

EUI Working Papers

LAW 2012/31

DEPARTMENT OF LAW

European Regulatory Private Law Project (ERPL - 01)

European Research Council (ERC) Grant

A SELF-SUFFICIENT EUROPEAN PRIVATE LAW – A VIABLE CONCEPT?

Edited by Hans-W. Micklitz / Yane Svetiev

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
DEPARTMENT OF LAW

“EUROPEAN REGULATORY PRIVATE LAW” PROJECT
EUROPEAN RESEARCH COUNCIL (ERC) GRANT

A Self-Sufficient European Private Law – A Viable Concept?

HANS-W. MICKLITZ / YANE SVETIEV (EDS.)

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

The research leading to these results has received funding from the European Research Council under the European Union’s Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement n. [269722].

European Research Council



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Abstract

This working paper collects the contributions to the first external workshop within the ERPL project that took place on 4 and 5 May 2012 at the EUI. The workshop aimed to clarify the key parameters to be used for analysing the claimed transformation process of European Private Law from 'Autonomy to Functionalism in Competition and Regulation'. Apart from the papers describing the features of the transformation process, separate sessions examined the four parameters (or possible scenarios) around which the project is conceptualised, (1) conflict and resistance, (2) substitution and intrusion, (3) hybridization and (4) convergence. These parameters were examined from a theoretical perspective, but also for their more specific implications for the project design and for testing the hypothesis of the emergence of a self-sufficient or self-standing European Private Law. Apart from the presentation of the project members' research, contributions from eminent scholars in European private law provided an outsider's view on the parameters. Finally, the working paper also includes some of the comments offered at a round table that critically examined the project design.

Keywords

European private law, regulation, hybridisation, convergence, autonomy.

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INTRODUCTION

Hans-W. Micklitz & Yane Svetiev***

The research project, of which this is the first working paper, proposes to chart the emergence of a European regulatory private law order and to examine its relationship with the national private law legal orders in the EU Member States. As such, the research comes at a time where the futures of both EU private law and national private law (as traditionally understood) are at a crossroads. At the EU level, the project for the codification of a European version of the national civil codes does not appear to have gained much traction and even more modest projects for an optional sales law instrument are facing opposition including from some unexpected circles, leaving the future of that project in the haze. At the national level, lawyers trained in the traditional categories and performing the routine disciplines of private law might often miss the fundamental ways in which the private law framework has been reshaped and transformed by forces beyond the nation state (invoking here Unger's distinction between formative frameworks and formed routines¹). This is not least because lawyers are trained to appropriate new phenomena into existing categories given that stability and legal certainty are among the values that the legal system cherishes and seeks to promote.

Traditional national private law had already to some extent faced challenges within its domain over the course of the last century, with the growth of mandatory protective rules for various groups and the emergence of differentiated regulatory spheres undermining both the horizontal and the autonomy-protecting logics of private law. This led, for instance, both common law and civilian scholars to declare in various terms the end or the death of contract or private law². While increasing economic integration and interdependence produces growing calls (or at least a need) for integrated solutions and instruments, the fragmentation of interests and social knowledge proceeds unabated and makes it very unlikely that a European response will take the traditional shape.

In the contributions to this working paper, we begin an exploration of the question whether the European version of what would have been called private law is already taking shape, often imperceptibly even if before our very eyes. European private law is a mixture of traditional private law, this means rules on contract and tort and regulatory private law. Regulatory private law first and foremost served the purpose of completing the internal market. This is most visible in the instrumentalisation of labour and consumer law and in the vast set of rules governing regulated markets, such as telecommunications, postal services, electricity, gas, transport and last but not least financial services. Such law is complemented by an ever growing set of ECJ case law not only to interpret and give shape to the secondary law, but also indirectly via the decisions on the economic freedoms, on competition and on state aids. The result might be viewed as an assemblage of capabilities and instruments developed not only at Member State level and at EU level³, but also from the various problem-solving and normative regimes that have emerged in the interstices of national, EU and international law and law-making. If the claim about this new legal assemblage is apposite, the novel legal phenomenon needs to be recognised, described and eventually evaluated.

