealth. We might recall that the original purpose of the European Economic Community was to guarantee peace and prosperity. *Münch* links *Smith* and *Ricardo* to *Durkheim* who analysed the effects of the international division of labour on societies. What matters is *Durkheim’s* recognition of the changing function of solidarity, which is transformed from mechanical into organic or network solidarity. Mechanical solidarity may be associated with collective national solidarity routed in the nation states whereas organic or network solidarity refers to those new forms of collective (transborder) activities

⁷² Published in 2008.

⁷³ A somewhat shortened version will appear under *R. Münch*, *European Governmentability. The Liberal Drift of Multilevel Governance*, 2010.

which are made possible by the international division of labour once the individual is freed from his national collective environment. The impact on the law, according to *Durkheim*, is striking. The rights of individuals are strengthened, he calls it the 'cult of the individual', the rights of the collective national entities are weakened. *Durkheim* developed his vision of the future European Society twenty years before the first world war. His insistence on the role and function of individual rights looks modern, in particular in light of the making and shaping of the European legal order by the ECJ via the extension of subjective rights, thereby indirectly turning down collective rights.⁷⁴ The cult of the individual, however, is characteristic for the EU as a whole.

The long term effects of the transformation process *Durkheim* had forestalled are becoming ever clearer. Somewhat overstated, we may observe that national collective entities, societies, but also groups within societies (trade unions, consumer organisations), are loosing their homogeneity and that the sharp differences between former different national cultures are beginning to wane. This complies with the summary findings of *Th. Wilhelmsson's* contribution to the conference on 'Private Law and the Many Cultures of Europe'.⁷⁵ By way of inner differentiation (migration, foreign workers) the national societies are steadily assimilating each other. EC law and the European legal order are enabling this transformation process and they are accelerating it by way of extending the legal position of all those who are willing and able to make use of the new freedoms. The recent case law of the ECJ on migrant workers and migrants provide ample evidence for such a development.⁷⁶ This process, according to *Durkheim* and in his shadow *Münch*, enables the development of transnational ties between individuals, who are freed from their national cultural constraints. The question remains of whether these transnational networks that yield out of de-nationalisation and de-territorialisation may still be associated with the term 'solidarity'. Here more research is needed to disclose the nature of a European concept of solidarity in labour and consumer law.⁷⁷

Not only from a sociological point of view the question remains: what are the driving forces behind this transformation process. Neither the mere spill over effect of transborder trade⁷⁸ nor bilateral or multilateral negotiations between states⁷⁹ might explain why transborder trade, division of labour and the creation of the European legal order are constantly accelerated in light of a transformation process which produces negative effects on the average citizen through the changing patterns of solidarity – from mechanical to organic – effects on distributive justice – enlargement of *Leistungsgerechtigkeit*, equality of chances and fairness in contrast to collective distribute justice guaranteed by the national welfare state⁸⁰ – which have so long been protected by a national identity and a national legal order.⁸¹

⁷⁴ D. Kelemen, The EU Rights Revolution: Adversial Legalism and European Integration, in T.A. Börzel/R.A Cichowski (eds.), *The State of the European Union*, 2003, pp. 223.

⁷⁵ Chapter 1 Introduction: harmonisation and National Cultures, in Th. Wilhelmsson et al, *Private Law and the Many Cultures of Europe*, 2007, p. 3.

⁷⁶ M. Dougan, Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States? in C. Barnard/O. Odudu (eds.), *The Outer Limits of EU Law*, 2009.

⁷⁷ See on the concept of solidarity in insurances against accidents at work and occupational diseases, ECJ, 5.3.2009, Case C-350/07 *Kattner Stahlbau*, 2009 ECR nyr.

⁷⁸ E.B. Haas, *The Uniting of Europe: Political, Social and Economic Sources*, 1958, pp. 1950-1957.

⁷⁹ A. Moravcsik, Preferences and Power in the European Community: A Liberal Intergovernmental Approach, *JCMSt* 1993, p. 473.

