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THE ECJ BETWEEN THE INDIVIDUAL CITIZEN
AND THE MEMBER STATES
– A PLEA FOR A JUDGE-MADE EUROPEAN LAW ON REMEDIES

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*The ECJ between the Individual Citizen and the Member States –
A plea for a judge-made European law on remedies**

HANS-W. MICKLITZ

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Abstract

Time and again the ECJ comes under fire, from the Member States who fear the loss of sovereignty, as well as from trade unions and public interest groups who fear the downgrading of 'The Social'. The overall message then may be condensed into the plea for a court which takes a more cautious stance. I am arguing the exact opposite, at least with regard to remedies in the social and the citizen rights order. Only more judicial activism can overcome the lacunae which results from a rights-remedy-procedure mechanism that is too much designed to enforce economic freedoms.

Keywords

The many European legal orders, the economic, the social legal order, citizen rights order, the principles of effectiveness and efficiency, materialisation

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Table of contents

Introduction.....	1
I. The ECJ between the individual citizen and the autonomy of the Member States	1
II. RRP in a ‘new’ European legal order having its ‘own’ legal system.....	2
1. The EU legal order autonomous and/or integrated	3
2. Three European legal orders – economic, social and citizen?.....	6
3. A rights based order – economic, fundamental, social, human, citizen rights	9
III. RRP – first, second, third... how many generations?	11
1. The ambiguities of the concept of conferred or attributed competences.....	11
2. A shaky consensus – the competence divide in RRP.....	13
3. Beyond consensus – the horizontal implications of RRP.....	15
IV. The institutional framework of judge-made European Law on Remedies.....	19
1. The parameters: judicial co-operation, organised law enforcement and legitimacy in RRP	20
2. Is the concept of subjective rights a Procrustean bed?.....	21
a) Prevalence of EU economic rights over social rights	21
b) The missing EU collective rights.....	24
3. Competence (constitutional) boundaries in the development of an EU law on remedies	26
a) The impact of the distinction between primary vs. secondary EU law on RRP.....	27
b) The line between constitutional and non-constitutional RRP	29
V. Thoughts on the future for the EU law on remedies de lege lata	32
1. Constitutional implications: A right to access in the preliminary reference procedure	33
2. Substantive implications: RRP to counterbalance the European economic order	34
a) From uniform application to uniform enforcement.....	34
b) The principle of effectiveness and the doctrine of economic efficiency	36
c) Materialising the principle of equivalence	37
Bibliography	39

Introduction

Time and again the ECJ comes under fire, from the Member States who fear the loss of sovereignty, as well as from trade unions and public interest groups who fear the downgrading of 'The Social'. The overall message then may be condensed into the plea for a court which takes a more cautious stance. I am arguing the exact opposite, at least with regard to remedies in the social and the citizen rights order. Only more judicial activism can overcome the lacunae which results from a rights-remedy-procedure mechanism that is too much designed to enforce economic freedoms.

I. The ECJ between the individual citizen and the autonomy of the Member States

It is a well known phenomenon that the ECJ strengthened the position of the individual citizen in what was designed to be a Treaty under international public law between sovereign states. This form of judicial governance¹ met with sympathy in particular from the business side as the ECJ helped to tear down statutory national barriers to trade thereby enlarging economic freedoms. Consumers from all over Europe silently or explicitly supported the opening up of markets as they benefitted from greater choice. Things became more complicated when the European integration process changed its outlook in the aftermath of the Single European Act. The completion of the Internal Market came at a price – the gradual strengthening of policies that reached beyond the market such as environmental, consumer, health and social protection. The ECJ had to face the challenge of how to integrate and transform the 'Social',² which gradually found its way into the Treaty, in a judge-made legal order which was constructed on individually enforceable rights. The difficulties increased even further when the Treaty of Amsterdam introduced the concept of European Union citizenship which reaches beyond the original economic design of the European *Economic Union* as it was originally called. There is an abundant literature on the way in which the ECJ transformed all sorts of collective interests bearing a social dimension or even EU citizenship into individually enforceable rights. The ever stronger intrusion of the ECJ into the shaping of market freedoms, of social policies and of citizenship raised increasingly deep concerns in the Member States. The critique is nourished by one and the same concern – the weakening of the autonomy of the Member States through expansive and activist European courts that are blamed for the destruction of the national social welfare state – *Viking*³ and *Laval*,⁴ but also *Mangold*⁵ and *Küçükdeveci*⁶ – and for undermining the autonomy and the sovereignty of the nation state via the creation of European Union citizenship – *Carpenter*⁷ and *Metock*.⁸ The

*) The paper will be published in H.-W. Micklitz/B. de Witte (eds.), *The ECJ and the Autonomy of the Member States*, intersentia 2012. It refers to a number of articles that form part of this volume. They show up in the bibliography under 'in this volume'. I would like to thank L. Azoulai, Bruno de Witte, Norbert Reich and Hanna Schebesta for their comments, which helped to improve the paper. The usual disclaimer applies.

¹ S. Frerichs, *Judicial Governance in der europäischen Rechtsgemeinschaft, Integration durch Recht jenseits des Staates*, 2008.

² D. Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in: D. Kennedy, *The New Law and Economic Development*, 2006, p. 19.

³ C-341/05 *Laval v Byggnads et al.* [2007] ECR I-11767.

⁴ Cases C-438/05 *International Transport Workers Federation (ITF) and Finnish Seaman's Union (FSU) v Viking Line* [2007] ECR I-10779.

⁵ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

⁶ Case C-555/07 *Seda Küçükdeveci v Swedex* [2010] ECR I-(19.1.2010).

⁷ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

⁸ Case C-127/08 *Metock* [2008] ECR I-6241.

critique has gained impetus and the language is getting harder. The ECJ is time and again attacked for overstepping its adjudicatory powers, for acting *ultra vires*, for claiming Kompetenz-Kompetenz, i.e. constituent power, *pouvoir constituant*.⁹

The purpose of the conference held in Florence in April 2009 openly addressed the tension between an invasive ECJ which uses its ‘rights’ rhetoric to expand the reach of the European legal order and the Member States which are more and more concerned by their gradually reduced autonomy. In light of these concerns, my plea for an even more invasive ECJ in promoting the development of a genuine European system of rights, remedies and procedures (RRP) might come as a surprise (see *Antenbrink*). The legal-political and legal-academic mainstream seems to point in a different direction, maybe not to reducing the role and function of the ECJ as the driving force of European integration, but advocating for a kind of ‘stand-still’ agreement leaving room for more political co-ordination. This might be even more so in the aftermath of the failed European Constitution and the painstaking process which finally led to the adoption of the Lisbon Treaty. The Florence conference brought academics from all over Europe together, many of them outstanding scholars and leading experts in their respective fields. The original idea was to use a selection of areas of European law, such as competence, internal market, fundamental rights, citizenship, social rights, remedies – see the table of contents – to demonstrate the contrast between the pros and cons, the critics and the supporters of the ECJ. Whilst this attempt more or less failed, it is still sizable in the various contributions. My personal impression from two days of discussions and from re-reading the contributions is that the ‘ECJ managed it quite well to strike a balance between extension of the EU law and autonomy of the Member States’.

I will develop my argument in four steps, thereby using the various contributions to the conference as building blocks. I will first underline where I take the legitimacy for my plea from – the genuine and autonomous European legal order (II). I will then try to sketch out how far the consensus in RRP reaches and where the dissent begins (III). The next two chapters are an attempt to give shape to the *institutional* framework of a judge-made European law on remedies (IV), which reaches beyond individual subjective rights and which relates the different sources of the Treaty and its multi-faceted character as a legal order, a constitutional charter and a European Economic Constitution to a more developed and sophisticated system of rights, remedies and procedures. The final part (V) outlines how a judge-made European law on remedies *de lege lata* could and should look like *in concreto*, particularly focussing on how it would reach beyond consensus and allow for strengthening the particularities of a ‘genuine’ and ‘autonomous’ legal order. Judicial protection could and should not be limited to economic integration; rather it should be understood as a means of social integration, where the civil status and the economic status are merging. What I am presenting here are preliminary thoughts which take the findings of the conference into consideration, thoughts which need to be discussed and which need to be further sharpened.

II. RRP in a ‘new’ European legal order having its ‘own’ legal system

Let me first recall the oft-quoted references in the landmark judgments of the ECJ, where the ECJ transformed the Treaty into a European legal order and then later into a constitutional charter governed by supremacy and direct effect. I will put in bold letters what I believe to be decisive in the context of my argument. The question raised by *Adinolfi*¹⁰ with reference to *Kakouris*¹¹ is whether the fact that

⁹ This is the key argument of R. Herzog, published in *Frankfurter Allgemeine Zeitung*, 24. July 2008; see for a sound analysis of how these highly debated judgments fit into the existing European legal order, K. Lenaerts/J. A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, CMLR 2010, 1629.

¹⁰ The ‘procedural autonomy’ of Member States and the constraints stemming from the ECJ’s case-law: is judicial activism still necessary?, in this volume.

‘EU law had its own particular needs’ entails the development of community law specific RRP. This implies the need to look closer into the character of the European legal order, whether and to what extent it must be seen as an integral part of the national legal orders or whether it remains distinct and even separated from the national legal orders. My overall argument is that judicial protection forms an integral part of the constitutionalisation process of the EU.

1. *The EU legal order autonomous and/or integrated*

The first series of judgments in the early 1960’s underlined the innovative character of EEC. The second series in the 1980’s transformed the legal order into a constitutional charter thereby pursuing a twofold purpose: a progressive one when reading into the Treaty that the ECJ is equally competent to control the Parliament; and a defensive one in that the constitutional charter needs to be protected against political attempts to re-transform it into an international treaty. The most recent series then tackled the relationship between the European legal order and the national legal orders, which is crucial for our context.

In *Van Gend en Loos*,¹² the ECJ invented the formula which has dominated the debate over the legal character of the Treaty for almost 50 years:

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this treaty is more than an agreement which merely creates mutual obligations between the Contracting States... The conclusion to be drawn from this is that the Community constitutes **a new legal order of international law** for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. **Independently** of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to **confer upon them rights** which become part of their legal heritage.

The ‘new’ legal order is different from any other legal order, but it is one which is designed under international law, one which grants directly enforceable rights to individuals. In the light of the arguments brought forward by the Member States in the proceedings, the ECJ was well aware of the fact that it had no blueprint against which the ‘new’ legal order could be designed and that it led the European Economic Union, as it then was, into rough political and legal waters.¹³ The new legal order was ‘new’ in the true sense of the word. The European legal order was no longer regarded as a Treaty under international public law, nor was it seen as a ‘European nation’ or ‘a European state’ similar to the Member States: the European legal order was identified as being ‘different’ and ‘distinct’ from all other national and international orders. The content of the ‘new’ order remains rather vague, though. All that we learn is that the new order is one which is based on a competence division and on rights conferred to individuals – and that it is for the ECJ alone to decide which of the rules of the Treaty are given direct effect.¹⁴ In *Costa Enel*¹⁵ the ECJ established the supremacy of the European law inside the

¹¹ Kakouris, Do the Member States possess judicial procedural ‘autonomy’?, 34 CML Rev. (1997), 1389, 1411-1412.

¹² ECJ, 5.2.1962, Case 26/62, [1963] ECR-3.

¹³ F.C. Mayer, The Foundation of a Community of Law, M. Poiras Maduro/L. Azoulai (eds.), The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome, 2010, 16 at 18 ‘The Member States: A Double No’, but see also the rather positive reaction from the head of the German delegation that negotiated the EEC Treaty at 22. For a reconstruction of the history of *van Gend en Loos* and *Costa Enel*, M. Rasmussen, From *Costa v. Enel* to the Treaties of Rome: A brief history of a Legal Revolution, M. Poiras Maduro/L. Azoulai (eds.), The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome, 2010, 69.

¹⁴ Which is said to be the ‘crucial doctrinal contribution’, B. de Witte, The Continuous Significance of *van Gend en Loos*, in: M. Poiras Maduro/L. Azoulai (eds.), The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome, 2010, 9 at 10.

legal systems of the Member States and thereby completed what *M. Rasmussen*¹⁶ calls ‘a revolution in European law’.¹⁷ Here, contrary to *van Gend en Loos*, the ECJ was forced to take a position on the relationship between the two legal orders – the ‘new’ international one and the Member States’ domestic legal systems. It referred to EEC Treaty as being governed by its ‘own’ legal system, but integrated into the Member States legal systems:

By contrast with ordinary international treaties, the EEC treaty has created **its own legal system** which, on the entry into force of the Treaty, became **an integral part of the legal systems of the Member States** and which their courts are bound to apply

In *Les Verts*¹⁸ the ECJ called the Treaty for the first time a constitutional charter (with a small ‘c’¹⁹), thereby strengthening the system of remedies provided to Member States and the EU for reviewing the legality of EU measures. It is here where we find for the first time the notion of ‘a complete system of legal remedies and procedures’. This is a crucial message in the context of the paper as the doctrine affects the further shaping of RRP as well as the constitutional character of RRP:²⁰

(23) It must first be emphasized in this regard that the European Economic Community is a community based **on the rule of law, inasmuch as neither its Member States** nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the **basic constitutional charter**, the Treaty. In particular, in articles 173 (Now Art. 230) and 184 (now Art. 241), on the one hand, and in article 177 (now Art. 234) on the other, the Treaty established a **complete legal system of legal remedies and procedures** designed to permit the Court of Justice to review the legality of measures adopted by institutions.

In *Opinion 1/91*,²¹ in which the ECJ rejects the compatibility of the EEA Treaty with the EU Treaty, the ECJ is even more outspoken on the reach of the constitutional charter which is no longer ‘basic’ and which not only includes a system of remedies, but is explicitly said to be dominated by ‘supremacy’ and ‘direct effect’:

(21) (The) EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the **constitutional charter** of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the **subjects** of which comprise not only Member States, but also their nationals (see, in particular the judgment in Case 26/62 *Van Gend en Loos* (1963) ECR 1). The essential characteristic of the Community legal order which has thus been

¹⁵ ECJ, 15.7.1964, Case 6/64, [1964] ECR 585.

¹⁶ M. Rasmussen, *From Costa v. Enel to the Treaties of Rome: A brief history of a Legal Revolution*, M. Poyares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 69.

¹⁷ See also the seminal article of E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*. *AJIL* 75 (1981), 1.

¹⁸ ECJ, 26.9.1984, Case 294/83 [1986] ECR 1339 at 23, for a deeper reading, N. Walker, *Opening or Closure? The Constitutional Intimation of the ECJ*, in: M. Poyares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 333.

¹⁹ N. Walker, *Big ‘C’ or small ‘c’*, *ELJ* (12) 2006, 12-14.

²⁰ In later cases the ECJ was more reluctant on whether the system of the Treaty is to be regarded as ‘complete’, K. Lenaerts, *A Community Based on a ‘Constitutional Charter’ Community Law as a Complete and Coherent Constitution System*, in: M. Poyares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 298, at 307 with reference to ‘Pupino’; even harder A. Alemanno, *What Has Been, and What Could Be, Thirty Years after Les Verts/European/Parliament*, in: M. Poyares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, in 324 at 326 referring to Case C-314/85 *Foto-Frost*, Case C-222/84 *Johnston*, Case C-188/92 *TWD Textilwerke Deggendorf*, which have completed the ‘complete system’ and later in the text V.1.

²¹ ECJ, 14.12.1991, *Opinion 1/91* [1991] ECR I-6079 at 21.

established are in particular its **primacy** over the law of the Member States and the **direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves**.

The latest in the series of judgments to be mentioned here is *Kadi*,²² where the ECJ first recalled the formula found in *Les Verts*, but then added a new facet to the oscillating concept of a European Constitution:

(81) Being thus called upon, in the second place, to determine the scope of the review of legality, especially in the light of fundamental rights, that it must carry out concerning Community measures giving effect to resolutions of the Security Council, such as the contested regulation, the Court of First Instance first recalled ... that ... the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the **basic constitutional charter**, the EC Treaty, which established a **complete system of legal remedies and procedures** designed to enable the Court of Justice to review the legality of acts of the institutions

(202) Furthermore, **the coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars**, as intended by the framers of the Treaties now in force ... constitute considerations of an institutional kind militating against any extension of the bridge to articles of the EC Treaty other than those with which it explicitly creates a link.