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¹ Unger, 2004, *Social Theory: Its situation and its task* (Verso), pp. 3-4 (for eg).

² Eg, Gilmore, 1985, *The Death of Contract*, 2nd ed (Ohio State); Atiyah, 1979, *The Rise and Fall of Freedom of Contract* (Clarendon); Wieacker, 1995, *A History of Private Law in Europe* (Clarendon, transl. by T. Weir).

³ See Sassen, 2006, *Territory-Authority-Rights: From Medieval to Global Assemblages* (Princeton).

The specific purpose of the working paper is to present the first steps in the research that seeks to understand and describe the phenomenon or phenomena of European regulatory private law together with a number of contributions that provide an external perspective on the conceptualisation of those phenomena beyond the standard categories of EU/Member State competence and harmonisation. Therefore, the starting point of all contributions is the premise that the landscape is much richer than is generally assumed, that it covers traditional private law matters, such as contract and tort, but that it encompasses also remote areas of regulatory private law and that, as a result, there are many different gardeners tending and cultivating the garden.

The contributions of the members of the research team point to the places in which we look for the phenomenon of European regulatory private law, i.e. the various sources of normativity that shape or even purport to control individual interactions and relationships in the economic sphere. These sources of normativity are often not the traditional ones (i.e., the Member States' or EU institutions) and they operate through non-traditional channels and instruments. These are precisely the phenomena that will ultimately call for characterisation and evaluation.

The external contributions by contrast were given the task of providing a conceptual analysis of the four "parameters" that might be used to characterise those phenomena. The idea was to provide an outsiders' perspective on these (hypothesised) parameters unaffected by the way in which they are used in the project outline or by the project members. After all, these are terms that are widely used both in debates about EU law and in various scholarly traditions, such as legal theory and philosophy, comparative law, new governance, experimentalist governance etc. The word "parameters" is sufficiently broad and neutral to convey the idea that the processes of characterisation and evaluation are quite distinct. European private law might emerge and be shaped by hybridisation, convergence, intrusion and substitution or conflict and resistance; it might be characterised as self-sufficient or dependent on national law and institutions. During the workshop, it was suggested that these might also be treated as alternative scenarios, which could be either mutually consistent (and co-exist) or mutually exclusive, or have a more complex dynamic relationship.

Ultimately, as foreshadowed in the last substantive part of the working paper, both the hypothesized emergence of the European private law and the conceptual framework will have to be tested on the ground. The work of the researchers points to some of the corners of the vast garden that will be explored in the course of the project, including Europeanised local remedies, standardisation as a source of normativity and the creation (the word is used deliberately⁴) of the new utilities markets, such as telecommunications or electronic communications more broadly. In all three areas, we can detect various degrees of blending of private and public, national and European, as well as administrative, contractual and legal instruments. This blending is precisely what makes the phenomena of European regulatory private law immanent and more difficult to grasp. Yet this is the task that stands before the project research team.

In the final section, the working paper includes some of the comments upon the research hypotheses, parameters and the overall research design offered at a roundtable concluding the workshop by the members of the scientific advisory committee and other invited participants.. This provided another set of constructive suggestions and contributions, again from an outsiders' perspective, though more focused on the questions of research design and research methodologies. Precisely when the field is not well understood and is under-elaborated, the fraught question of the appropriate methodologies of legal research in a (substantively and intellectually) post-doctrinal world can be both liberating and a source of anxiety. It is liberating to the extent that there is no accepted corpus and therefore it is easier to avoid assuming away the distinction between context-shaping frameworks and within-context

⁴ Invoking the idea of markets as constructed, as attributed to some Ordoliberal. Eg, Joerges, 2006, 'La constitution économique européenne en processus et en procès', *Revue Internationale de Droit Economique* XX(3): 253. See also Colliat, 2012, 'A Critical Genealogy of European Macroeconomic Governance', *European Law Journal* 18(1): 6, 7-8.

rouines (again following Unger⁵). It is a source of anxiety precisely because there is no research script to follow; these first steps may be the foundations of the corpus even if, as always in research and scholarship, we stand on the shoulders of giants.