⁸⁰ See R. Münch at p. 129.

⁸¹ See R. Münch at p. 71.

Münch offers four factors which help to explain the shift of the legitimate power and the construction of the legitimate order from the national to the European level:

1. the instauration of a formal European legal power. Institutional procedures for the law making and the law application must present a stable ground which allows the *transnational elites* to realise their vision of a transnational project from whom they benefit,
2. the orientation of a '*Leitidee*' a leading idea or leading concept which allows the *transnational elites* to realise their own vision whilst guaranteeing that possible conflicts resulting from the social transformation are solved which is equated with the fundamental freedoms and anti-discrimination,
3. emergence of a dominant community of European lawyers and the transformation of politics into a juridical technique. The *transnational elites* can only apply a legitimate power, which respects procedure rules and thereby allows to overcome national resistance whilst securing out-put legitimacy,
4. functional adaptation has to be transformed into the construction of a legitimate legal order. The transnational legal order which is the result of conflicts between *transnational elites* and national resistance must gain the status of a new legal order, which makes sense as a whole and which appears to be just and can therefore require legitimacy to justify the transformation of national legal orders and national concepts of justice.

I will focus in my analysis on the role and function of 'the transnational elites' which are at the forefront of those who build new European i.e. transnational ties and thereby uncouple themselves from their national cultural links. *Münch* is not advocating a 'Verschwörungstheorie', a theory of conspiracy or complot. He claims to observe and to analyse the current reality which is the construction of the European society via transnational elites. He identifies transnational elites also termed moral pioneers in science, art, economy, politics and law as the driving force behind the integration process.⁸² Lawyers are said to play a crucial role, in the comitology procedure – in the law-making and law-enforcement via the executive (the Member States and the European Commission), and in the law application and the making (judicial governance)⁸³ via the ECJ (the European judges and the national judges as European judges). Both areas read together establish a European legal field⁸⁴ – *Münch* calls it a transnational network – composed out of academics, judges, public officials, lawyers and NGO's.⁸⁵ Genuine European actors such as the European Commission, the European judges or European NGO's are united in a network where national executives, national judges, national lawyers, national NGO's form an integral part. They form and they build a new identity, objectively in the meaning that the transnational networks become more and more institutionalised and subjectively as the members of the transnational networks develop a genuine sense of affiliation with their particular European legal and political environment.⁸⁶ However, there is a clear demarcation line between those national courts, national lawyers, national executives etc who form part of the

⁸² See R. Münch at p. 60.

⁸³ S. Frerichs, *Judicial Governance in der Europäischen Rechtsgemeinschaft, Integration durch Recht jenseits des Staates*, 2008.

⁸⁴ P. Bourdieu, *La force du droit: Éléments pour une sociologie du champ juridique*, *Actes de la recherches en sciences sociales*, 1986, 12, H. 64, 3.

⁸⁵ On the role of NGO's in organised law enforcement, with regard to labour and consumer organisations, see H.-W. Micklitz, *The Politics of Judicial Co-operation in the EU*, 2005; with regard to environmental organisations, see R. Slepcevic, *The Judicial Enforcement of EU law through national courts: possibilities and limits*, *Journal of European Public Policy*, 2009, p. 378; the same, *On the Strategic Use of the Preliminary Reference Procedure, Plausible Assumptions v. Empirical Reality*, *EUI Working Papers*, Max Weber Programme MWP 2009/24.

⁸⁶ P. Culpepper/E. Fagatto/A. Fung/T. Lee, *Beyond Elections? Deliberations of Democracy in the European Union*, 2010 on file with author, A. Glencross/A. H. Trechsel, *First or Second Order Referendum? Understanding the Votes on the EU Constitutional Treaty in Four Member States*, *Western European Politics*, forthcoming.

transnational network and those who are excluded from the network. Those excluded from the transnational network, be they national courts, national governments and national lawyers are marginalised.⁸⁷ They belong to a different nationally determined legal field.