Right from the beginning of what was later termed the ‘constitutionalisation process of the European Union’, two different strains of arguments can be clearly distinguished: (1) one which insists on the distinct nature of the European Treaty, encapsulated in references to a ‘new’ legal order which establishes ‘rights’ ‘independent’ from national legal orders (*van Gend en Loos*), enshrined in a constitutional charter (*Opinion 1/91*) and (2) one which underlines the strong link between the new European legal order, i.e. the constitutional charter, and its national counterparts by putting emphasis on the European legal order being an ‘integral part of the national legal systems’ (*Costa Enel*), being measured against the constitutional requirements inherent in national legal orders (*Les Verts*) or stressing explicitly the parallel nature of the Member States’ and the Community’s ‘integrated but separated legal orders’ (*Kadi*).

There is much room for interpretation of what exactly the latest shift in *Kadi* means and whether it contradicts the former concept. ECJ has not given a clear answer yet. One might, however, deduce from the landmark cases that the European legal order is both unique and separate, as well as being interrelated with - to the point of even being integrated into - the national legal orders. This distinction, however, is questioned by the well established practice of the ECJ to strive for an autonomous interpretation²³ of EU law, independently of whether it comes under the first or second category. Autonomous interpretation could therefore lead to differences even in areas where the EU law is integrated into the national law.

There is a first lesson to be learnt from the double function of the Treaty with regard to RRP – rights, remedies and procedures. There may be fields in which EU law and national law are congruent, but there might also be areas where the European legal order is specific in the sense that national legal orders do not contain a blueprint for action. The point then is not only where to draw the line between the two different situations but how to handle the doctrine established in *Les Verts* and confirmed in *Opinion 1/91* that the treaties provide for a ‘complete system of remedies and procedures’.

²² ECJ, 3.9.2008, Joined Cases C-402/05 P and C-415/05 P *Kadi*, [2008] ECR I-6351.

²³ ECJ 06.10.1982, Case C-283/81 (*C.I.L.F.I.T.*), [1982] ECR 3415.

2. *Three European legal orders – economic, social and citizen?*

It is a truism that the European legal order is based on rights and that the ECJ has been and still is the driving force behind this development ever since. The credo of the ECJ has already been laid down in *van Gend en Loos*:²⁴

Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended **to confer upon them rights which become part of their legal heritage**. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

When the ECJ coined that formula Europe was still called European *Economic* Community. So what the ECJ had implicitly in mind was the creation of economic rights to the benefit of business. Under the strong influence of German ordo-liberal thinking the European Economic Union was conceived as a *European Economic Constitution*.²⁵ The constitutional order of the EEC, the four freedoms and the competition rules, should shield business against statutory regulatory interventions in the market order by which all sorts of non-market related policies could be promoted. The directly applicable rights which the ECJ deduced from the Treaty were turned into a tool to eliminate any national statutory regulatory measures regarded as unduly and illegitimately hindering the free flow of goods and services. The mechanism established by the ECJ mainly under the preliminary reference procedure is certainly unique and has no counterpart in national or other supranational regional legal orders. At most, national legal orders allow nationals to invoke rights against statutory measures. What makes the EU mechanism unique is that it allows for the striking down of national statutory measures by reference to a superior legal order.

In Germany ordo-liberal thinking came under pressure with the rise of the social welfare state where ‘law’ became widely used to implant into the market order social policy concerns, enhanced protection of workers, as well as the newly discovered devices to protect the environment and the consumer. Similar tendencies could be observed in the European Union in the aftermath of the Single European Act. *Craig*²⁶ analyses how the extension of social competences in the broadest sense affected the autonomy of the Member States and changed the outlook of the European Union. Some go as far as arguing that the adoption of the Maastricht Treaty in 1991 constituted the end of the ordo-liberal European Economic Constitution.²⁷ Be that as it may, the Lisbon Treaty not only makes the Charter of Fundamental Rights an integral part of the European legal order, it also introduces under pressure from France the new paradigm of a ‘social market economy’. Whether the new paradigm must be read as the official end of the ordo-liberal version of the European Economic Constitution²⁸ or whether it is to be seen as mere window dressing,²⁹ remains to be seen.

²⁴ ECJ, 5.2.1962, Case 26/62, [1963] ECR-3.

²⁵ E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union*, Beiträge zu Recht, Theorie und Politik der Europäischen Integration, 2. Auflage 2006; 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, 29; J. Drexler, *Wettbewerbsverfassung*, in: A. v. Bogdandy/J. Bast (eds.), *Europäisches Verfassungsrecht*, 2. Aufl., Dordrecht etc., Springer, 2009, 905.

²⁶ *Competence and Member State Autonomy: Causality, Consequence and Legitimacy*, in this volume.

²⁷ 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, 29.

²⁸ In this direction L. Azoulay, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation*, CMLR 45 (2008), 1335.

²⁹ J. Drexler, *Wettbewerbsverfassung*, in: A. v. Bogdandy/J. Bast (eds.), *Europäisches Verfassungsrecht*, 2. Aufl., Dordrecht etc., Springer, 2009, p. 905.

What has undoubtedly changed is the character of the European legal order. The European economic order and the emerging European social order are standing side-by-side. I will not embark on the debate of whether the European Economic Constitution has now been complemented by a European Social Constitution, which would bring me to discuss the 'Many Constitutions of Europe'.³⁰ I would like, however, to raise the question whether and to what extent the so-called *European social order* could or should be regarded as a distinct legal order separate from the economic order governed by a proper understanding of RRP. The major differences between the economic order on the one hand and the social order on the other is that the Treaty even in its most developed form does not establish self-executing social rights, but merely formulates policy objectives which can only be achieved by way of secondary community law measures.³¹

The social field is not homogenous. That is why the situation differs considerably in the various areas of 'The Social', in regard to the transfer of competences, in scope and in depth. The Member States were prepared to delegate powers to the EU in the field of environmental, consumer protection and anti-discrimination, but were much more reluctant in core areas of social security and employment law.³² There is another major difference between the European economic order and the European social order. The former is inherently based on the idea that uniform standards apply all over Europe, while the latter draws on a distinction between minimum and maximum standards. The social dimension developed incrementally, step by step, and was designed to conceive a market based on a limited set of social guarantees. Originally social standards were regarded as being conceived as minimum standards per se, as the EU did not compete with the Member States over the design of the social welfare state. The deeper the EU intervened into 'The Social', the more the European Commission started advocating for maximum standards, at times alone but sometimes supported by the ECJ.³³ At the time of writing, it seems as if the heyday of maximum harmonisation policy is over and that a European social order will mainly be based on minimum standards or, to put it differently, the European social order based on minimum standards defines a framework which might be completed by higher national social standards.

Any shaping of RRP has to face the challenges of the minimax debate and the overarching degree of compliance between the European social order and the national social order. This means that there will remain few areas where the European social order is distinct from the national legal order. Distinct differences might show up where European social measures embark upon new areas within the respective policy field, such as e.g. the anti-discrimination law or where they deal with particular transborder issues that do not emerge in a purely national legal environment e.g. posted workers. RRP should be the same whether the underlying social standards are fully or partially harmonised. It does not make sense to distinguish RRP in fully harmonised areas from those where harmonisation lays down only minimum standards. However, one might consider the availability of distinct RRP in social areas that bear a genuine European character and remain outside the Member States' ambit.

I wonder whether there is a third legal order in the offing which again bears a particular European connotation – a European *citizen rights order*, although here the *transborder* dimension is much more dominant than in the social legal order.³⁴ Union citizenship was introduced in 1991 in the Treaty of

³⁰ K. Tuori/S. Sankari (eds.), *The Many Constitutions of Europe*, 2010.

³¹ The ECJ is quite generous in recognising 'rights' either as individually enforceable rights or as 'interests', which have to be taken into account, M. Kumm, *Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm* in M. Poiares Maduro/L. Azoulay (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 106.

³² F. Rödl, *Europäische Arbeitsverfassung*, in: A. v. Bogdandy (Hrsg.), *Europäisches Verfassungsrecht*, 2. Aufl., 2009.

³³ See Case C-205/07 *Gysbrechts* [2008] ECR I-9947; comment W.-H. Roth, *CMLRev* 2010, 509.

³⁴ The transborder dimension dominates the case law of the ECJ as well as the conception of European citizenship, F. Jacobs, *Citizenship of the European Union – A Legal Analysis*, *ELJ* 2007, 59; also L. Azoulay, *la Citoyenneté*

Maastricht. *Kostakopoulou*³⁵ and *Dougan*³⁶ discuss the development European Citizenship and the particular role of the ECJ. There is overall agreement in the legal doctrine that the ECJ has freed Union citizenship from the economic foundations of the European Union. This means that citizenship issues must not be related to economic activities. Citizenship rights are protected independent of whether the nationals (or to a certain extent the non-nationals) exercises a profession or is at least a passive recipient of the four market freedoms. *Kostakopoulou*³⁷ distinguishes three areas: citizenship as status, family reunification and non discriminatory restrictions. A whole series of bold judgments – *Grzelczyk*³⁸ and *Baumbast*³⁹ defining the status of citizenship, *Carpenter*, *Metock* and *Chen*⁴⁰ providing for a broad understanding of family reunification, just to name a few, have raised strong concerns in the respective Member States. There are at least two reasons which justify the reluctance of the Member States and which at the same time demonstrate the potential which lies in the development of a particular European citizen rights order. The first reason is that in *Baumbast* the ECJ understood Art. 21 TFEU as creating directly effective rights; the second that the ECJ deduced European Union citizenship directly from the nature of the EU legal order which seems to favour a reading under which the ECJ might be prepared to disconnect national from European Union citizenship.⁴¹ However, in *Rottmann*⁴² the ECJ clarified that there is no such thing as a European Union Citizenship which exists independent from national citizenship. In so far the ECJ interpreted Union citizenship as being an integral part of the national legal order.

What does this imply with regard to RRP's? Referring back to the basic distinction already enshrined in *van Gend en Loos* and *Costa Enel*, the European citizen rights order could be understood as a stand-alone order, widely disconnected though not independent from the Member States legal order. Contrary to social rights, the ECJ designed Union citizenship as a directly enforceable right enshrined in the Treaty itself. It is plain that there is no similar article in the Treaty which grants a particular status to consumers or workers. However, one might wonder whether the citizenship case-law could not be used to upgrade the position of the consumer and the worker in the Treaty. The European Commission has already introduced the citizen-consumer, a concept which gains ground in the academic discussion although its legal content remains to be spelt out.⁴³ Why should there not be a citizen-worker then?⁴⁴ My starting hypothesis is that the European citizen rights order could strengthen the status of workers, consumers and environmentalists in the European social order, and thereby under the European Economic Constitution by extension. The rather independent and largely

Européenne, un Statut d'Intégration Social, in: *Mélange en l'honneur du Professeur Jean Paul Jacqué*, Dalloz 2010, forthcoming.

³⁵ The European Court of Justice, Member State Autonomy and European Citizenship: Conjunctions and Disjunctions, in this volume.

³⁶ Judicial Activism or Constitutional Internaction? Policymaking by the ECJ in the field of Union Citizenship in this volume.

³⁷ In this volume.

³⁸ Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

³⁹ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

⁴⁰ Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

⁴¹ At least this is the understanding of *Kostakopoulou* taken in this volume.

⁴² ECJ, 2.3.2010, Case C-135/08 not yet reported. See for an attempt to separating nationality and citizenship M.J. Garot, *La Citoyenneté de l'Union Européenne*, 1999, as quoted in N. Reich, *Understanding EU Law*, 2nd edition 2005, at p. 86.

⁴³ See J. Davies, *Entrenchment of New Governance in Consumer Policy Formulation: A Platform for European Consumer Citizenship Practice?* JCP 2010, 201.

⁴⁴ M. Dougan, *Free Movement: The Workseeker as Citizen* 2001, 4 CYELS at 9; M. Bell/R. Whittle, *Between Social Policy and Union Citizenship, The Framework Directive on Equal Treatment in Employment*, ELrev 2002 (27) 677.

autonomous concept of European citizenship facilitates such a transfer of arguments and status from the European civil rights order to the social order. The European citizen rights order could serve as a bridge between the European economic order and the European social order – albeit a fragile bridge, however, as the two dimensions cannot so easily be merged.⁴⁵ The flip-side of the coin is the citizen-businessman. The citizenship dimension cannot be limited to the social order as it would equally affect the economic order. I will return to these implications later on.

3. *A rights based order – economic, fundamental, social, human, citizen rights*

The threefold distinction between the economic, the social and the citizen rights order suggests a clear-cut distribution between the respective categories of rights. Such an understanding is not very helpful, however. There would not seem to be any common understanding of how these different rights might be separated from one another, and if so what for. From my German background I would argue that distinguishing between economic, social and citizen rights is *prima vista* self-explanatory. Fundamental rights (Grundrechte)⁴⁶ cover all three dimensions, just as human rights do, at least if one takes the three generations of human rights into account. The difficulties are more subtle. The border line between economic and social rights is far from being clear. Many social rights bear a strong economic connotation, as came clear in *Viking* and *Laval*. Citizen rights reach into social rights, when combined in concepts like the citizen-consumer and citizen worker. Fundamental rights have no clear meaning. The ECJ sometimes qualifies economic rights as fundamental rights.⁴⁷ The EU Charter on Fundamental Rights sets out mostly social and citizen rights, but from a German understanding a number of these rights overlap with economic rights. *Azoulai*⁴⁸ and *Cartabia*⁴⁹ start from the premise that the Charter on Fundamental Rights, or even more specifically the notion of fundamental rights, does not deal with economic rights. Human rights – in particular via their interpretation through the European Court of Human Rights – are more and more economised which makes the envisaged integration of the European Human Rights Convention into the EU legal order more problematic.

RRPs show up as a human right in Arts. 6 and 13 ECHR and as a fundamental right in Art. 47 EU Charter. The ECJ has referred to Arts. 6 and 13 ECHR in all sorts of cases notwithstanding the nature of the right, be it economic, social and citizen. The same holds true with regard to the case-law in which the ECJ also referred to Art. 47 EU.⁵⁰ One might therefore wonder whether any attempt to classify the rights according to their origin or nature is helpful at all.

Similar confusion exists with regard to the right holder. The general understanding might be to associate rights, whatever they are and wherever they come from with a right holder, be it a natural or a legal person, a national, an EU national or a non-EU national. However, in *Schmidberger*⁵¹ and *Omega*⁵² the ECJ seems to understand the Member State as the right holder.⁵³ The question then arises

⁴⁵ A. J. Menéndez, European Citizenship after Martinez Sala and Bambast: Has European Law Become more Human and Less Social?, M. Poiras Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 363.

⁴⁶ A.v. Bogdandy, *The European Union as a Human Rights Organization?*, CMLR 2000, 1308.

⁴⁷ Case C-49/89, *Corsica Ferries France* 1989 ECR 4441 at 8, in this context L. Azoulia, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization*, CMLR 2008, 1335.

⁴⁸ The ECJ and the Autonomy of the Member States: The case of Fundamental Rights: A State of Ambivalence, in this volume.

⁴⁹ A pluralistic Europe of Rights, in this volume.

⁵⁰ Judgment 16.7.2009, Case C-12/08 *Mono Car Styling* [2009] ECR I-nyr at 47.

⁵¹ Case C-112/00 *Eugen Schmidberger v Austria* [2003] ECR I-5659.