⁵ Unger, 2004, *Social Theory: Its Situation and its task* (Verso), p. 130.

Section I: CONCEPTS

A SELF-SUFFICIENT EUROPEAN PRIVATE LAW – A VIABLE CONCEPT?

*Hans-W. Micklitz**

I. Introduction and Explanation

This paper is composed of two parts: under (II.) I have reprinted the two decisive parts of the grant application for the project a) the overall hypothesis of the project and b) the methodology applied to test the hypothesis.

The European Union – this is the overall idea - is establishing its own private legal order referred to as ‘**a self-sufficient legal order**’, largely distinct from national private legal orders. This presupposes a particular understanding of private law as *regulatory* law. I am therefore less concerned with the attempts of the European Union to adopt a European Civil Code or a Common European Sales Law (CESL). Instead my attention is devoted to the regulations and directives the EU has adopted in the last decades in seemingly remote areas of private law, such as sector related rules on telecommunication, energy, transport, financial services and the like or on new forms of contract governance such as standardization of services contracts. Here, so the arguments goes, the European Union is building its own legal orders, as sectorial orders, separated from national private law.

The **methodology** aims at testing the hypothesis of self-standing European private legal order around four parameters: **hybridization, self-sufficiency, convergence, and conflict and resistance**. Each parameter requires a clarification of its meaning and a deeper reflection on its theoretical grounding and implication. Each parameter will be tested in a particular sub-project. This is what the workshop was all about. We – means the Research Group – aimed to receive

a critical feedback on the overall research question – the leading hypothesis,
on the four parameters used to test the hypothesis, and on
the sub-projects assigned to the four parameters.

Under (III.) I will lay down **my first thoughts** on the relationship between national private legal orders and what I call European regulatory private law and to give shape to the parameters in linking the two levels together.

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II. Summary of Grant Application

a) State-of-the-Art and Objectives: The Visible Hand of European Regulatory Private Law (ERPL) - The Transformation from Autonomy to Functionalism in Competition and Regulation

1. The hypothesis: ERPL a Self-sufficient Private Legal Order Enshrining a New Order of Values

There is a strong coincidence between ideological preconceptions of European constitution building and European private legal order building through the DCFR. The dictate at the moment seems to convey, more than ever, a quest to embark on constitutional pluralism and private law pluralism, bearing different headings in the private law discourse: “Private Law and the Many Cultures of Europe” (Wilhelmsson/E. Paunio/A. Phjolainen), “Private Law Beyond the State” (Michaels/Jansen), or “Open Method of Co-Ordination” (van Gerven). However, outside political and academic debates, European constitution building and European private law construction steadily continues via secondary law making with the support of the Member States and via by the ECJ and national courts. My project focuses on ERPL beyond the boundaries of autonomy and freedom of contract guided national private legal orders (L. Raiser, H. Collins). I start from the following hypotheses:

- ERPL is developing through regulation and new modes of governance in subject matters usually regarded as being beyond traditional private law, for example consumer and anti-discrimination law, regulated markets, private competition law, state aids, public procurement, property rights and unfair commercial practices, risk regulation and standardisation of services,
- ERPL is striving for self-sufficiency, it is EU made and EU enforced, via old and new modes of governance,
- ERPL yields its own order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

The focus of this socio-legal project lies in the search for a normative model which could shape a self sufficient European private legal order in its interaction with national private law systems.

- It aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation.
- It suggests the emergence of a self sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law.
- It elaborates on the interaction between ERPL and national private law systems around four normative models: intrusion and substitution, conflict and resistance, hybridisation and convergence.

b) Methodology

In the overall project I will demonstrate (1) the transformation of European private law from autonomy to regulation and competition and (2) the emergence of a new order of values enshrined in the concept of access justice/Zugangsgerechtigkeit. This twofold shift produces tensions between the alleged market bound European private law and the state bound national private legal systems.