The members of the transnational legal networks are led by a common *Leitidee*, which is in my mind a widely understood anti-discrimination principle, mainly one where different nationalities do not and should not matter. The *Leitidee* of anti-discrimination so strongly favoured by the ECJ has rendered it possible that the ideal of a collectively shared nationality is gradually losing importance in the European society building. This entails the ‘supremacy’ of (the politically intended) European organic solidarity over (still existing) national mechanic collective solidarity. Social litigation before the ECJ may serve as a prominent and paradigmatic example. The transnational judicial networks intentionally (if the claimants are business organisations and manage to mobilise national courts and the ECJ) or unintentionally (if the claimants are public interest groups using the same strategy as business organisations) are accelerating the drifting away of national solidarity, thereby deepening the conflict between transnational integration and national disintegration. The ambiguous effects of law making and law enforcement via transnational judicial and executive networks raise *legitimacy questions* which are at the forefront of the political and academic discussion since decades and which gain pace the deeper EU law intrudes and destroys national mechanic solidarity.⁸⁸ *Laval*⁸⁹ and *Viking* stand as lighthouses for such a type of a conflict in the European judicial legal field. They are widely perceived as favouring transnational integration at the expenses of national disintegration. *F.W. Scharpf* goes as far as requesting civil disobedience against the ECJ which is said to act outside its jurisdiction and without a solid legitimacy basis.⁹⁰

2. *Mechanic/Organic Solidarity and the Missing Collective Dimension*

The Two Grand Projects do not pay much attention to the tension between transnational integration and national disintegration. This would have required a strong attempt to openly address the conflicts and to seek for a solution resulting from the falling apart of national mechanic and transnational organic/network solidarity, more precisely to discuss collective rights, collective participation in administrative decision-making within the transnational executive networks and new forms of collective judicial actions. Quite the contrary is true. The two Grand Projects largely miss the point in that they oscillate between attempts to strengthen national mechanic solidarity and half-hearted attempts to pave the way for a new European organic solidarity. The existing EU law does not suffice to close that gap. In theory my hypothesis could be demonstrated in both European legal fields, the one governed by the executive (comitology and Lamfalussy) or by the judiciary. For the sake of the argument it might suffice to have a deeper look into collective litigation.

The Treaty does not deal with collective rights, with the exception of Art. 230 (4) EC. Whether or not, and under which requirements these articles grant NGO’s standing to sue has been the subject of major controversy even between the CFI and the ECJ. In *UPA*⁹¹ and *Jégo-Quéré*⁹² the ECJ held – contrary to

⁸⁷ See the interesting analysis of H. Schepel/R. Wesseling *The Legal Community: Judges, Lawyers and Clerks in the Writing of Europe*, *European Law Journal*, 3 (1997), 3 who analyse the *Common Market Law Review*, *Europarecht* and *Cahiers de Droit Européen*.

⁸⁸ See, in particular the work of F.W. Scharpf, *The European Social Model*, *Journal of Common Market Studies*, *Coping with the Challenges of Diversity*, 40 (2002), p. 4; same author, *Legitimacy in the multilevel European polity*, *European Political Science Review* 2009, p. 173; Ch. Joerges, *Deliberative Political Processes Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making*, (2006), *Journal of Common Market Studies*, pp. 779-802.

⁸⁹ Judgment, 18.12.2007, Case 341-05, *Laval and Partneri* ECR 2007, I-11767.

⁹⁰ F.W. Scharpf, *Der einzige Weg ist, dem EuGH nicht zu folgen*, *Die Mitbestimmung*, 7+8/2008, p. 18; same author, *The only solution is to refuse to comply with ECJ rulings*, *Social Europe Journal*, Vol. 4, 2009.