⁵² Case C-36/02 *Omega* [2004] ECR I-9609.

as to whether Member States can hold fundamental rights,⁵⁴ as AG *Maduro*⁵⁵ seems to suggest when he writes: “the fact that the view of the fundamental rights held by a Member State is not shared by other Member States does not prevent that Member State from relying on it so as to justify a restriction of the freedom to provide services”. The deeper question is whether and to what extent Member States may defend public interests against competing private economic interests, which leads directly to the next complicated question of what might be understood by public interests or public policy (cies) at the European level, as can easily be demonstrated by reference to the ECJ case law in the social (consumer protection) field.⁵⁶ *Claro*⁵⁷ adds a new dimension to the uncertainty in that it queries the proper classification of RRP as individual rights or public policy. AG *Tizziano*⁵⁸ seeks the solution in the violation of the individual right to be heard, whereas the ECJ⁵⁹ seems prepared to understand certain mandatory consumer protection rules as public policy.

My search for a tentative explanation to the terminological and conceptual confusion directs me to what is termed ‘constitutionalisation’ of legal orders. The process of constitutionalisation is initiated and driven by the ‘rights revolution’. It covers all fields of law and, to the dismay of a large number of civil lawyers, also encompasses the national and the European private law regimes.⁶⁰ Economic rights are constitutionalised – not only via the concept of the European Economic Constitution but in particular via the impact of non-economic (mainly social) rights on economic rights. This happened in *Viking* and *Laval*. Social rights are going to be constitutionalised via the Treaty and via the Charter on Fundamental Rights – *Küçükdeveci* and the majority of the anti-discrimination cases might serve as examples. Civil rights may be regarded as constitutional rights per se, but in the framework of the Treaty they could serve a bridging function to social–constitutional rights (consumer protection) or economic–constitutional rights (the four freedoms).

The constitutionalisation process yields two major effects as stressed by *Azoulai*⁶¹: the potential threat of EU fundamental rights to national legal orders and the need to balance out conflicting values, i.e. conflicting rights at the EU level. *Azoulai* demonstrates how the fundamental rights issue turned from a threat of national (constitutional) law to EU law into a threat posed by EU fundamental rights to national (inter alia constitutional) laws. The latter aspect is spelt also out in detail by *Cartabia*. I would add that the need for constitutional balancing will necessarily arise as seemingly each and every

⁵³ See for a critical assessment of such an understanding, N. Reich, How proportionate is the proportionality principle in the internal market case law of the ECJ, in this volume.

⁵⁴ See the suggestive title of J.-D. Mouton, Vers une reconnaissance des droits fondamentaux aux Etats dans le système communautaire? In *Les Dynamiques du droit européen en début du siècle. Etudes en l’honneur de J.-C. Goutron*, 2004, 463.

⁵⁵ Case C-213/07, *Michanichi* 2008 ECR I-9999 at 32.

⁵⁶ E.g. whether consumer protection, being part of social protection, can be regarded as an integral part of public policy, ECJ, Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421; Case C-40/08, *Asturcom Telecomunicaciones SL*, judgment of 6 October 2009, I-nyr; Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi*, judgment of 4 June 2009 I-nyr.

⁵⁷ Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421.

⁵⁸ 27.4.2006, Case C-168/05 at 58.

⁵⁹ 26.10.2006, Case C-168/05 at 36.

⁶⁰ See for a discussion St. Grundmann (ed.), *Constitutional Values and Contract Law*, 2008; O. O. Cherednychenko, *Fundament Rights, Contract Law and the Protection of the Weaker Party, A Comparative Analysis of the Constitutionalisation of the Contract Law with Emphasis on Risky Financial Transactions*, 2008; A. C. Ciachhi/G. Brüggemeier/G. Commandé (eds.), *Fundamental Rights and Private Law in the European Union, Volume II, Comparative Analysis of Selected Case Patterns*, Cambridge University Press 2010; 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.

⁶¹ In this volume.

conflict and litigation today is claimed to bear a constitutional dimension. Such a finding implies that conflicts around RRP are perceived as constitutional conflicts regarding divergent values and that the extension of European RRP threatens the national legal orders. When each and every right bears a constitutional dimension as it enshrines constitutional values, then every right-holder also bears a constitutional responsibility.⁶²

RRPs *could* have a constitutional dimension. Any recognition of a new right under the Treaty bears a constitutional dimension – but is this equally true with regard to rights enshrined in secondary law, i.e. in the field of social protection? Remedies might contain a constitutional dimension when they affect the ‘particularities’ of the legal order of the European Union, as in *Francovich*. But the same cannot be said for each and every remedy in the field of consumer and labour law, although one might wonder from what point onwards does the non-availability of appropriate remedies gain a constitutional dimension. Procedures could have a constitutional dimension, but how does one distinguish more technical rules from those with a human or fundamental rights impact? I will come back to that distinction later in my paper. The ‘threat’ can also take different forms. *Azoulai* uses the paradigm in order to analyse the liberty, the independence and the identity of the State. He stresses the institutional implications between the ECJ and the Member States, but he does not look into the implications for an individual seeking ‘justice’ before and through the ECJ. Plaintiffs behind preliminary reference procedures feel threatened by the insufficiency, or even absence, of national RRP. They put their faith in the ECJ to improve their legal situation beyond the national level. In its rights-based approach to the European legal order the ECJ has itself set these expectations into motion, rather successfully with regard to the setting aside of national laws constituting barriers to trade, but much less successfully in the area of social regulation.

III. RRP – first, second, third... how many generations?

The majority of the voluminous literature dealing with RRP analyses the ECJ case-law *from within*, thereby trying to define a more or less clear demarcation of what shall be put in the hands of EU law and what shall remain for the Member States (courts). There is, however, a strong need to analyse the judge-made European legal order *from without*, i.e. from a constitutional perspective which starts from the premise that constitutionally a line must be drawn between EU and Member States competences in the application and enforcement of EU law. I will restrict myself to highlighting the difficulties which are enshrined in the concept of conferred or attributed powers when it comes down to shaping RRP, before I try to show how far the consensus in RRP might reach and where dissent will probably begin. This is a difficult task in light of the inconsistent case-law in the area of RRP, which *Bobek* calls a ‘mess’. My task is somewhat facilitated in that I do not intend to define a common denominator in the legal doctrine, but a common denominator in the case-law of the ECJ.

1. *The ambiguities of the concept of conferred or attributed competences*

Koen Lenaerts, an active judge of the ECJ, wrote in 2007:⁶³

By virtue of the principle of conferred or attributed competences, the Court of Justice of the European Communities exercises only the jurisdiction conferred on it by the Treaties. Otherwise, it falls to the courts of the Member States to adjudicate cases involving community law. In other words, each Member States contributes its own judicial system for the sake of ensuring the effective application and

⁶² In this vein, *Azoulai*, CMLR 2008, 1350 et seq., see on the possible consequences for the shaping of RRP under IV.3. b).

⁶³ *The Rule of Law and the Coherence of the Judicial System of the European Union*, CMLR 2007, 1625.

enforcement of Community law, which is indeed in line with the deeper philosophy of unity and diversity underlying the Union itself.

This statement reproduces in a highly condensed form the general self-understanding of the ECJ which is obviously in line with what the founding fathers of the Treaty had in mind, setting aside the rather opaque formula of ‘integrated but separated’ the ECJ found in *Kadi*. The thinking departs from a sense of the European and the national courts being institutionally parallel. Though they are deemed to be interlinked by the principle of conferred and attributed powers, the quotation suggests that it is possible to draw a clear demarcation line between national and European competences, between national and European jurisdiction, and so between national and European Courts. With all due respect to such a nicely and well balanced statement which correctly reflects the political and legal commonsense, the question might be allowed whether it is factually and normatively correct. *Azoulai*, *Basedow*⁶⁴ and *Bobek*⁶⁵ are united in the conviction that the key problem of the principle of conferred and attributed powers is that it does *not* define clear borderlines which could and should be respected by the ECJ in order to safeguard the autonomy of the Member States and that, in particular, the preliminary reference procedure paved the way for the Court’s activism which raised concern in the Member States. The competences rules are linked to the dynamic of completing the Internal Market and creating an ever closer Union: in short to a process which logically entails that there should be no boundaries at all. How close is close enough, how integrated is integrated enough? Already *E. Steindorff* has underlined that the European market is far from being fully integrated, at least in comparison to the US market. Whilst *Basedow* focuses on the open texture of the Internal Market logic as promoted by the preliminary reference procedure, *Bobek*⁶⁶ stresses that ‘once there is an EU law-based right which is to be enforced at the national level, its equivalent or effective enforcement covers all aspects of national procedure’, which is in strong contradiction to *Lenaerts*’ quotation.

My hypothesis is that it is exactly this open-textured judge-made legal order that, in the absence of a constitutional Treaty, explains the ever deeper incursions of the RRP case-law into national autonomy. Due to the lack of political will amongst the Member States to adopt a European Constitution deserving of the name, which does not revolve around economic integration but develops a genuine European social outlook and shapes the boundaries of the EU and the Member States levels in the application and enforcement of EU law, the ECJ or more precisely the European courts simply have no choice other than to continue along the path they have followed since *van Gend & Loos* as well as *Costa Enel* if they do not want to jeopardize the European integration project as a whole. The ECJ is not in a position to shape these boundaries. Like in so many other fields of EU law, the ECJ’s activism in RRP is inherently linked to the different functions the ECJ has to play. *Basedow* distinguishes between the review, the impulse and the uniformity function. In the field of RRP the latter two are at the forefront of what the ECJ has been doing and are key in the context of this paper. This does not mean that the review function is not equally important. It comes to bear when the ECJ has to assess whether Member States RRP suffice to meet the standard formula enshrined in secondary law.⁶⁷

⁶⁴ The Judge’s Role in European Integration – The Court of Justice and its Critics, in this volume.

⁶⁵ Why there is no principle of ‘Procedural Autonomy’ of the Member States?, in this volume.

⁶⁶ At p. 11 of this contribution.

⁶⁷ The post Heinger case-law of the ECJ might serve as a paradigmatic though rather sad example of judicial review in the field of consumer law, see under IV. 3. a).

2. *A shaky consensus – the competence divide in RRP*

There is a steadily growing case law on RRP – rights (subjective rights), remedies (compensation, restitution and injunctive relief/injunction) and procedure – and an equally growing voluminous literature. Advocates general and academics alike have been trying to structure the case law and sometimes to label its contents. First (initial deference to national remedies), second (assertive period of judicial activism) and third generation (retreat to the limited negative approximation) talk has become common, though the meaning and the selection criteria might differ.⁶⁸ The language is telling. The development of RRP is understood as a process which, although not never-ending, will be gradual and contain ups and downs, with activist and receptive phases. All in all, one might concur that RRP is creeping forward steadily but much less spectacularly than in other areas of substantive EU law, perhaps with the exception of the landmark decisions in which the ECJ ‘invented’ new remedies – interim relief in *Factortame*,⁶⁹ state liability in *Francovich*,⁷⁰ compensation for anti-discrimination in *Raccanelli*⁷¹ and for antitrust injuries to the benefit of any person in *Courage*⁷² and *Manfredi*,⁷³ as well as the somewhat less spectacular actions for injunction against discrimination in *Feryn*⁷⁴ and (individual) representative actions in environmental matters in *Janecek*.⁷⁵

I will start by summing up where we are currently in what I call a ‘judge-made Law on Remedies’. The ECJ, according to my hypothesis, is developing a genuine European Law on Remedies by drawing on the Treaty, secondary Union law and general principles.⁷⁶ One might argue that the ECJ is filling a ‘gap’ left in the Treaty and only partially covered by secondary Union law. This gap results from the absence of rules on a European procedural law.⁷⁷ Contrary to the United States, which often serves as a comparator, primary and secondary community law has to be enforced through national procedural rules, setting aside the patchy provisions enshrined in a given context or subject-related secondary rules. Under the Treaty the Member States remain competent for the enforcement and application of EU law. The Treaty is based on the concept of ‘*Vollzugsföderalismus*’ (literally ‘enforcement federalism’) – whereby the EU lays down the rules and the Member States apply them. It is from the institutional framework of the Treaty that the notion of ‘procedural autonomy’ of the Member States derives. Both concepts are interlinked but they should clearly be kept separated. *Azoulai* uses ‘autonomy’ as device to look deeper into what remains for the stateness of Member States in the ongoing European integration, while *Sarmiento* places emphasis on national institutional autonomy in order to argue that the authority of the EU law and the autonomy of the Member States can co-exist. Both emphasize the relationship between two different institutions, the EU and the

⁶⁸ M. Dougan, National Remedies before the Court of Justice, 2004, 227-233; T. Tridimas, The General Principles of EC Law, 2nd ed. 2006, 420-422.

⁶⁹ Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

⁷⁰ ECJ, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357.

⁷¹ ECJ, *Raccanelli*, [2008] ECR I-5939.

⁷² ECJ, Case C-453/99, [2001] ECR I-7079.

⁷³ ECJ, Case C-295/04 [2006] ECR I-6619.

⁷⁴ ECJ, Case C-54/07 *Feryn* (2008) ECR I-5187.

⁷⁵ ECJ, Case C-237/07 *Janecek* (2008) ECR I-6221.

⁷⁶ K. Lenaerts/K. Gutman, Federal Common Law in the European Union: A comparative perspective from the United States, *AJCL* 2006, 1.

⁷⁷ B. Hess, *Europäisches Zivilprozessrecht*, 2009, who argues that the bits and pieces are to become a consistent body of law, at least in the field of civil law. With regard to public procedural law, see J. Jans/R. de Lange/S. Prechal/R.J.G.M. Widdershoven, *Europeanisation of Public Law*, 2007 and J. Kokott, *Europäisierung des Verwaltungsprozessrechts*, *Verw* 31 (1998), 335.

Member States. This should not be confounded with ‘procedural autonomy’ which results from European ‘*Vollzugsföderalismus*’.

In the original perspective taken by the Treaty – and maintained in the various Treaty amendments, there is no room for the development of a judge-made European Law on Remedies. Be that as it may, as early as 1976 in *Rewe*,⁷⁸ the ECJ set into motion a process which, depending on the perspective, might be regarded as either integrationist – i.e. with a positive connotation – or interventionist i.e. with a negative connotation. The result of more than five decades of development⁷⁹ in the meantime is relatively clear and widely recognised. Since then, the ECJ has constantly stressed the ‘procedural autonomy’ of the Member States. At the same time, however, the ECJ is restricting and shaping that very same autonomy through the principle of equivalence – a variation of the anti-discrimination principle – the principle of effectiveness and occasionally the principle of proportionality. A striking example is the *ex officio* case-law where the ECJ struggles with the requirements under which Member States courts are obliged to investigate a possible infringement of EU law upon their own motion.⁸⁰ This development is perfectly characterised in the two contributions of *Adinolfi* and *Bobek*. If there is no such thing as procedural autonomy (*Bobek*), one might consider giving up the concept of ‘procedural autonomy’ and replacing it by ‘procedural competence’. The idea behind such thinking is that the EU should follow the US where procedural matters are regarded as constitutional matters as they cut across federal and state competence, whereas in the EU procedural autonomy is linked to the principles of efficiency and equivalence and so to the respective rights and remedies at stake.⁸¹

In defining the status quo in line with *W. van Gerven’s* seminal article⁸² ‘on rights, remedies and procedure’ I will use RRP as a synonym for the emerging European Law on Remedies. The following chart is intended to outline a common(ly) agreed/agreeable platform for further analysis. It takes a ‘constitutional’ perspective and relies on the distribution of competences between Member States and the EU as the starting point, despite concerns raised against the use of this paradigm in mapping the boundaries between EU and national law, thereby setting aside the public/private law divide⁸³ as well as possible differences resulting from primary/secondary Union law and/or subjects/actors.

	Member States level Autonomy	EU level – ECJ EU Procedural law
Rights		Derived from the EU Treaty and from Secondary Law
Remedies	<ul style="list-style-type: none"> • Competence of the Member States 	<ul style="list-style-type: none"> • Interim relief (<i>Factortame</i>) • State liability (<i>Francovich</i>) • Compensation for antitrust injuries

⁷⁸ ECJ, 16.12.1976, Case 33/76 *Rewe* [1989] ECR 176.