In a *first* step I will sketch four normative models on the relationship between the two legal orders – conflict and resistance – intrusion and substitution – hybridisation – convergence and their theoretical grounding in legal theory and institutional economics. These four normative models constitute the

areas in which socio-legal research needs to be undertaken. In a *second* step I will link the four normative models to particular types of institutions: – conflict and resistance to differing orders of values, – intrusion and substitution to regulated markets, – hybridisation to remedies and – convergence to co/self-regulation. This allows me to transform the overall theoretical frame into a concrete research design around the four normative models and their particular links to European regulatory private law. Based on the findings in the four sub-projects, in the *third* step, I will give shape to the suggested transformation process, from autonomy to regulation and competition and to the emergence of a new order of values.

(1) Step 1 – Four normative models and their theoretical grounding: The four normative models are intended to capture the set of variants available in the relationship between European regulatory private law and national private law. They reflect my current analysis of what I have termed European regulatory private law.

Conflict and resistance: This is suggested as one of the possible reactions of the Member States. The perspective is that the Member States do not give way to the intruding European regulatory private law. Instead, they provoke a clash between the European regulatory private law and the national law and set limits to where the intruding law ends and where the national laws begin.

Intrusion and substitution: This is suggested to be the perspective of the current EU law-making and law enforcement strategies, enshrined in the idea of a self-sufficient order composed of three major elements: (1) the horizontal and vertical sectoral rules; (2) the general principles enshrined in the horizontal and vertical sectoral rules; (3) the general principles of civil law.

Hybridisation: This is suggested to be an overall normative model of a composite legal order, within which the European and the national legal orders both play their part in some sort of a merged European-national private legal order. Hybridisation means that the legal character of the respective rule is neither European nor national. It bears elements of both legal orders and is therefore supposed to be hybrid.

Convergence: This is suggested to be a process of mutual approximation of the two different legal orders. They are not merged like in the concept of hybridisation, they still exist side by side, but they are drawing nearer to each other. Convergence is not bound to mandatory standards and default rules. It instead enshrines in particular the new modes of governance, co-regulation and self-regulation, which are enhanced by limited and limiting state powers.

A common theoretical background

The four categories share a common theoretical background. I intend to incorporate in my analysis legal theories on the transformation of private law into economic law (*L. Raiser*) with theories analysing private law beyond the state (*Michaels/Jansen*). In order to fully grasp the change in paradigm I will draw on institutional economics as an analytic framework. The concept of ‘institutions’¹ that I intend to use in order to get to grips with the ‘substance’ of European regulatory private law – understood as the rules regulating the structure of human interaction, composed of formal (legal) and informal (social) constraints and their enforcement – complies with the institutional design of legal orders, notwithstanding their origin, be it European or national. In this light, legal theories help to understand and to explain the transformation process on a more abstract theoretical level. The insights of institutional economics allow for an analysis of how exactly the transformation process of the two legal orders occurs or in the language of institutional economics how the ‘institutional change’ reaching beyond national political economies manifests itself.

¹ “Institutions: The rules of the game: the humanly devised constraints that structure human interaction. They are made up of formal constraints (such as rules, laws, constitutions), informal constraints (such as norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics”, <http://www.coase.org/nieglossary.htm>.

The strong sometimes even static association of a particular type of national political economy does not leave much room for the interpenetration of different political economies. In such a perspective, the non-convergence thesis of legal orders defended by *P. Legrand* and the categorisation of the varieties of capitalism developed by *Hall/Soskice* share a common origin. This variant will have to be analysed under the category 'conflict and resistance'. National political economies, just as national legal orders, stand side by side. The different 'autonomies' enshrined in Member States' private legal orders would then have to be mobilised against European regulatory intrusion. National legal orders, being understood as institutions, are suggested to build barriers against the incoming tide of European regulatory private law – to paraphrase the famous word of *Lord Denning*.²

Just as private law theory is becoming increasingly involved with the debate on private law beyond the state, research in institutional economics is reaching further and further beyond the boundaries of national political economies, thereby emphasising 'institutional change' and/or 'institutional flexibility' (*Lane/Wood*). The more radical strand of the new research in institutional economics yields the question whether private legal orders would have to be understood as institutions, disconnected from the nation states and organised around markets, not around states. Particularly telling are the findings on regional and sectoral varieties of capitalism (*Crouch/Schröder/Voelzkow*). This comes near to observed trends in European regulatory private law striving for normative self-sufficiency, here captured in the model of 'intrusion and substitution'.