⁹¹ Case C-50/00 P, *Union de Pequenos Agricultores (UPA) v. Council* (2002) ECR I-6677, affirming Case T-173/98 *Union de Pequenos Agricultores (UPA) v. Council* (1999) ECR II-3357.

the opinion of *AG Jacobs* – inadmissible two actions for the annulment of community regulations because the respective applicants did not satisfy the condition of individual concern under Article 230 EC = 263 (4) TFEU. The ECJ delegated the question of who should have standing away to the Member States. The European Constitution as well as the Lisbon Treaty contains changes which might facilitate access to the ECJ. Article 263 (4) TFEU now reads as follows: ‘a regulatory act which is of direct concern to him or her and does not entail implementing measures’.⁹³ Whether or not the amendment will enhance modes of organic solidarity remains to be seen. *R. Schwensfeier*⁹⁴ calls it a shame package as only regulatory acts, not regulations and directives may be directly attacked.

Whilst the European Constitution seems inclined to somewhat strengthen the role and function of collective organisations before the ECJ, the European Civil Code project has deliberately set aside the collective dimension in private law. The DCFR is based on an individualistic conception of private law, in line with the 19th Century philosophy and in line with the ECJ’s possibility to use individually enforceable rights as a vehicle to promote transborder integration. This does not exclude that individually enforceable rights can in fact stand for collective interests, – a most recent example is *Janecek*⁹⁵ – but such disguised collective conflicts may reach the court only if they can be presented in the form of individual rights.⁹⁶ In fact many of the preliminary reference procedures bear that strategic touch, be they brought to court by companies or by NGO’s.⁹⁷

All in all this is a rather poor record for two Grand Projects which are designed to meet the challenges of the ongoing European integration. However, at this stage it seems necessary to look into the current primary and secondary community law, as interpreted by the ECJ, in order to provide for a somewhat fuller account of the impact of EU law on *Durkheim’s* distinction between mechanic and organic solidarity. I will limit my rough overview to labour, anti-discrimination and consumer law and the degree to which EU law provides guidance on collective rights.

The right for workers to organise themselves is laid down in Art. 28 of the Constitutional Charter. More specific rules on collective rights may be found in the recent anti-discrimination directives.⁹⁸ They do not grant collectively enforceable rights before national courts.⁹⁹ The rules limit the legal position of trade unions and NGO’s operating in the field of anti-discrimination law to participate in individual litigation. The collective right is dependent on a pending individual case and in which a collective interest group can then provide support to the individual in her litigation. More interesting and more telling are the few judgments of the ECJ which deal with the collective dimension of labour law. Neither in *Albany*¹⁰⁰ nor in *Viking*¹⁰¹ did the ECJ provided guidance on how the right to strike could be voiced *in the courts*.

(Contd.) _____

⁹² Case C-263/02 P, *Commission v. Jégo-Quéré & Cie SA* (2004) ECR I-3245, setting aside Case T-177/01 *Commission v. Jégo-Quéré & Cie SA* (2002) ECR II-2365.

⁹³ See amendment of Art. 263 OJ L 115, 09.05.08, 47.

⁹⁴ *Individual Access to EU Jurisdictions under Community Law*, phd Groningen, 2009, p. 362.

⁹⁵ ECJ C-237/07 *Janecek v. Freistaat Bayern*, 2008 ECR nyr.

⁹⁶ This complies with N. Walker’s concept of legal formalism which dominates the EU Constitution, see his contribution in this volume.

⁹⁷ See F. Cafaggi/H.-W. Micklitz (eds.), *New Frontiers of Consumer Law*, 2009.

⁹⁸ See the identical rules and the identical recitals in Art. 7 (2) Directive 2000/43/EC, Art. 9 (2) Directive 2000/78, Art. 6 (3) Directive 2002/73, Art. 8 (3) Directive 2004/113, Art. 17 (2) directive 2006/54.

⁹⁹ For a different reading, R. Nickel, *Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie 2000/43/EG*, NJW 2001, p. 2668.