⁷⁹ See in particular the four contributions on *Francovich* in M. Poiras Maduro/L. Azoulay, *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 403.

⁸⁰ H. Schebesta, *Does the national court know European Law?*, in: S. Geschwandtner, V. Kosta, H. Schebesta, P. Verbrüggen, *The Impact of the Internal Market on Private Law of the Member Countries*, EUI Working Paper 22/2009, p. 47 = *Does the ECJ know European Law? A note on ex officio application after Asturcom ERPL* 2010, 847.

⁸¹ This is the conclusion of J. Lindholm, *State Procedure and Union Rights – A Comparison between the European Union and the United States*; phd Umäa, Iustus, 2007.

⁸² *Of Rights, Remedies and Procedures*, CMLR 2000, 501.

⁸³ N. Reich, *The public/private law divide in European Law*, in: H.-W. Micklitz/F. Cafaggi (eds.), *European Private Law After the Common Frame of Reference*, 2010, 56; L. Azoulay, *Sur un sens de la distinction public/privé dans le droit de l’union européenne*, RTD eur. 48 (2010), 853.

	Member States level Autonomy	EU level – ECJ EU Procedural law
		(Courage and Manfredi) <ul style="list-style-type: none"> • Reserve for additional remedies (<i>Unibet</i>)⁸⁴ • Injunction in anti-discrimination law (<i>Feryn</i>) • Representative action in environmental law (<i>Janecek</i>) • Sector or subject related secondary law
Procedure	<ul style="list-style-type: none"> • Procedural autonomy of the Member States strictu sensu⁸⁵ • Duty to investigate infringements of EU law ex officio (<i>Eco Swiss</i>,⁸⁶ <i>Claro, van der Weerd</i>,⁸⁷ <i>Asturcom</i>,⁸⁸ <i>Pannon</i>⁸⁹) 	<ul style="list-style-type: none"> • Principle of efficiency and equivalence (<i>Petersbroeck</i>,⁹⁰ <i>Palmisani</i>,⁹¹ <i>San Giorgio</i>⁹²) • Principle of Proportionality, rule of reason (<i>van Schijndel</i>)⁹³ • Policy related procedures in secondary law

3. Beyond consensus – the horizontal implications of RRP

The (assumed) harmony diminishes rapidly should the RRP be viewed from a different angle: one which turns the vertical state-based perspective into a horizontal one and where it is the relationship between individuals themselves rather than between the state and the individual that matters. By shifting from a vertical to a horizontal perspective the potential differences between the three legal orders, i.e. the economic, social and citizen rights order, as well as their implications come into clearer focus.⁹⁴

Though somewhat oversimplified, it might be argued that RRP in primary Union law mainly serves economic market integration goals via the elimination of statutory national barriers to trade. This is a vertical relationship, clearly demonstrated when businesses challenge national statutory laws via EU economic rights, remedies and procedures. Competition law is different as there the horizontal dimension dominates. Problems have arisen as a result of private parties seeking to strike down

⁸⁴ Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd*. [2007] ECR I-2271.

⁸⁵ W. van Gerven, CMLR 2000, 524.

⁸⁶ Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

⁸⁷ Joined Cases C-222/05 to C-225/05, *J. van der Weerd and others* [2007] ECR I-4233.

⁸⁸ Case C-40/08, *Asturcom Telecomunicaciones SL*, judgment of 6 October [2009] I-nyr.

⁸⁹ Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi*, judgment of 4 June [2009] I-4713.

⁹⁰ Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599.

⁹¹ Case C-261/95, *Palmisani v INPS* [1997] I-4025.

⁹² Case 199/82, *San Giorgio* [1983] ECR 3595.

⁹³ Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.

⁹⁴ L. Niglia, Form and substance in European Constitutional Law: the ‘Social’ Character of Indirect Effect, ELJ 2010, 439.

statutory rules which restrict competition (*Meng*).⁹⁵ The ECJ has strengthened the horizontal dimension of the economic freedoms in two directions, namely by recognising the rights of recipients of market freedoms (*Cowan*)⁹⁶ and by placing statutory regulations and private collective agreements on an equal footing (*Bosman*,⁹⁷ *Angnose*,⁹⁸ *Viking*, *Laval*, but note *Wouters*⁹⁹), thereby granting a limited horizontal direct effect to economic freedoms.

RRP in secondary Union law may *grosso modo* be associated with social regulation. The emerging European social order is designed mostly through secondary law measures, as the primary law's role is in granting the powers needed to realise social policy objectives, as is developed more clearly in the contributions of *Craig*, *Schiek*¹⁰⁰ and *Damjanovic*.¹⁰¹ Social regulation is enacted via public authorities, adopted by the EU and implemented and enforced by the Member States. Its effects may be vertical and/or horizontal depending on whether the contracting partner, or the wrongdoer in tort law cases, is a public authority or a private party. The ECJ was prepared to recognise the vertical direct effect of directives (*van Duyn*¹⁰²), but it has rejected horizontal direct effects (*Dori*¹⁰³). The consequence is that private parties are in a better position – at least with regard to EU law – when the contracting partner is a public employer or a state monopoly. The only means of reaching even a quasi-horizontal effect of secondary Union law measures in contract and tort law results from case-law requiring them to be interpreted in line with the community rules (*Marleasing*,¹⁰⁴ *Pfeiffer*,¹⁰⁵ *Adeneler*¹⁰⁶). Due to an active court, primary Union law may occasionally contain a social horizontal dimension, which is most clearly visible in directly applicable anti-discrimination cases (*Defrenne II*,¹⁰⁷ *Mangold*, *Kücükdevici*).¹⁰⁸ The second major area regards the recognition of patients' rights as an integral part of the freedom to choose trans-border health care services (*Kohll*,¹⁰⁹ *Decker*,¹¹⁰ *Watts*,¹¹¹ but *Commission vs. France*¹¹²). However, the addressee of the right to choose is again a public health care institution.

⁹⁵ Case C-2/91 *Criminal proceedings against Meng* [1993] ECR I-5751.

⁹⁶ Case C-186/87 *Cowan v Trésor public* [1995] ECR I-195.

⁹⁷ Case C-415/93 *ASBL v Bosman* [1995] ECR I-4921.

⁹⁸ Case C-281/98 *Angonese* [1995] ECR I-4139.

⁹⁹ Case C-309/99 *Wouters and others* [1995] ECR I-1577.

¹⁰⁰ D. Schiek, ECJ Fundamental Rights jurisprudence between Member States' prerogatives and citizens' autonomy, in this volume.

¹⁰¹ Damjanovic, 'Reserved Areas' of the Member States and the ECJ: The Case of Higher Education, in this volume.

¹⁰² Case C-41/74 *Van Duyn v Home Office* [1995] ECR 1337.

¹⁰³ C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325.

¹⁰⁴ Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* [1990] ECR I-4135.

¹⁰⁵ C-397/01 *Pfeiffer and others* [2004] ECR I-8835.

¹⁰⁶ Case C-212/04 *Adeneler and others* [2006] ECR I-6057.

¹⁰⁷ Case 43/75 *Defrenne v SABENA (Defrenne II)* [1976] ECR 455.

¹⁰⁸ L. Azoulaï, Sur un sens de la distinction public/privé dans le droit de l'union européenne, RTD eur. 48 (2010), 842 at 853.

¹⁰⁹ Case C-158/96 *Kohll v Union des caisses de maladie* [1998] I-1931.

¹¹⁰ Case C-120/95 *Decker v Caisse de maladie des employés privés* [1998] I-1831.

¹¹¹ Case C-372/04 *The Queen, on the application of: Yvonne Watts v Bedford Primary Care Trust, Secretary of State for Health*, [1995] I-4325.

¹¹² Where AG Sharpston rejects the attempt of the European Commission to achieve via primary Community law what it failed to realise by the stalled patient rights directive, 15. July 2010, Case C-512/08.

I have already made clear that the case law on citizenship reaches beyond economic integration and disconnects individually enforceable rights from the market logic. In the area of citizen rights, the substance of primary Union law and Directive 2004/38 (the so-called citizenship directive)¹¹³ might be read and interpreted as a homogeneous whole, at least with regard to the ECJ's vision of Union citizenship, and especially as regards the free movement rights conferred to in Art. 21 TFEU (former Art. 18). This is how I understand the analysis of the case-law of the ECJ undertaken by *Kostakopoulou* and *Dougan*. However, since 2008, and in particular with regard to the scope and content of Directive 2004/38, the ECJ's straightforward approach has lost its impetus and contours (*Förster*,¹¹⁴ *Bidar*,¹¹⁵ *Vatsouras*¹¹⁶). The ECJ has not yet had the opportunity to decide over the horizontal directive effect of Directive 2004/38. Setting aside the recognition of a directly applicable right under Art. 21 TFEU in *Baumbast*, the existing case law does not, as far as I know, provide any substantial additional input to RRP.¹¹⁷ Thus, it remains to be seen whether and how the citizen rights order may contribute to the further development of RRP in the European legal order as a whole. At the end of this paper, I will try to demonstrate what this impact might look like.¹¹⁸

The chart below condenses the existing case law and highlights the different stages of RRP in two areas: firstly, market integration via primary Union law and, secondly, in social regulation through secondary Union law, as is reflected in the distinction drawn between negative (market integration) and positive integration (social regulation). The parameters of analysis are the triad of rights, remedies and procedures in the way they have been given shape by the ECJ. The distinction between primary and secondary community law is crucial for a deeper understanding of the interplay between positive and negative integration as well as the concrete shaping of RRP in all three of the chosen parameters. There are some directives, most notably in consumer, labour and anti-discrimination law, that contain more specific rights, more detailed remedies and more concrete procedural rules. For the sake of argument, sector specific particularities are set aside and the emphasis is instead put on the general formula.

The differences between primary and secondary Union law as transposed into the distinction between vertical and horizontal relationships in the handling of RRP are striking and often neglected in legal doctrine. On the whole, one might distinguish three different layers: (1) The ECJ is most vigorous and most intrusive when it comes to enforcing primary EU law rules in the vertical, i.e. individual vs. state relationship; (2) The ECJ seems ready to grant appropriate rights and develop corresponding remedies in horizontal situations as long as business relations are at stake; (3) The ECJ is most reluctant in matters relating to the shaping of horizontal relations under the European social order. A disclaimer applies, however. One might detect tendencies in the case law of the ECJ of a desire to overcome these layers and to develop a more coherent and consistent legal order, thereby strengthening the horizontal dimension of RRP. Art. 47 will have a key role to play. Since 2000 the ECJ has regularly referred to Art. 47, often in tandem with Art. 6 and 13,¹¹⁹ but it seems that *Alassini*¹²⁰ was the first occasion where the ECJ was ready to give Art. 47 more weight in strengthening the role and function of ADR mechanisms as a means of access to justice.

¹¹³ OJ 2004 L 157/77. The Commission is quite critical on the effectiveness of the Directive, COM (2008) 85 final, at 5.

¹¹⁴ Case C-158/07 *Förster* [2008] ECR I-8507.

¹¹⁵ Case C-209/03 *Bidar* [2005] ECR I-2119.

¹¹⁶ Cases C-22/08 & C-23/08 *Vatsouras* (Judgment of 4 June 2009) [2009] I-4585.

¹¹⁷ See the account of F. Jacobs, *Citizenship of the European Union – A Legal Analysis*, ELJ 2007, 59 who does not devote particular attention to the RRP dimension, obviously because it does not play such an important role in the case-law.

¹¹⁸ See under IV. 3 and V.

¹¹⁹ See judgment 16.7.2009, C-12/08, *Mono Car Styling*, Slg. 2009, I-nyr, at 27 with further references.

¹²⁰ Judgment 18.3.2010, Case C-317/08 [2010] I-nyr at 61.

All in all, the chart might be read so as to confirm the high degree of autonomy Member States benefit from in shaping RRP within social regulation. This results from the standard formula under which Member States are obliged to take efficient, proportionate and dissuasive measures to enforce a given directive.

	Individual vs. state Vertical	Individual vs. individual Horizontal
(1) Rights under <i>primary</i> Union law - negative integration - - but <i>Johnston</i> ¹²¹ and <i>Heylens</i> ¹²² - but <i>Kohll, Dekker, Watts</i>	<ul style="list-style-type: none"> • Market freedoms • Competition law (<i>Meng</i>) • Non-discrimination (<i>Johnston</i> and <i>Heylens</i>) • Transborder health care (<i>Kohll, Dekker, Watts, Commission vs. France</i>) 	<ul style="list-style-type: none"> • Market freedoms as far as collective regulations (<i>Bosman, Wouters, Angonse, Viking, Laval</i>) • Competition law (<i>Courage</i> and <i>Manfredi</i>) • Non-discrimination (<i>Defrenne II, Manfredi, Küçükdevici, Raccanelli</i>)
(1) Rights under <i>secondary</i> EU law - positive integration -	<ul style="list-style-type: none"> • Vertical direct effect of directives (<i>van Duyn</i>) 	<ul style="list-style-type: none"> • No horizontal direct effect (<i>Dori</i>) • EU conforming interpretation (<i>Marleasing, Pfeiffer, Adelenor</i>)
(2) Remedies under <i>primary</i> EU law - negative integration - - but <i>Carpenter</i> and citizenship cases	<ul style="list-style-type: none"> • Interim relief (<i>Factortame</i>) • State liability (<i>Brasserie</i>¹²³) 	<ul style="list-style-type: none"> • Compensation for antitrust injuries (<i>Courage</i> and <i>Manfredi</i>) • Compensation for violation of market freedoms (<i>Bosman, Laval via national courts</i>,¹²⁴ <i>Raccanelli</i>)
(2) Remedies under <i>secondary</i> EU law - positive integration -	<ul style="list-style-type: none"> • State liability (executive) (<i>Dillenkofer</i>,¹²⁵ <i>Rechberger</i>¹²⁶) • State liability (judiciary) <i>Commission vs. Spain</i>¹²⁷) • Representative action in environmental law (<i>Janecek</i>) 	<ul style="list-style-type: none"> • Injunctions against discriminations (<i>Feryn</i>) • Injunctions in consumer law (no case law)
(3) Procedure under <i>primary</i> EU law	<ul style="list-style-type: none"> • virtually impossible or excessively difficult 	<ul style="list-style-type: none"> • 00 ?

¹²¹ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-1651.

¹²² Case 222/86 *Unectef v Heylens* [1987] ECR I-4097.

¹²³ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

¹²⁴ N. Reich, *Laval, Vierter Akt*, EuZW 2010, 454.

¹²⁵ Case C-178/94 *Dillenkofer and others v Bundesrepublik Deutschland* [1996] I-4845.

¹²⁶ Case C-139/97 *Rechberger and others* [1996] ECR I-3499.

¹²⁷ 12.11.2009, Case C-154/08, [2009] I-nyr. The Spanish Supreme Court judgment is blamed to be in breach of Directive 77/388/EC (common value added taxes).

	Individual vs. state Vertical	Individual vs. individual Horizontal
- negative integration -	<i>(Francovich formula)</i>	
(4) Procedure under <i>secondary</i> EU law - positive integration -	<ul style="list-style-type: none"> • State liability for violation of EU procedural rules (<i>COS.MET</i>¹²⁸) • Stand still procedure (<i>CIA-Security</i>¹²⁹) 	<ul style="list-style-type: none"> • Standard formula ‘effective, proportionate and dissuasive’¹³⁰ • Consumer law (<i>Claro, Cofidis, Asturcom, Pannon</i>) • Labour law and IP law

IV. The institutional framework of judge-made European Law on Remedies

I have explored elsewhere how the judge-made European legal order, which later came to be seen as a Constitutional Charter (*van Gend en Loos, Costa Enel, Les Verts, Opinion 1/91, Kadi*), is based on three pillars: judicial co-operation between the European courts and the national referring courts under the preliminary reference procedure, organised law enforcement via the systematic use of individually enforceable rights, and the political legitimacy of the judgments.¹³¹ Such a preconception explains, to my mind, the key role of RRP in the development of the European law on remedies. This is the first matter explored below.