¹⁰⁰ ECJ, 21.9. 1999 Case C-67/96, 1999 ECR I-5751.

¹⁰¹ See again in this context the opinion of AG Maduro in *Viking* and the comment by N. Reich, *Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskampfrecht*, EuZW 2008, p. 391.

The situation is slightly more promising in consumer law. Since the Treaty of Amsterdam, Art. 169 (ex Art. 153) grants consumers the right to organise themselves, neither the Treaty nor the Constitution nor the Charter provides for any collective rights. Secondary Community law on collective consumer rights exists in the form of an action for injunction in the field of unfair terms and unfair commercial practices, however, this right is tailored to the national markets, the mechanical side of solidarity. Directive 98/27 provides for rules on transborder litigation on the basis of the principle of mutual recognition. Regulation 2006/2004 sets up a transborder network of enforcement authorities which includes the right to take an action for an injunction. Both rules may be read as an attempt to lay down ground rules for fostering organic and network solidarity through collective litigation. In practice transborder litigation in consumer law does not play a role, neither at the national nor the EU level.¹⁰²

In short, EU law is reluctant in protecting mechanic solidarity, which means it does not set clear boundaries for national disintegration. What is likewise missing in EU law, primary, secondary, Treaty and Constitution, is a consistent attempt, perhaps with the exception of consumer law, to mobilise the potential of organic solidarity which results from transborder integration, although Art. 65 allows for taking regulatory measures to develop organic solidarity. The existing set of rules in the Brussels Regulation and the Rome I and II Regulations are limited to a mere individualistic conception of cross border enforcement.¹⁰³

3. *What Role for Transnational Elites, the Average Citizens and the Vulnerable Parties in Mechanic/Organic Solidarity*

With *Münch* we may distinguish between three broad categories: the transnational elites, the average citizen and the weak = vulnerable parties. The European Constitution and the Lisbon Treaty start from citizenship. Vulnerable parties are not directly addressed. If any they show up in what *Rödl* calls 'Leitnormen', which leave room for interpretation – such as social justice and solidarity. The DCFR shows more promising signs in that it distinguishes between the average market citizens and the consumer which is equated with the vulnerable parties.¹⁰⁴ If we break down the existing EU law (broadly speaking, Treaties and secondary Community law) to the three categories we will find that EU law is using the first two groups of persons for fostering transborder integration, whereas the last group suffers from national disintegration. I would like to demonstrate that the questions behind the threefold distinction as well as the possible effects resulting from that decision can only be solved by Constitutional and Private Law in tandem.

The EU Constitution (including the existing primary and secondary Community law) and the European Civil Code project (the DCFR) are designed to meet the needs of the *average* citizen – which is the mobile, active and multilingual worker or the famous circumspect, well informed consumer. The driving force behind this concept has been the ECJ. The abundant case-law on the freedom of persons – i.e. workers and consumers – may be translated into an attempt by the ECJ to transform the national worker and the national consumer into pioneers of EC law. They are invited by the ECJ to make use of their rights to reap up the benefits of the markets – to use the language of the Lisbon conclusion, which has been adopted in 2000.¹⁰⁵ These consumers and workers are the spearhead of transnational integration via collective litigation in the judicial legal field and via their

¹⁰² H.-W. Micklitz, Transborder Law Enforcement – Does it exist? in U. Bernitz/St. Weatherill (eds.), *The Regulation of Unfair Commercial Practices under EC Directive, New Rules and New Techniques*, 2006, p. 235.

¹⁰³ On this, see G. Saumier, *Transborder Litigation and International Private Law: The View from Canada*; P. Rott, *Cross-Border Collective Damage Actions in the EU*, both in F. Cafaggi/H.-W. Micklitz (eds.), *New Frontiers in Consumer Protection, The Interplay between Private and Public Enforcement*, 2009, p. 361 and p. 379; A. Stadler, *Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen*, in M. Caspar/A. Janssen/P. Pohlmann/R. Schulze (eds.), *Auf dem Wege zu einer europäischen Sammelklage*, 2009, p. 149.

¹⁰⁴ See Principles DCFR no. 46.

¹⁰⁵ http://www.europarl.europa.eu/summits/lis1_en.htm.

input into the various consultation mechanisms in the administrative legal field. They shall use their enforceable rights to free themselves from national restrictions which hinder their search for the individual best solution. The whole bunch of secondary EU on labour, anti-discrimination and consumer law is largely governed by the very same spirit. The recent shift in secondary EU law from minimum to maximum harmonisation – which affects not only consumer but also labour law despite the restriction in the Treaty¹⁰⁶ – translates the ECJ *Leitbild* into an ever denser system of rules which narrows down the leeway for Member States to take protective measures to the benefit of the most vulnerable parties. The DCFR fits into that perspective as it is conceptualised as a fully fledged code which does not conceptually distinguish between the average and the vulnerable consumer.¹⁰⁷

The further construction of Europe will largely depend on whether it is possible and feasible to educate at least the majority of the average citizens, workers and consumers in a way that they comply with the normative requirements of the EU ‘*Leitbild*’. Transnational integration via the development of appropriate organic networks will largely depend on the – factual not the normative – success or failure of that transformation (education) project whose outcome is hard to predict. It might well be that the average citizen/worker/consumer will not meet the challenge and that the threefold distinction has to be replaced by a new, twofold differentiation: first an enlarged group of transnational elites and moral pioneers which meet the average standards and secondly the then larger group of vulnerable citizens/workers/consumers which would not only cover the ‘true’ vulnerable parties but also the ‘average’ citizen/worker/consumer who fails the education process.

How shall Europe deal with the group of the vulnerable parties, be it a smaller or a bigger group? Are these the socially excluded – which according to the Lisbon Council 2000 – should be integrated into the ‘most competitive economy of the world’? One might argue that the protection of the weakest in society is not a task for the European Community but for the Member States and that at least with regard to this group the old consensus reached between the founding members in 1957 still applies. For the good or for the bad, even in this highly sensitive area of the social domain, the EU Constitution as well as current EU primary and secondary Community law set already the tone. My hypothesis is that the EU law on universal services provides for the nucleus of a set of rules aiming at the protection of the socially excluded.¹⁰⁸ This set of rules cuts across primary and secondary community law, public and private law and provides for a fertile ground of studying the interplay between constitutional values and private law issues.

IV. Rethinking the Relationship between European Constitutional and European Private Law

The European Constitution is part of the European integration history now. The Lisbon Treaty just passed the ratification procedure and will now absorb political and academic attention. The Draft Common Frame of Reference is still an academic project. Officially the European Civil Code project has not (yet) come to an end. Neither the European Commission, nor the Council, nor the European Parliament has taken a final position on the political future of the DCFR. Whatever the final position of the Community organs will be, the least that can be said is that its political future is uncertain.

¹⁰⁶ With regard to labour law and in particular on the correct interpretation of the Directive on posted workers, S. Deakin, *Regulatory Competition after Laval*, (2008) *Cambridge Yearbook of European Legal Studies*, p. 581; M. Dougan, *Minimum Harmonisation after Tobacco Advertising and Laval Un Partneri*, in M. Bulterman/L. Hancher/A. McDonnell/H. Sevenster (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot*, 2009, p. 12 and 13; with regard to consumer law, company law, capital market law and competition law see in the contributions in B. Gsell/C. Herresthal (Hrsg.), *Vollharmonisierung im Privatrecht, Die Konzeption der Richtlinie am Scheideweg?*, 2009.

¹⁰⁷ Different from Art. 5 (3) of the Directive 2005/29 on Unfair Commercial Practices.

¹⁰⁸ *Universal Services: nucleus for a social European private law*, to be published in *Collected Course of the Academy of European Law*, ed. M. Cremona, EUI Working Paper 12/2009.