RRPs are built on the existence of *individual* rights whatever the qualifications and capabilities of the person at stake are. The ECJ has enhanced what *Durkheim*¹³² called the ‘cult of the individual’, which was so paradigmatic for the developments seen the 20th century. The collective side of the society – solidarity between individuals and the realisation of solidarity through collective rights – largely falls by the wayside. Hence, the Procrustean bed of subjective rights forms the basis of my second point.¹³³

RRPs have to be placed within the constitutional boundaries of the Treaty. This statement needs a short clarification of what constitutional boundaries in the Treaty are. I will refer here to a kind of a common sense found in the legal doctrine, and then transfer the constitutional boundaries to RRP in order to test the possible impact on the distinction between primary and secondary EU law. Similarly, this will help in trying to define the line between constitutional and non-constitutional RRP. Together, these discussions form my third point.

¹²⁸ Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749.

¹²⁹ Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] I-2201.

¹³⁰ The formula slightly varies, but in substance it is composed of these three elements.

¹³¹ The Politics of Judicial Co-operation in the EU 2005, at 11.

¹³² See on this R. Münch, *Die Konstruktion der Europäischen Gesellschaft*, 2008 at 71 and 141.

¹³³ Ph. Bobbitt, *Terror and Consent*, 2008 at p. 487 and D. Patterson/A. Afilalo, *The New Global Trading Order, The Evolving State and the Future of Trade*, 2008, argue both that the turn to the individual is the result of the transformation of the nation state after World War Two. In such a perspective the individualisation is the result of a process that cannot be turned back.

I. The parameters: judicial co-operation, organised law enforcement and legitimacy in RRP

This is not the place to go much deeper into the ways in which European courts and national courts co-operate in the RRP issues.¹³⁴ However, implicitly or explicitly, all contributors share the same conviction. The current debate around the autonomy of the Member States has, by and large, been triggered by the ECJ's approach to institutional shaping under the Treaty's preliminary reference procedure, which has remained unaffected since 1957. Two of the authors, *Reich* and *Sarmiento*, go even further and criticise the insufficient factual and normative basis on which the ECJ has to base its judgment. *Sarmiento* especially disapproves of the fact that individuals have no access to the preliminary reference procedure, an issue which deserves further exploration.¹³⁵

Organised law enforcement was not really an explicit subject of the conference. Implicitly all those dealing with economic (*Basedow*, *Reich*) fundamental (*Azoulai*, *Cartabia*), social (*Schiek*, *Damjanovic*), citizen rights (*Dougan*, *Kostakopolou*) as well as those dealing with RRP (*Adinolfi*, *Bobek*, *Sarmiento*) rely on natural or legal persons, workers, migrants, citizens and consumers who are ready to fight before both national courts and the ECJ through preliminary references for the rights they have been granted via primary or secondary EU law and now even via the Charter of Fundamental Rights.

The legitimacy issue appears again in the guise of the competence conflict between the intruding ECJ and the autonomy-defending Member States – which was the theme of the conference. Indeed, the legitimacy issue seemed to constitute an ever-present silent observer of the overall debate as to whether the ECJ has gone too far in the ever more expansive European legal order. A number of contributions shed new light on old questions, be they institutional or subject-related.

Craig highlights how the Member States themselves have, over the course of the more than fifty years since its signing, extended the regulatory frame of the Treaty to their own detriment and without ever setting outer boundaries on the jurisdiction of the ECJ, as highlighted by *Azoulai*, *Basedow* and *Bobek*. *Sarmiento* touches upon the democratic legitimacy of the preliminary reference procedure which has as its source the strong reliance on organised law enforcement that is, in principle, open not only to business, but also to workers, consumers and citizens. *Azoulai* confronts the well established legitimacy of the ECJ in building an economic order with the shaky one in the social order. He argues that in the field of economic rights the Court's case law is governed by 'the argument of transnational effects' which Member States have to take into account.¹³⁶ He claims that such a justification is still missing with regard to the trans-border reach of fundamental rights (he refers mostly to social rights), although the newly introduced reference to the 'Social Market Economy' might fill that gap. I wonder whether the justification can be found in the need for member states to take the social rights of non-nationals and non-citizens into account when they seek justifications for national social standards.¹³⁷

Beyond the more institutional patterns, the lesson to be learnt from the contributions is that legitimacy is connected to the issues at stake. *Dougan* takes a sharp critical stand against the ECJ case law on citizen rights and migration issues, which is said to set reduce Member States' room to manoeuvre when drafting policies. *Damjanovic* is concerned by the ECJ's massive intervention to the benefit of

¹³⁴ See on a deeper analysis of the kind of co-operation, L. Corrias, *The Passivity of Law: Competence and Constitution in the European Court of Justice*, phd 2010 at 138 and 141.

¹³⁵ See in more detail, under V. 1.

¹³⁶ M. Poiars Maduro, *Reforming the Market or the State? Art. 30 and the European Constitution: Economic Freedom and Political Rights*, *ELJ* 1997, 55, A. Menon/St. Weatherill, *Legitimacy, Accountability, and Delegation in the European Union*, in: A. Arnulf/D. Wincott (eds.), *Accountability and Legitimacy in the European Union*, 2002, 113.

¹³⁷ AG Maduro made this argument in his opinion in *Viking Cases C-438/05 International Transport Workers Federation (ITF) and Finnish Seaman's Union (FSU) v Viking Line* [2007] ECR I-10779 at 70, whereas L. Azoulai, *CMLR* 2008, 1350 rejects that argument.

students' mobility, in particular for those going from Germany to Austria and from France to Belgium. *Reich* pleads for more cautious use of the proportionality principle in what he terms the 'quasi-legislative approach' where the ECJ is charged with acting as a legislator.

2. *Is the concept of subjective rights a Procrustean bed?*

Subjective rights are status-related. One must have an economic, social or civil status in order to be able to benefit from rights as businessmen, as consumers, customers, tourists, patients, workers, environmentalists, as citizens, migrants or students. The list could easily be extended. What the ECJ has been doing ever since its inception is defining a particular status for nationals as individuals and to link that status to the existence of a particular right, sometimes a remedy and then, last but not least, to the guarantee of minimum procedural requirements. The concept of subjective status-related rights leads to what *Luhmann* calls 'Ausdifferenzierung der Gesellschaft'. This is possible because the individual right holders defend not only their interests but also those of the public at large. In fact, these individual rights may be regarded as 'public' individual rights.¹³⁸ In more practical and more doctrinal terms: one needs to have a status in order to have an enforceable right. I have demonstrated that the ECJ has developed a European legal order which is composed of three constitutive elements, the economic, the social and the citizen rights order. Each order is perceived and legally constructed through the lenses of the individual: the economic order is based on the ideology that individualism fosters economic success and economic integration; the social order relies on the individual in her particular status (consumer, customer, tourist, patient, etc.) to foster and finally achieve equality and justice; the citizen rights order is not a political order as such, rather it is an order where the citizen only exists with regard to particular EU relevant activities, family reunification or migration.

One may easily squeeze the legal construction of the judge-made European legal order into such a scenario. In granting direct effect to the Treaty and later to the directives the ECJ relied on the self interest of individuals, private persons and legal entities to foster the integration process. The consistently high rate of preliminary reference procedures, about 50 % of all cases, testifies to the success of the ECJ judges' 'realism and passion'. However, the whole concept of subjective (public) rights depends on those who are able and willing to file a law suit. Since *Galanter*¹³⁹ we have become aware of the different chances of repeat players and single players. The ECJ mainly relies on the market for litigation which structurally favours business. The success of the judge-made legal order comes at a double price: the individualisation of society via status related rights – which, in turn, tilts the balance between the economic and the social.

a) Prevalence of EU economic rights over social rights

The Treaty even in its current form does not seem to counterbalance the dominant market rational of the European integration process. Translated into the logic of RRP, the Treaty does still not contain individually enforceable social rights. Here the difference between rights and interests matter. Social interests play a role, not least via the Charter of Fundamental Rights, and they may even gain

¹³⁸ See AG Trstenjak, C-445/06 *Danske Slagterier* [2009] ECR I-2119 at 75, for a deeper analysis of individual public rights, L. Azoulai, Sur un sens de la distinction public/privé dans le droit de l'union européenne, RTD eur. 48 (2010) at 851 with reference to N. Foulquier, Les droits publics subjectifs des administrés, 2003.

¹³⁹ M. Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change (1974) 9 *Law and Society Review* 95.

constitutional relevance but they are not condensed into ‘individually enforceable rights’.¹⁴⁰ One might even go further and raise the questions as to what extent ‘the Social’ can be broken down into individual rights at all. At the very least ‘The Social’ might change its outlook.¹⁴¹ It is true that since *Cowan (tourists)*, *Kohll and Watts (patients)*, *Defrenne II (workers)* and *Viking (labour unions)* the recipients of the market freedoms may equally benefit from RRP to improve their legal position. The status as a recipient, however, is linked to the prior existence of economic freedoms as a reference point for taking action. *Viking* demonstrates that the recognition of a social right (the right to strike) via economic freedoms (Art. 43 EU, now Art. 49 TFEU) does not automatically lead to the legalisation of the collective activities. My point is not to challenge the need to balance conflicting rights (see on this aspect *Reich*), rather is that it matters whether a social right is derived from the social order or is derived from the economic freedoms. There are limits to construing a social order out of economic freedoms, limits which may also have to do with the methodology that the ECJ applies. *Azoulai*¹⁴² has amply demonstrated that the ECJ uses the argumentation it developed in the shaping of economic freedoms to handle social and citizen rights.

With the outlook of the European Union gradually changing by way mainly of secondary legislation, the ECJ was faced with the challenge of whether and to what extent the concept of subject rights could be extended to market based (consumer law, company law, labour law) social regulation. The recognition of vertical direct effect (*van Dyn*) constituted a major step in the development of RRP, as did the discovery of state liability (*Francoovich*) as a means of sanctioning the non- or incomplete implementation of directives by the Member States. However, the ECJ did not grant horizontal direct effect to directives. One might argue that the ECJ developed, or is going to recognise, a negative horizontal direct effect of directives (*Quelle, Mangold, Küçükdevici*) and that the obligation of EU conforming interpretation could operate as a functional equivalent to the missing horizontal direct effect of directives.

What is more important is that by denying horizontal direct effect the ECJ sent, possibly unintentionally, a rather problematic message to the Member States, their courts and to the EU citizens: We the Court are not responsible for striking a *structural* balance between the economic and social order. Social matters are instead for the Member States and their courts to decide. I will not deny that the ECJ may take favourable decisions to protect the weaker parties in individual cases, but it is not ready to free the protective device of secondary community law rules from its individualistic outlook and to transform it into a structural rule, like the German Constitutional Court did in the *Bürgschaftsurteil*.¹⁴³ The emerging European social order which establishes a kind of a framework of protections for consumers and workers could serve as a generally agreeable minimum standard of a ‘European Social Market Economy’. In this vein, the ‘constitutional division of power’ (*Lenaerts*) and the transformation of the national social welfare state (*Bobbitt and Patterson/Afilalo*), which puts much more emphasis on individual public rights, could be united in a new supranational concept. So

¹⁴⁰ See M. Kumm, *Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm*, in M. Poiras Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 106.

¹⁴¹ I have coined the term of ‘access justice’ which is characteristic for the model of justice dominating the European law, see *Social Justice and Access Justice in Private Law*, Working Paper EUI 2011/02.

¹⁴² As demonstrated in the way the ECJ decided *Viking* thereby turning *Defrenne* upside down, L. Azoulai, *CMLR* 2008, 1350-1351.

¹⁴³ Federal German Constitutional Court, BVerG, *Beschl. v. 19.10.1993-1 BvR 567/89 u.a.* in: *NJW* 1994, S. 36 ff.

why not accept horizontal direct effect?¹⁴⁴ In *Küçükdevici* the ECJ has prepared the ground for such an understanding, at least with regard to the application of the non-discrimination principle.

In sum, thus far secondary community law that can often be equated with market based social regulation does not seem to benefit from the same weighty appreciation as do the four economic freedoms. One might glean from the case law that the application and enforcement of the market freedoms belongs (much more) to the core of the ECJ jurisdiction, compared to the application and enforcement of market based social regulation where Member States and their courts have to take the lead. Where the ECJ is ready to get involved in social regulation, it is accused of subjugating national social rights to the prevalence of EU economic freedoms (*Schiek*). Secondly, in differentiating between the potential horizontal direct effects of the market freedoms and the widely rejected horizontal direct effect of socially biased directives, the ECJ has created a model of individual ‘rights without duties’,¹⁴⁵ a legal system where the infringement of subject rights results in some form of state liability, if any. The addressees of the rights, i.e. those who have to meet the EU obligations, remain largely outside the ambit of EU law, perhaps with the exception of those who benefit from the broad interpretation of the anti-discrimination principle.

The judge-made European legal order looks more ‘human’,¹⁴⁶ if one takes the ECJ case law on citizen rights into account, at least in the view of those who hail the ground-breaking progress made by the ECJ in *Martinez Sala* and *Baumbast*.¹⁴⁷ However, both decisions have a ‘dark’ side, as they import a non-solidaristic logic into areas of the legal system which had previously been protected from economic pressure. It suffices to refer to the position the ECJ has taken with regard to student mobility. The individual advantage for the lucky ones may lead to a collapse of the whole institutional framework of higher education in Belgium and Austria (*Damjanovic*).¹⁴⁸ The ‘transnational effects’ that *Azoulai*¹⁴⁹ argues for, have not been taken into account by the ECJ. So there more is needed than simply linking the different orders together and then using citizen rights as a tool to ‘upgrade’ social (citizen-consumer) and maybe even economic (citizen-businessman) rights. In a nutshell, *Bosman*, *Agnose* and *Laval* may allow for a new understanding of the responsibilities imposed on private parties. If private parties are also the holders of the ‘public interests’ then they bear a responsibility which extends beyond seeking individual or collective economic advantage. The degradation of the state as the unique holder of social rights goes appears to herald an increase in responsibilities for private parties.¹⁵⁰ This is in essence what the citizen dimension is all about.

¹⁴⁴ See for a summary of the arguments AG has done this perfectly in C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325; deeper L. Niglia, Form and substance in European Constitutional Law: the ‘Social’ Character of Indirect Effect, ELJ 2010, 439.

¹⁴⁵ N. Reich, Rights without Duties, Yearbook of European Law 2010, forthcoming.

¹⁴⁶ A.J. Menéndez, European Citizenship after *Martinez Sala* and *Baumbast*: Has European Law Become more Human and Less Social?, M. Poyares Maduro/L. Azoulai, The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome, 2010, 363 at 364.

¹⁴⁷ See the analysis of F. Jacobs, Citizenship of the European Union – A Legal Analysis, ELJ 2007, 59.

¹⁴⁸ ECJ, Case C-73/08 *Bressol* [2010] ECR I-nyr (judgment of 13.4.2010).

¹⁴⁹ See also from the same author also L. Azoulai, la Citoyenneté Européenne, un Statut d’Intégration Sociale, in *Mélange en l’honneur du Professeur Jean Paul Jacqué*, Dalloz 2010, forthcoming, where he conceptualizes European citizenship as a form and means of social integration, thereby crossing the borderline between economic, social and citizen rights.