However, there is a decisive conceptual difference between the two Grand Projects. The so-called European Constitution never was a constitution in the sense of the American or the French Constitution. That is why there is an even greater danger in that the promoters of the European Constitution might feel tempted to read into the Lisbon Treaty the original intentions and conceptual ideas which could not be realised and which ended in deadlock. This might exactly be feasible *because* the European Constitution never was meant to be a Constitution but a further amendment to the Treaty of Rome. The DCFR instead is conceived as a fully-fledged European Civil Code, even though labelled and marketed under a different acronym. The danger here is that the drafters, as well as the Community organs, despite the absence of official political support will use the DCFR as a kind of a benchmark in the debate on the future development of European private law. The current debate over the Proposal of the European Commission on a Directive of Consumer Rights¹⁰⁹ seems to prove the contrary as the European Commission did not refer to the DCFR as a reference point for its solutions. However, the European Parliament¹¹⁰ as well as the Economic and Social Committee¹¹¹ criticise the European Commission exactly for this, for setting aside the DCFR. If the DCFR turns into a benchmark for law reforms, the conceptual flaws laying behind the DCFR, the missing analysis of the European Regulatory Private Law, the missing collective dimension as well as the missing integration of private regulation, would be neglected and set aside.

What is instead needed is to initiate a second round of research¹¹² which discusses the flaws, the deficiencies and which take the ideological preconceptions of the two Grand Projects into account. My paper maybe a modest contribution to this debate and it is mainly written with the intention to highlight the links between the two Grand Projects of a European Constitution and a European Civil Code. Maybe the European Court of Justice is paving the way for joint research projects outside merely academic considerations. In *Hamilton*,¹¹³ the ECJ refers for the first time, if I am correct, to the 'general principles of civil law'. This reminds us of similar reference in early ECJ judgments some decades ago, when the ECJ started to refer to the 'common principles of constitutional law' mainly to justify the reference to human rights in its judgments. The short reference in *Hamilton* opens up a new horizon of research. What kind of principles are meant here? Certainly not the ones the DCFR is presenting since they do not contain principles but solutions. Why not develop these common principles in Constitutional and Private Law jointly, thereby making an effort to overcome the boundaries between the two disciplines? Any further research, however, has to be aware that the role and function of Europe in the world has changed,¹¹⁴ this is true for the construction of Europe as a federal state¹¹⁵ as well as for the building of a European private legal order.¹¹⁶ The outside boundaries of the two Grand Projects yet deserve a deeper analysis which reaches beyond the scope of this paper.

¹⁰⁹ COM (2008) 614 final.

¹¹⁰ See the study undertaken on behalf of the European Parliament by M.J. Hesselink, A Comparison between the Draft Common Frame of References and the European Commission's Proposal for a Consumer Rights Directive, 2009 and by H. Schulte-Nölke, The Potential Impact of the Consumer Rights' Directive on the Member States' Contract Law, 2009.

¹¹¹ OJ C 317, 27.12.2009, 54 in its position paper on the Proposal of the Commission on a Consumer Right's Directive.

¹¹² See our Introduction in H.-W. Micklitz/F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, 2010, to be published, where we tried to outline the needs for further research.

¹¹³ ECJ, 10.4.2008 Case C-412/06 at p. 42.

¹¹⁴ G. Majone, *Europe As the Would-Be World Power*, 2009.

¹¹⁵ See D. Patterson/A. Afilalo, *The New Global Trading Order, The Evolving State and the Future of Trade* who coined the term of the 'market state' which differs from the nation state on which the post second world war order was built.

¹¹⁶ R. Michaels/N. Jansen, *Private Law Beyond the State? Europeanization, Globalisation, Privatization*, *AJCL* 2006, p. 843; N. Jansen/R. Michaels (eds.), *Beyond the State Rethinking Private Law*, 2008.

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