¹⁵⁰ L. Azoulai, Sur un sens de la distinction public/privé dans le droit de l’union européenne, RTD eur. 48 (2010), 842; the same, CMLR 2008, 1350.

b) The missing EU collective rights

A legal order based on individually enforceable rights is not in a position to cope with the collective dimension of social conflicts. The Lisbon Treaty and the Charter of Fundamental Rights have upgraded solidarity and made it into a value-guiding principle. However, the ECJ has neither managed to cope with solidarity and to transform it into a building block of the European Social Order, nor tried to build a link between the EU concept of solidarity and collective rights.¹⁵¹ That is why collective conflicts have to be turned into individual rights to make them heard in the European right concert. This transformation matters in particular in the different fields of social regulation. Trade Unions, women's organisations and environmental organisations have all developed quite successful strategies of organised law enforcement in order to implement the doctrine of equal treatment.¹⁵² Consumer organisations, meanwhile, have also followed suit but in a much less organised way and with less visible results. *Quelle*, however, may represent a creative attempt to use collective actions under national law to bring a consumer case to the ECJ via the preliminary reference procedure. The ECJ has been innovative in granting individuals standing where their actions produce collective effects. In *Janecek*¹⁵³ it obliged the Member States authorities to set up action plans against air pollution to protect the individual rights of EU citizens. The logic behind this could easily be transferred to the field of financial services.¹⁵⁴

The Treaty does not deal with collective rights, with the exception of Art. 263 (4) TFEU. Notwithstanding, the question of under which exact conditions these articles grant NGOs standing to sue has been subject of a major controversy even between the CFI and the ECJ. In *UPA*¹⁵⁵ and *Jégo-Quéré*¹⁵⁶ the ECJ held – contrary to AG *Jacobs* – as inadmissible two actions for the annulment of community regulations because the respective applicants did not satisfy the condition of individual concern under the then Art. 230 EU. The ECJ delegated the question of who should have standing to the Member States. In *Lesoochránárske VLK*¹⁵⁷ the ECJ will have to decide over an interesting variant of the collective standing issue or, in terms of the 'Les Verts' decision, whether or not the system of judicial protection under the Treaty is indeed 'complete'.¹⁵⁸ The Aarhus Convention is quite outspoken on the existence of collective rights in environmental matters. The European Commission presented a Draft¹⁵⁹ which was meant to implement the Aarhus Convention and which would have introduced common standards on collective actions European wide. However, the initiative failed and the Draft

¹⁵¹ A. Wunder, *The Usage of Solidarity in the Jurisdiction of the ECJ: Symbolism or a European Legal Concept*, LLM thesis Florence 2008.

¹⁵² C. Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in: S. Sciarra (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice*, 2001, 31.

¹⁵³ ECJ C-237/07, *Janecek v Freistaat Bayern*, [2008] 2008 ECR I-6221.

¹⁵⁴ J. Keßler/H.-W. Micklitz/N. Reich (eds.), *Institutionelle Finanzmarktaufsicht und Verbraucherschutz, Eine rechtsvergleichende Untersuchung der Regelungssysteme in Deutschland, Italien, Schweden, dem Vereinigten Königreich und der Europäischen Gemeinschaft, unter Mitarbeit von Valentina Calderai/K. Purnhagen/P. Verbruggen*, 2010, p. 278/279.

¹⁵⁵ 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.

¹⁵⁶ 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.

¹⁵⁷ Case C-240/09 not yet decided by the Court.

¹⁵⁸ K. Lenaerts, *A Community Based on a 'Constitutional Charter' Community Law as a Complete and Coherent Constitution System*, in: M. Poyares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 295, at 304.

¹⁵⁹ COM (2003) 624 final, thereto H.-W. Micklitz, *Collective action in European Consumer and European Environmental Law – A mutual learning Process*, in *Reflections on 30 Years of EU Environmental Law A High Level of Protection* (ed.), R. Macory (Festschrift für Ludwig Krämer), European Law Publishing, 2005, 451-473.

fell into oblivion. AG *Sharpston* rejected attempts by Slovakian environmental organisations to construe a right to standing in administrative procedures (access to courts) by reference to Art. 9 (3) Aarhus Convention, thereby using the lack of the EU implementation measures as the key argument for delegating final decisions on locus standi claims to the Member States and, eventually, to national courts. This is very much in line with *UPA* and *Jego-Quéré* as well as the rejection of direct effect of the WTO Treaty.¹⁶⁰ I would not be surprised if the ECJ would fully confirm her reasoning.

In its case law on Art. 263 (4) TFEU, the ECJ has set the tone for the role and function NGOs could and should play in the building of the European legal order. In practice, they have effectively been excluded from the development of a judge-made legal order, as they have no direct access to the ECJ. Their role and function is left to the discretion of national courts and national legislators. To this extent, *UPA* and *Jégo Quéré* may be seen as equivalent to the denial of horizontal direct effect of directives.

What holds true for Art. 263 (4) TFEU is equally correct with regard to the role and function of NGOs in market-based social regulation. Their position depends entirely on the degree to which Member States are willing to introduce collective remedies, initiated via secondary EU law or not as the case may be. In consumer law the collective action of injunction in the hands of public authorities or consumer organisations belongs to the minimum standard of collective actions.¹⁶¹ The addressees of the actions for injunction, however, are Member States institutions. The consumer directives do not foresee that EU institutions could elaborate consumer rules which come under the scope of the different directives. A good example are the technical standards in the field of services which are, legally speaking, standard contract terms elaborated by the European standards bodies (CEN/CENELEC) within the framework of the Service Directive.¹⁶² No case has ever reached the ECJ so far. Labour law and even anti-discrimination law remains behind consumer law. The respective directives do not provide for collective actions, not even for an action of injunction. In *Feryn*¹⁶³, however, the ECJ, in line with Advocate General *Maduro*, developed a collective right to injunction in order to guarantee effective legal protection out of the individual right to be protected against discriminatory job selection criteria. Such reasoning seems in line with the reserve voiced in *Unibet* regarding the possibility of introducing new European remedies in cases of urgent need (*Sarmiento*).¹⁶⁴ Thus, *Unibet* might be understood as a cautious correction of *Les Verts* and *Opinion 1/91*, where the ECJ insisted on a ‘complete system of remedies and procedures’,¹⁶⁵ although it still seeks the roots for any new remedies in the national legal systems.¹⁶⁶

¹⁶⁰ See for a recent case *C-377/07 Van Parys v Belgische Interventie- en Restitutie Bureau* [2005] ECR I-1465. However, the ECJ has granted indirect effect in Case 70/87 *Fediol* [1989] ECR 1781 and Case C-69/89 *Nakajima* [1991] ECR I-2069.

¹⁶¹ See N. Reich/H.-W. Micklitz, *Europäisches Verbraucherrecht*, 4. Auflage 2006, § 29.15.

¹⁶² See H.-W. Micklitz, *The Service Directive – The making of consumer contract law via standardisation, the example of the Service Directive*, in *Festschrift für G. Brüggemeier*, 2009, 483; Ch. Busch, *DIN-Normen für Dienstleistungen – Das Europäische Normungskomitee produziert Musterverträge*, *NJW* 2010, 3061.

¹⁶³ ECJ, 10.7.2008, *C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, [2008] I-5187.

¹⁶⁴ For a more reluctant reading N. Reich, *Understanding EU Law*, 3rd edition, forthcoming 2011, who stresses the role of national law.

¹⁶⁵ See *Les Verts*, ECJ, 26.9.1984, Case 294/83 [1986] ECR 1339 at 23; in later cases the ECJ was more reluctant on whether the system of the Treaty is to be regarded as ‘complete’, K. Lenaerts, *A Community Based on a ‘Constitutional Charter’ Community Law as a Complete and Coherent Constitution System*, in: M. Poiras Maduro/L. Azoulay (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 298, at 307 under reference to ‘Pupino’; even harder A. Alemanno, *What Has Been, and What Could Be, Thirty Years after Les Verts/European/Parliament*, in: M. Poiras Maduro/L. Azoulay (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, in 324 at 326 referring to

The Treaty of Lisbon contains major changes which might facilitate access to the ECJ. It gives natural and legal persons locus standi to bring an action against “a regulatory act which is of direct concern to them and does not entail implementing measures”. Therefore any natural or legal person may institute proceedings against such an act irrespective of the severe criterion of “individual concern” which was so hard to overcome in the past. *Adinolfi* argues that the new formula allows for the ECJ to overcome remaining barriers to national courts by facilitating access to the ECJ and bringing the national and European jurisdictions closer together in the uniform application of EU law.¹⁶⁷ Such a positive understanding would close the gap resulting from the narrow reading of the former Art. 263 (4) TFEU, thereby paving the way for natural and legal persons to challenge the legality of European acts, but even the Treaty amendment cannot compensative for the collective deficiencies in the design of the European social order. One might therefore wonder whether and to what extent the ECJ should not ‘invent’ a collective action along the line of *Feryn*, in order to make the action for injunction a universal tool applicable in all sorts of social relations to stop illegal activities. Art. 47 Charter of Fundamental Rights is of little direct help in that respect, as it addresses only individual national persons. I will come back to the access question later on.

3. Competence (constitutional) boundaries in the development of an EU law on remedies

The subjective rights rhetoric which was/is so effectively used to build and shape the European legal order turns rather a blind eye to the *constitutional* implications of the ever deeper intrusion of RRP into the Member States autonomy. On the surface this becomes clear with the notorious insistence on the ‘procedural autonomy’ of the Member States, which, however, is not unlimited. In the absence of EU rules national RRP’s ‘*must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain (reparation)*’.¹⁶⁸ So what do ‘constitutional boundaries’ mean in light of the theoretically endless process of European integration, which does not have clear demarcation lines and which makes the handling of RRP’s so difficult?¹⁶⁹

I will not go deeper into what ‘constitution’ might mean,¹⁷⁰ but take a more doctrinal view under which the following parameters are usually attributed to the ‘constitutional charter’ (*Sarmiento*):¹⁷¹ horizontal division of powers (institutional balance between the different European institutions), vertical division of powers (institutional balance between the Union and the Member States), protection of fundamental rights, and the rule of law (complete and coherent system of judicial protection). These four parameters have been enshrined, though to differing degrees, in the

Case C-314/85 *Foto-Frost*, Case C-222/84 *Johnston*, Case C-188/92 *TWD Textilwerke Deggendorf*, which have completed the ‘complete system’.

¹⁶⁶ Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd*. [2007] ECR I-2271 at 64 and 72.

¹⁶⁷ In the same direction, K. Lenaerts, A Community Based on a ‘Constitutional Charter’ Community Law as a Complete and Coherent Constitution System, in: M. Poiares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, at 298 stressing also the importance of Art. 19 EU ‘Member States shall provide remedies, sufficient to ensure legal protection in the fields covered by Union Law’.

¹⁶⁸ *Francovich*, at 43.

¹⁶⁹ As explained under V. 3 and V.

¹⁷⁰ See N. Walker, *Opening or Closure? The Constitutional Intimation of the ECJ*, in: M. Poiares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 333 at 335 ‘status’ and ‘value’.

¹⁷¹ See e.g. K. Lenaerts, A Community Based on a ‘Constitutional Charter’ Community Law as a Complete and Coherent Constitution System, in: M. Poiares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 298.

constitutionalisation process right from the beginning, as initiated in *van Gend en Loos* and *Costa Enel*. In the early stage of constitutionalisation fundamental rights, however, show up as economic rights or economic freedoms only.

The dynamic of the constitutionalisation process can be brought into clearer focus by linking the four constitutional parameters to the three distinct orders, i.e. the economic, the social and the citizen rights order, in a RRP perspective. All three orders, but in particular the social order and to some extent the citizen rights order, were developed by way of secondary legislation. The vast amount of directives and regulations which have been adopted in the last fifty years affect the constitutional architecture of the European Union. The law making has changed the horizontal balance of power somewhat, but has had a much more acute impact on the vertical balance. The social order is by and large a product of secondary community law, resulting from the transfer of powers from the Member States to the EU (*Craig*). Translated into constitutional language, the question then is whether and to what extent these second order rules benefit from constitutional standing and what the implications of such a classification would eventually be. It is here that supremacy (*Costa Enel*, *Simmmenthal*) and direct effect of primary (*van Gend en Loos*) and (!) secondary EU law (*van Dyn*, *Dori*) ties in. By means of these legal tools, secondary EU law gains a quasi constitutional character as it is put on a more or less equal footing with the Treaties. The possible implications seem somewhat under-researched, most prominently with regard to RRP. Only *Reich* stresses the need to differentiate in the application of the proportionality principle in the shaping of the Internal Market, however, without discussing its applicability with regard to RRP, where the ECJ uses the equivalence and the effectiveness principle, with the exception of *van Schijndel (Bobek)*.

In a constitutional perspective I will put emphasis on two parameters which are claimed to determine the elaboration of a judge-made European law on remedies: a) the implications of the distinction between primary and secondary EU law in RRP and b) the implications of the different functions the ECJ has to fulfill with regard to RRP enshrined in primary and secondary EU law. I am aware that the question is huge. That is why I will limit myself to outlining a selection of the several lines for discussion, which deserve further investigation.

a) The impact of the distinction between primary vs. secondary EU law on RRP

In RRP the ECJ starts from the premise that the EU law constitutes a unity. The ECJ uses identical criteria for the decision of whether EU law grants subjective enforceable rights or not. The origin of the subjective rights, whether they can be derived from the Treaty directly or are found in secondary EU law, is principally of no importance for the shaping of remedies and procedural rules provided that secondary law does not provide for more specific ones. This is witnessed by the transferability of remedies from the Treaty to secondary law and vice versa. However, the result is not the same with regard to state liability (*Francovich*), interim relief (*Factortame*) and compensation for antitrust injuries (*Courage* and *Manfredi*). Whereas transferability is fully realised in state liability (*Francovich* and *Brasserie de Pêcheur*), it is absent with regard to interim relief, as the ECJ made clear in *Unibet*.¹⁷² Whether and to what extent horizontal liability can be transferred within primary EU law, in concreto from competition law to the directly applicable market freedoms has not yet been decided by the ECJ. In *Bosman*, the ECJ was not asked about compensation, unlike in *Raccanelli*,¹⁷³ where the ECJ insisted on the direct effect of Art. 39 EU vis-à-vis an association under private law (Max Planck Gesellschaft eV). However, compensation for damage arising out of an alleged discrimination of the

¹⁷² At 80: 'Therefore, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to determine the conditions under which interim relief is to be granted for safeguarding an individual's rights under Community law.'

¹⁷³ ECJ, *Raccanelli*, [2008] ECR I-5939 at 52.

claimant must be assessed ‘in the light of national legislation applicable to non-contractual liability’. This is exactly what happened in *Laval* through the Swedish Labour Court (Arbetsdomstolen).¹⁷⁴ In *Courage* the ECJ refers to *Factortame* to justify compensation. Horizontal liability in primary EU law has become a topical issue in academia,¹⁷⁵ but horizontal liability in directly applicable articles of the Treaty in the introduction of compensation claims under the standard formula of ‘effective, proportionate and dissuasive’ RRP in national legal systems is a long way down the road. In the field of ‘procedure’ the ECJ uses its own case law for cross references in both directions from primary to secondary EU law and vice versa – and so do the academics. However, this does not mean that the results must be same. The obligation of national courts to investigate *ex officio* the compliance of the parties with EU law obligations might serve as an example. There is no uniformity in *Eco Suisse, Claro, Asturcom, Pannon* and *van der Weerd*.¹⁷⁶ What is missing is a more systematic approach to possible differences between primary and secondary EU law and the implications on RRP.

I would argue that there is a difference between the two sources of law which has to be more openly addressed. The starting point is the different understanding of *effectiveness*. In primary EU law, *effective application and enforcement* bears a *negative* connotation, independent of whether the ECJ deals with first, second or third generation RRP. Negative here refers to the purpose of the effectiveness. The overall objective is to take away national statutory barriers to trade. This becomes clear in the formula the ECJ first used in *Rewe* and then expanded in *Francovich*. In secondary EU law the EU legislator uses a different formula which varies according to context and history. The overall message is that Member States are obliged to introduce effective, adequate and proportionate means to implement any given directive. Such wording implies a *positive* forward looking perspective. RRP shall help to promote the realisation of social objectives. National measures must be shaped so as to allow for the realisation of the *effet utile* of the directive.¹⁷⁷ The open ended formula – when does effective become effective enough – raises much concern in academia and also explains why national courts tend to delegate allegedly insufficient national RRP to Luxembourg (*Schulze*,¹⁷⁸ *Crailsheimer*,¹⁷⁹ *E. Friz*¹⁸⁰).

Provided the distinction between negative and positive effectiveness holds true, the ECJ would in principle benefit from much broader leeway in secondary law than in primary law. However, reality seems different. *Adinolfi* argues that the ECJ is most rigorous, and most ready to intrude into Member States autonomy, when the supremacy of the European legal order is jeopardised. She refers to the case law on *res judicata*, but her understanding is in line with *Francovich, Factortame* and *Courage, Manfredi, Unibet* where the ECJ seems more inclined to introduce new legal remedies.¹⁸¹

¹⁷⁴ N. Reich, *Laval* ‘Vierter Akt’, EuZW 2010, 454; U. Bernitz/N. Reich, Comment Case No. A 268/04, The Labour Court Sweden Judgment No. 89/09 of 2 December 2009, *Laval un Partneri*, CMLR 2011 forthcoming.

¹⁷⁵ N. Reich, Horizontal liability in EC law: Hybridization of remedies for compensation in case of breaches of EC rights, CMLR 2007, 705.

¹⁷⁶ H. Schebesta, Does the national court know European Law? in: Geschwandtner/Kosta/Schebesta/Verbrüggen, The Impact of the Internal Market on Private Law of the Member Countries, EUI Working Paper 22/2009, p. 47 = Does the ECJ know European Law? A note on *ex officio* application after *Asturcom* ERPL 2010, 847.

¹⁷⁷ H.-P. Schwintowski, Informationspflichten und *effet utile* – Auf der Suche nach einem effektiven und effizienten europäischen Sanktionssystem, in: R. Schulze/M. Ebers/H.Ch. Grigoleit (eds.), Informationspflichten und Vertragsschluss im *Acquis communautaire*, 2003, 267 demonstrated the power of the *effet utile* doctrine in the field of European private law.

¹⁷⁸ Case C-120/05 *Heinrich Schulze* [2006] I-10745.

¹⁷⁹ Case C-229/04 *Crailsheimer Volksbank* [2005] I-9273.

¹⁸⁰ ECJ, 15.4.2010, Case C-215/08 [2010] ECR I-nyr; F. Podewils, Haustürwiderrufsrichtlinie: Anwendung auf Personengesellschaften – Fortgeltung der Grundsätze der fehlerhaften Gesellschaft, EuZW 2010, 265.

¹⁸¹ *Unibet*: (40) Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts

Quite to the contrary, the ECJ is rather reluctant in the field of secondary EU law, in particular when RRP's in the social order are at stake. *Adinolfi* and *Sarmiento* draw a distinction between constitutional claims (supremacy, horizontal and vertical competences) and those where 'only' the 'level of judicial protection' (these are the words from *Adinolfi*; *Sarmiento* speaks of access to justice) has to be defined. This assessment touches upon the relationship between RRP's and the social order, represented by environmental, labour, anti-discrimination and consumer law. Environmental law issues have reached the ECJ in particular via attempts of NGO's to obtain 'by force' access to the ECJ under Art. 230 (4) EU before its amendment via Art. 263 (4) TFEU.

Labour law issues and anti-discrimination issues cannot be put in the same box. The ECJ is rather active when anti-discrimination issues are at stake (*Mangold, Küçükdevici*), whereas labour law does not provide a clear picture (*Schiek*). Consumer law suffers more and more from a rather strange bias. The ECJ is ready to confer rights to consumers under the various directives, but it is not ready to recognise a right to appropriate remedies and procedures associated with consumer rights based on EU law. The counter-productive effects of *Schulze, Crailshaimer, E. Friz* highlight what I mean.

The ECJ grants a comprehensive right to withdrawal, thereby extending the scope of application of secondary EU law, but refused to guarantee via EU law – even using the pre-existing general formula of effective, proportionate and dissuasive protection – that the consumer is not worse off after having executed his right. The recognition of an individually enforceable EU right thus remains highly symbolic. Social rights are rather used to defend national autonomy than for enhancing the rights of workers (*Schiek*)¹⁸² or consumers.

Through such an interpretation of RRP's the ECJ sets the imbalance between economic and social rights in the European constitutional charter (*Les Verts, Opinion 1/91*) in stone. Constitutional concerns (division of vertical power) prevail over the right to effective judicial protection. This highlights the fact that judicial protection and access to justice does not form part of the 'complete system of remedies and procedures'.

b) The line between constitutional and non-constitutional RRP's

I am using the above-mentioned four parameters of what is to be understood as the content of the constitutional charter of the EU in order to demonstrate the relationship between these four parameters and rights, remedies and procedures. It will have to be shown that the third and the fourth category are closely interlinked. One might even argue that fundamental rights are just a means to give the 'complete and coherent system of judicial protection' a new outlook, one where the rights of individuals (and maybe in the long run collective entities) are given more consideration in shaping the future of the European legal order. The overall purpose is to find a reasonable line between the constitutional and the non-constitutional implications of RRP's.

to ensure the observance of Community law other than those already laid down by national law (Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44); (41). It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law (see, to that effect, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraph 16; and *Factortame*, paragraphs 19 to 23).

¹⁸² J. Coppel/A. O'Neill, *The European Court of Justice: Taking Rights Seriously*, 29 CMLR 1993, 669.

	horizontal division of powers (institutional balance between the different European institutions)	vertical division of powers (institutional balance between the EU and the Member States)	rule of law (complete and coherent system of judicial protection)	protection of fundamental rights
Subjective rights Natural and legal persons	Art. 263 (4) environmental and consumer organisations, trade unions	recognition of EU (fundamental- social) rights tilts the balance	access to preliminary procedure (?)	right to effective judicial protection, Art. 47 TFEU, Art. 17 EU
Remedies	Annulment (Art. 263 (4)) injunction	against the state – compensation or positive action against contracting partner/wrongdoer - (execution, restoration, compensation)	going beyond the existing system (<i>Unibet</i>) If: no remedy available in the national legal system	Art. 47 (?) Art. 17 EU (?)
Procedure	EU procedural rules	ECJ plea in <i>Rewe</i> : ¹⁸³ European procedural law	<i>Van Schijndel</i> ¹⁸⁴ (rule of reason) 'role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. ...basic principles ...such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure'	Art. 47 (?) Art. 17 EU (?)

The ECJ has to fulfil a manifold function; it operates as a constitutional and supreme court overlooking administrative, civil and even penal law matters. The chart shows the dominant constitutional dimension even under a RRP perspective.

The recognition of subjective enforceable rights affects the division of power – horizontally as far as new rights touch upon the balance between the European institutions, and vertically to the extent that new rights tilt the balance towards the prevalence of EU law over national law. The Lisbon Treaty

¹⁸³ ECJ, 16.12.1976, Case 33/76 *Rewe* [1989] ECR 176 at 5. With regard to the implicit message of the ECJ see Adinolfi in this volume.

¹⁸⁴ Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705: (19) For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

opens the door for a more proactive stance in the development of subjective rights, individual and collective rights against legal acts of the European Union. Art. 263 (4) might serve to find a new balance at the EU level, a balance where the voice (*Sarmiento*) of the European citizen might be better heard. In this light, Art. 263 (4) reflects the understanding that the future European legal order can no longer be represented and shaped by the institutional actors. The ECJ has to integrate individual and collective action into its system of power. The amendment of the Treaty provides the ECJ with a unique opportunity to rethink the individualistic and anti-solidaristic outlook of the Treaty and to positively define the role and function of NGOs in society, and more theoretically of societal constitutional bodies generally.¹⁸⁵ So far the ECJ treats societal constitutional bodies (such as trade unions (*Viking*) or sport associations (*Bosman*)) like states, which may result from the limits enshrined into the market freedoms even in a horizontal perspective. They aim at setting aside statutory barriers to trade. The implications are far reaching as societal constitutional bodies are not granted the same margin of discretion states have. They lack self-determination.¹⁸⁶ Granting them standing under Art. 263 (4) would constitute a first step in upgrading the role and function of such societal constitutional bodies.

Subjective rights in the vertical division of power have a different role to play. The Treaty as it stands even after Lisbon does not provide much room for the recognition of additional subjective rights, although the ECJ might always come up with a surprising new solution such as it did in *Sala* and *Baumbast*. What might change, however, are the character and understanding of the role and function of subjective rights. The constitutionalisation of values, not least via the Charter on Fundamental Rights, leads to an understanding whereby right holders also bear a constitutional responsibility.¹⁸⁷ They do not hold an individual right alone, as the right enshrines values that bear a public policy dimension. Whether such a development will lead to the recognition of new rights depends on how the ECJ will approach the declaration laid down in Art. 51 (2) of the Charter of Fundamental Rights. As is already clear in *Küçükdevici* or *Promusia*,¹⁸⁸ the Charter will play a key role in the interpretation of secondary EU law. The EU itself is actively promoting such a development by referring in the recitals to the Charter of Fundamental Rights. Such a perspective might shed new light on the upcoming litigation in the field of the social legal order. The right of access to the preliminary procedure is a possible candidate for a new stand alone subjective right, which could be anchored in the Charter.

The recognition of new remedies can take two forms: the scope of application of established remedies could be extended – from the vertical into the horizontal perspective – from one field of EU law (competition) to another (market freedoms), or ‘new’ remedies could be introduced into the Treaty which do not yet belong to the *acquis communautaire*. Most scholars would agree that the ECJ did not strictly apply the doctrine developed in *Les Verts* and *Opinion 1/91*. A more difficult question arises when ‘the national legal system does not provide for a remedy’ (*Unibet*)? I would argue that a distinction should be made whether the question comes up in areas of the European legal order, (1) where the national legal order cannot serve as a blueprint because the question behind the search for a remedy is ‘genuinely European’ and (2) where the European legal order is clearly reaching beyond the national legal orders in establishing new values which need to be preserved. A striking example for the second variant is the anti-discrimination principle.

¹⁸⁵ M.C. Dorf/Ch. F. Sabel, A Constitution of Democratic Experimentalism, 98 Columbia Law Review (1998), 267; O. Gerstenberg/Ch. Sabel, Directly-Deliberate Polyarchy: An Institutional Ideal for Europe, in: Ch. Joerges/R. Dehousse (eds), Good Governance in Europe’s Integrated Market, OUP 2002, 289.

¹⁸⁶ L. Azoulay, CMLR 2009, 1335 at 1350.

¹⁸⁷ See on responsibilities enshrined in individual and collective rights, L. Azoulay CMLR 2009, 1335 at 1350.

¹⁸⁸ V. Kosta, Internal Market Law and the Private Law of the Member States. The Impact of Fundamental Rights, in: Geschwandtner/Kosta/Schebesta/Verbrüggen, The Impact of the Internal Market on Private Law of the Member Countries, EUI Working Paper 22/2009, 25 = ERCL 2010, 409.

The horizontal division of power is governed by proper EU procedural rules and today also by inter-institutional agreements. These are missing in the vertical dimension where the ECJ as early as in *Rewe* cautiously advocated for the development of European procedural rules (*Adinolfi*). The constant reiteration of the reference to the principles of equivalence and effectiveness has not prevented the ECJ from heavily intervening in national procedure rules, mainly to break down barriers to trade – so-called negative effectiveness. The ECJ has not further developed the rule of reason doctrine enshrined in *van Schijndel (Bobek)*,¹⁸⁹ which might serve as a tool for fostering positive effectiveness. Whether or not the principles of equivalence and effectiveness will suffice to shape procedural rules remains to be seen. Just as in the field of remedies, it might be helpful to more clearly distinguish between areas where the European legal order and the national legal orders are interlinked in a comparable way from areas where the particularity of the European legal order requires solutions reaching beyond the national procedural rules.

If all RRP bear a constitutional dimension, what then remains for the ECJ acting as a Supreme Court?¹⁹⁰ One might feel tempted to seek a solution in the different types of remedies foreseen in the Treaty. It seems as if distinctions of this kind are not really helpful in finding out whether RRP is a matter for the ECJ as a constitutional court or whether it can also be regarded as a matter for the ECJ as a supreme court. It seems much more important to look into the substance of RRP and then to decide what are the questions that should be upgraded to the constitutional level and those which could be downgraded to the substantive level. Even if such an undertaking leads to feasible results, the overall effort is only worthwhile if the distinction between the constitutional level and the substantive level of RRP entails different legal consequences. What springs to mind is the conviction that a constitutional court will have to decide only on the very basics of the RRP and that it will be for a Supreme Court to go much more into the details of the respective rights, the respective remedies and the respective procedural rules. It is then only one step further to open the debate on where the CFI should precede the ECJ. The preliminary reference procedure seems to be one of the possible candidates for an enlarged body of CFI's.

V. Thoughts on the future for the EU law on remedies de lege lata

In *Goethe's* poem of the 'Sorcerers Apprentice' (Zauberlehrling) we can find the following quotation:¹⁹¹

“From the spirits that I call, Sir, deliver me! (Die ich rief, die Geister werd ich nun nicht los!)”

The ECJ remains bound to the spirit of the Treaty of Rome which has remained unchanged despite the major Treaty revisions through the Single European Act, the Maastricht and the Lisbon Treaty. European integration is a process, an open ended process which makes it difficult to define a clear line between the constituted and the constituent power of the ECJ. *L. Corrias*¹⁹² concludes after analysing the relationship between constituent and constituted powers, both theoretically and legally, in selected areas of EU law: “Paradoxically ‘ensuring that the law is observed’ can only be done by going beyond a simple textual explanation of the Treaty. So the ECJ can only ensure the observance of the EU legal order by truly creative acts, acts of chiasmic constitution. That is what constitutionalisation ultimately boils down to. Yet this is only half of the story. The ECJ can only bind others to the law while being bound by the law. It stands on trial while sitting on trial”.

¹⁸⁹ Under reference to S. Prechal, Community Law in National Courts: The Lessons from van Schijndel, CMLR 35 (1998) 681 at 690.

¹⁹⁰ With regard to private law, Ch. Schmid, The ECJ as a Constitutional and a Private Law Court, ZERP DP 4/2006.

¹⁹¹ <http://german.about.com/library/blgzauberl.htm>

¹⁹² At p. 171.

In essence I am arguing for an active court, a court which takes the imbalance between the three orders seriously and which is ready to develop RRP's in the social legal order. So what is requested is a stronger 'impulse' (*Basedow*) and a 'quasi-legislative approach' (*Reich*) which urges the ECJ to 'invent' (*Bobek*) new RRP's – as an integral part of the European legal order. Art. 47 of the Charter of Fundamental Rights will have to play a key role in that respect. The immediate question in the context of the conference is nevertheless from where such a claim for judicial activism or judicial governance could take its legitimacy. It took the ECJ decades before its concept of 'a genuine legal order' gained political and social acceptance. I am wondering why the legitimacy is so forcefully claimed when it comes to giving judicial shape to the European legal order. Maybe the reason can be found in the anxieties of the Member States that, having lost control over the national 'economic' order, they may also lose control over 'The Social'. If such a reading is correct it is necessary to go much deeper into the changing role of the national state, of the national welfare state and even of 'The Social' as such. Any answer, however, goes far beyond the purpose of this article.¹⁹³

1. Constitutional implications: A right to access in the preliminary reference procedure

Let me start with a quotation from the late *Pierre Pescatore*, one of the grand old men of the European legal integration project, a former judge of the ECJ who joined the Court in 1967 and left us with the following legacy:¹⁹⁴

The court held that the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Art. 169 and 170 in the diligence of the Commission and the Member States. This formulate is prophetic, since we would see later on that the preliminary reference procedure ... – will effectively become the infringement procedure for the European citizen.

Undoubtedly the ECJ was prophetic, but has the prophecy become reality? I do not think so, as the position of the citizen depends on the preparedness of the national court to refer her case to Luxembourg. One might construe arguments under the national legal systems which compel the national court to refer the case to Luxembourg, but even such a right cannot replace the chance of directly invoking the preliminary reference procedure. *Sarmiento* argues in favour of establishing a fundamental right of access to the preliminary reference procedure in referring to the Opinion of the late Advocate General *Ruiz-Jarabo Colomer* in *La Roda Golf*,¹⁹⁵ who raised this point and purported an interpretation of the provisions governing preliminary references in light of this fundamental right:

(29) Access to justice is a fundamental pillar of western legal culture. 'To no one will we sell, to no one will we deny or delay right or justice' proclaimed the Magna Carta in 1215, expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the case-law of the Court. Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised. In a number of Member States, such as Germany and Spain, that fundamental right is framed in such a way that it also includes the preliminary ruling procedure under Article [267 TFEU]. The present reference is doubly crucial with regard to safeguarding the procedural rights of individuals at both Community and national level. Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seized of those proceedings. Furthermore, from a procedural point of view, references for a preliminary

¹⁹³ I have given a first account in *Social Justice and Access Justice in Private Law*, EUI WP 2011/02; see also: *The Many Faces of Social Justice in Private Law* (ed.), Elgar 2011 forthcoming.

¹⁹⁴ P. Pescatore, *van Gend en Loos*, 3 February 1963 – A view from Within, M. Poyares Maduro/L. Azoulai (eds.), *The Past and The Future of EU Law, The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, 2010, 3 at 7.

¹⁹⁵ Case 14/08 *La Roda Golf* [2009] I-nyr.

ruling are subject to the principles of the uniformity and consistency of Community law, from which it follows that any national court must have competence to seek assistance from the Court of Justice. Any barrier preventing a national court from making a reference undermines that fundamental right’.

In the forefront of the discussion over the content of a European Constitution, *N. Reich*¹⁹⁶ argued in favour of introducing into the revised legal system of the EU a Europäische Grundrechtsbeschwerde (a European fundamental right on access). Such a possibility has never been seriously taken into consideration. True, citizens in Europe may refer claims directly to the European Court of Human Rights and once the EU has joined the ECHR the role of citizens might even be further strengthened. Reading the TFEU, the Charter of Fundamental Rights and the ECHR together might even enhance the idea proposed here that the EU legal order embraces a constitutional right of access to justice.

There are convincing arguments in favour of establishing such a right of access to justice. It would reflect the increasing importance of citizen rights in the European constitutional charter, it would bring light into the black box of the preliminary reference procedure (*Reich*) and it would strengthen the democratic outlook of the EU. In *Unibet* the ECJ opened the door for completing the existing system of remedies and procedures. A right of access to justice, i.e. to the ECJ directly not only for individuals but also for collective entities, would be ‘new’ in the sense that direct access to the ECJ cannot have a counterpart in the Member States legal orders. Time seems ripe for a bold step forward in the development of the European legal order that finalises *Pescatore’s* prophecy.

2. Substantive implications: RRP to counterbalance the European economic order

The crux in the current state of RRP in Europe is the standard formula of the principle of effectiveness and the principle of equivalence which the ECJ constantly reiterates – gebetsmühlenartig wiederholt – despite the unclear meaning of the two principles; despite the unsettled relationship between the two principles which have led to an inconsistent and often hard to understand case-law (*Bobek*); and despite its clear sometimes explicit, sometimes implicit focus on Member States RRP as a yardstick even where the rights, remedies and procedures do not fit with the particularities of the European legal order.

I started this paper by reference to *Walter van Gerven’s* seminal article and I will conclude this paper by again referring to his plea to transform the principle of equivalent and effective protection into a *principle of adequate and effective protection*. *Van Schinjdell* points in this direction,¹⁹⁷ but the Court has not developed this path any further, despite numerous references in key judgments such as *Asturcom*, *Feryn*, *van der Weerd* and *Eco Suisse*, just to name those which are of relevance in our context.

I will sketch out three different possibilities for developing RRP within the dominant paradigms, beginning with the doctrine of uniform application, shifting to the principle of effectiveness and concluding with a new reading of the principle of equivalence.

a) From uniform application to uniform enforcement

The principle of uniformity is a central theme in all decisions by the ECJ, which aims to ensure that the application and interpretation of EU laws does not differ between member states. *Basedow* calls

¹⁹⁶ Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde, ZRP 2000, 375; also B. Hansel, Effektiver Rechtsschutz in Grundrechtsfragen durch Vorlagepflicht oberster Bundesgerichte oder europäische Verfassungsbeschwerde?, Walter Hallstein Institut, 2003.

¹⁹⁷ See my attempt to use it for striking down highly doubtful time limits in investor protection rules, H.-W. Micklitz, Vereinbarkeit der Verjährungsregelung § 37 a) WpHG mit dem Gemeinschaftsrecht, WM 2005, 536.

this the uniformity function of the ECJ. There is a strong link between the ECJ's insistence on autonomous interpretation and the doctrine of uniform and effective application of EU law.¹⁹⁸ Uniform application of EU law cannot be equated with uniform enforcement. *However, is there a way to move from uniform application to uniform enforcement?*

Uniform enforcement seems to contradict the principle of procedural autonomy (*Adinolfi*) and the vertical division of power between the EU and the Member States. On the one hand, it must be overlooked that rights cannot be enforced in compliance with the principle of uniformity without common standards on remedies and procedures.¹⁹⁹ On the other hand, uniform enforcement cannot mean that the Member States must establish identical rules on RRP. There is a second line of argumentation which enhances the pressure on more uniform standards of enforcement. Secondary law which is subject to RRP is regulatory law. Most of the directives are status-related. They tie the envisaged protection to the status of a worker, consumer or indeed a citizen, i.e. citizen consumer. It is precisely here that the European Commission is going to change its policy, admittedly more or less successfully. Minimum harmonisation shall be replaced by maximum harmonisation. The standard formula of the need for 'effective, proportionate and dissuasive' protection is still the same. However, maximum harmonisation can only yield the expected results if the development of enforcement mechanisms keeps pace with the intensity of harmonisation. Strangely enough, the highly questionable policy of maximum harmonisation²⁰⁰ may lead to better and more harmonised RRP.

A possible balance between the two conflicting rules may be found by distinguishing two sets of enforcement issues:²⁰¹ (1) the serious infringements that bear a trans-border connotation and (2) the less serious infringements that are more closely connected to a mere national legal environment. A similar distinction has been proposed by AG *Maduro* in *Centro Europa 7 Srl*:²⁰²

18. Since the adoption of the Treaty of Amsterdam, respect for fundamental rights is a formal legal requirement for membership of the European Union. Article 6 EU, as amended by that Treaty, now firmly proclaims that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Article 7 EU sets out a mechanism for imposing sanctions on a Member State where there is a clear risk of a *serious breach of those principles*, thus confirming that respect for fundamental rights is an indispensable condition of EU membership.

20. Against this background, the Court fulfils its function of ensuring the observance, by the Member States, of fundamental rights as general principles of law. *In this respect, a distinction must be drawn between, on the one hand, jurisdiction to review any national measure in the light of fundamental rights and, on the other hand, jurisdiction to examine whether Member States provide the necessary level of protection in relation to fundamental rights in order to be able adequately to fulfil their other obligations as members of the Union.* The first type of review does not yet exist and is not within the Union's current competences. However, the second type of review flows logically from the nature of the process of European integration. It serves to guarantee that the basic conditions are in place for the proper functioning of the EU legal order and for the effective exercise of many of the rights granted to European citizens. Though the degree of protection of fundamental rights at national level does not have to be exactly the same as the degree of protection of fundamental rights at the level of the European Union,

¹⁹⁸ ECJ 06.10.1982, Case C-283/81 *C.I.L.F.I.T.* [1982] ECR 3415, para. 7.

¹⁹⁹ I refer to *Adinolfi* (fn. 40): As expressed by former Advocate General *Van Gerven*, the need for harmonisation of procedural rules "is inherent in the concept of uniformity: in the absence of (sufficiently) harmonized legal remedies, uniform rights cannot be adequately secured throughout the Community": *Bridging the Gap between Community and National Laws: towards a Principle of Homogeneity in the Field of Legal Remedies?*, 32 CML Rev. (1995), 690.

²⁰⁰ B. Gsell/C. Herresthal (Hrsg.), *Vollharmonisierung im Privatrecht*, 2009.

²⁰¹ See H.-W. Micklitz, *Collective private enforcement in antitrust law – what is going wrong in the debate?*, to be published in: L. Tichy/J. Terhechte (eds.), forthcoming = EUI Working Paper 00/2010.

²⁰² 12.9.2009, Case C-380/05 [2009] I-nyr. The Court has not discussed this proposal yet.

there must be some measure of equivalence in order to ensure that the law of the Union can operate effectively within the national legal order.

21. The scenario may seem unlikely at first sight, but I do not discount, offhand, the idea that a serious and persistent breach of fundamental rights might occur in a Member State, making it impossible for that State to comply with many of its EU obligations and effectively limiting the possibility for individuals to benefit fully from the rights granted to them by EU law. For instance, it would be difficult to envisage citizens of the Union exercising their rights of free movement in a Member State where there are systemic shortcomings in the protection of fundamental rights. Such systemic shortcomings would, in effect, amount to a violation of the rules on free movement.

The Advocate himself made clear that the case at issue could be solved within the standard framework of rules. Thus it is not surprising that the court does not take the distinction into consideration. What matters in our context, however, is the plea for the identification of breaches where it is not possible to leave the level of judicial protection to the Member States but where common rules are needed – in particular to protect fundamental rights. This is exactly in line with the argument put forward throughout this paper.

b) The principle of effectiveness and the doctrine of economic efficiency

The principle of effectiveness is not a normative concept as there is no normative yardstick available beyond or below the non-existence of appropriate RRP or, in the terms of *Rewe*, making ‘it impossible in practice to exercise the rights which the national courts are obliged to protect’ (*Bobek*). On further reflection one might even doubt whether the impossibility doctrine has a normative nucleus, as the ECJ makes the impossibility depend on ‘practice’. By downgrading the level of intervention to ‘excessively difficult’ (*Francoovich*) the ECJ opened up a huge amount of leeway in instrumentalising the principle of effectiveness in both directions – in establishing a low level of enforcement or in requiring a high level of enforcement. Therefore the principle of effectiveness is technically an empirical concept which would, in theory, require the ECJ to investigate the existence of RRP in the respective Member States, maybe even in a comparative perspective. The way the ECJ is using the principle, i.e. as a kind of jack-in-the-box instrument,²⁰³ allows the Court to justify – within the limits of the impossibility doctrine – almost every result. The weakness of the concept is the reason behind the inconsistency of the current case-law in the field of RRP.

I see two ways out of this dilemma: to give up on the principle and to substitute it via a truly normative concept or else to take the factual implications seriously. The first variant would bring us back to *van Schijndel* which might be read as a ‘rule of reason’ formula against which Member States’ RRP could be measured. I would not put the rule of reason formula on an equal footing with the proportionality principle. *Reich* has shown that the proportionality principle needs to be re-visited in order to avoid arbitrary results. He distinguishes between autonomous balancing (public policy choices or equally justified opposing state interests), state margins of appreciation (where law and facts do not give a clear answer), a fundamental rights approach (continuation of the division of work between EU and national jurisdictions), and a quasi-legislative approach. A transfer of these four categories to RRP would certainly not contribute to increasing legal certainty or to making the case-law of the ECJ more predictable.

²⁰³ I borrow this metaphor from Th. Wilhelmsson, Jack-in-the-box theory of European Community Law, in: L. Krämer/H.-W. Micklitz/K. Tonner (eds./Hrsg.), *Law and diffuse Interests in the European Legal Order/Recht und diffuse Interessen in der Europäischen Rechtsordnung*, Liber amicorum Norbert Reich, Band 3 der VIEW Schriftenreihe, 1997, p. 177.

So what remains is putting emphasis on the factual side. Since 2002, since the beginning of the governance debate,²⁰⁴ the European Commission has put more and more emphasis on measuring EU regulation against the doctrine of economic efficiency. The technical means of doing so is enshrined in the ever more sophisticated apparatus of impact assessments.²⁰⁵ So far the methodology has been used in order to test the probable effects of an EU measure that the European Commission intends to adopt, – with sometimes highly doubtful results²⁰⁶ – but it has not yet been applied to evaluate the (economic) efficiency of national RRP. In a methodologically-revised form the Impact Assessment Procedure might provide guidance to the ECJ on the situation in the Member States with regard to the effectiveness of RRP. It seems therefore fair to assume that the principle of effective application and enforcement could be turned into a more efficient regulatory tool. However, it cannot overcome the uncertainties which result from a case-law whose outcome depends on non-normative criteria. But this is a methodological question which brings us too far away from the scope of the paper.

c) Materialising the principle of equivalence

The principle of equivalence is *in nuce* a variant of the anti-discrimination principle. The national rules on RRP may pass the equivalence test if they do not discriminate against the enforcement of EU law rules. Even stronger and even more explicitly than the principle of effectiveness, the principle of equivalence uses national RRP as reference points. This means that the ECJ has to find and to define a ‘comparator’ against which the RRP needed to enforce the respective EU rules can be measured. It should be recalled that the ECJ cannot and does not compare European RRP and national RRP; rather it compares the feasibility of national RRP being designed for a particular national purpose with their transferability to the relevant EU rules. More clearly, the ECJ compares substantive rules not procedural rules (RRP). *Bobek* demonstrates the difficulties and, in a way, the arbitrariness of this selection process.²⁰⁷ The experience the ECJ has gained over recent decades in finding the appropriate comparator in indirect discrimination cases should help to challenge the feasibility of the concept.

The first and most important step would be to more carefully look into the substance of the rules in order to find out whether and to what extent the EU rules complement national rules or whether the EU rules introduce regulatory elements which reach beyond the existing national frame and are designed to meet the particularities of the European legal order. So far the ECJ draws the distinction only implicitly, in that it does not apply the principles jointly but uses whichever one is more suitable in the case at issue. It would be worth analysing the abundant case-law to test the hypothesis that the ECJ tends to apply the principle of effectiveness when there are no comparable EU rules due to the particularities of the EU legal order. It would equally be worth analysing what kind of criteria the ECJ used to define the parameter. *Bobek* has already shown that the choice of the parameter depends on the level of abstraction. I would insist that the academic discourse on the ECJ case-law in RRP does not take sufficiently into account the factual and the legal context of the cases. Even a more sophisticated contextual analysis, drawing a clearer border line between the cases which are apt for the equivalence test and those which are not, would still not overcome the inherent difficulties enshrined in the test.

It is hard to imagine the ECJ giving up the equivalence test. The Court might be ready to upgrade the effectiveness test to an adequacy test, but it will and it must – in the light of the vertical division of

²⁰⁴ http://ec.europa.eu/governance/index_en.htm.

²⁰⁵ http://ec.europa.eu/governance/impact/index_en.htm.

²⁰⁶ See for a methodological critique R. Monday, In the Wake of Good Governance: ‘Impact Assessments and the Politicisation of Statutory Interpretation, *Modern Law Review* 2008, 385; for a demonstration of politically guided impact assessments, H.-W. Micklitz, *The Targeted Full Harmonisation Approach: Looking behind the Curtain*, in: Howells/Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, 2009, 47.

²⁰⁷ H.-W. Micklitz, *Vereinbarkeit der Verjährungsregelung § 37 a) WpHG mit dem Gemeinschaftsrecht*, WM 2005, 536.

power – stick with the equivalence test. The anti-discrimination test is in essence a *negative* one. In EU law, anti-discrimination and equal treatment are used interchangeably, although equal treatment bears a *positive* forward looking connotation. A promising starting point might therefore be to use equal treatment as the guiding principle, which comes also nearer to the wording of the principle of equivalence. *Mangold* and *Küçükdevici* provide evidence that the ECJ is going to materialise the anti-discrimination principle in labour law relations. The growing positive connotation of anti-discrimination could be used to reshape the principle of equivalence. I would plead for the development of a kind of materialised access test²⁰⁸ which is not restricted to the already difficult comparison of whether Member States apply the same standards for the enforceability of similar national rules, but rather whether the existing RRP in the Member States, beyond comparability, provide for adequate access to RRP. Such an understanding could gradually merge the two principles of equivalence and effectiveness in the new formula of adequate judicial protection.

To be continued...

²⁰⁸ See on the background to this argument, H.-W. Micklitz, Social Justice and Access Justice in Private Law, EUI Working Paper 2011/02.

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