Somewhere in the middle lies the task of combining an emphasis on institutional flexibility with retention of the idea that there exists distinctive types of political economy, resulting from the country's history, enshrined in the common knowledge and the common culture (*Hall/Soskice*). The combined approach, the so-called historical institutionalism, introduced two categories into the debate – hybridisation and convergence (*W. Streek/K. Thelen, in legal theory N. Reich, v. Gerven*) – which have become fashionable in legal doctrine, often without disclosing its origin in institutional economics. In institutional economics both hybridisation and convergence imply the need to look at the formal constraints, the informal constraints and the enforcement characteristic in order to get a full picture of the institutional change. Both concepts seem to be well suited in catching the compartmentalised character of European regulatory private law, whilst insisting on the genuine national character of private legal orders, thereby yielding hybrid institutions or provoking convergence of inherently different institutions.

(2) *Step 2 – The four normative models (conflict – intrusion – hybridisation – convergence) and their impact on the different subject matters:* Combining legal theory and institutional economics allows for building correlations between the relationship between intrusion – conflict – hybridisation – convergence and the different areas of European regulatory private law:

- conflict and resistance: value conflicts between different forms of capitalism are suggested to emerge in consumer, anti discrimination, unfair commercial practices law, private competition, state aids and public procurement law, thereby confirming the static assumptions of particular forms of capitalism to which Member States belong,
- intrusion and substitution: self-sufficiency might succeed, if at all, in regulated markets (energy, telecom, financial services), thereby overruling and out-ruling national private legal orders
- hybridisation: remedies in consumer, anti-discrimination, private competition, state aids, public procurement might be developed out of European regulatory private law and national private law, thereby leading to a truly integrated legal device,
- convergence: co-regulation in risk regulation and standardisation of services, self-regulation in those areas where party autonomy/freedom of contract/autonomie de la volonté still prevails,

² ...when we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.. (1974) 2 AII E.R. 1226, 1231.

thereby maintaining the specificities of the European and the national legal orders, but bringing them more closely together.

III. Thoughts on the Relationship between National and European Private Law³

A Short Narrative on two Grand Projects and the Consequences of their Failures

The Berlin wall fell in 1989, exactly 200 years after the French Revolution. In 1992 the old Member States decided to offer the Middle and Eastern European Countries the opportunity to join the European Community, as it then was.⁴ This decision triggered two large but strongly interconnected political and legal debates: the making of a Constitution for the United States of Europe and the establishment of a European Civil Code. The assumption behind this debate was that the new European legal order, composed of these two grand legal projects – the constitution and the civil code – should be modelled after the institutional pattern of the nation state. We all know what happened.

The European Constitution, if it ever deserved the title ‘constitution’, was rejected by the referenda in France and the Netherlands and then turned into what became the Treaty of Lisbon in 2009. The European Civil Code project so forcefully promoted by the European Parliament since the early 1990s led to the so-called Academic Draft Frame of Reference in 2008⁵ and now to the Draft Regulation on a Common European Sales Law in 2011.⁶ The two projects yielded a wealth of legal thought ranging from doctrinal analysis to deep theoretical and philosophical reflections on the nature of a constitution and the character of a civil code in the early 21st century. The contra-punctual reply to monistic concepts of a supranational constitutional order was constitutional pluralism (*Maduro, Walker*),⁷ challenging the idea and the ideology of a monistic legal political order for Europe whereby the European Treaties could substitute the national constitutions.

It took more than ten years before the debate on pluralism reached the minds of private lawyers in Europe. This might be due to the fact that the constitutional debate started already in the 1990s whereas the civil law codification project needed the publication of the 2001 Communication of the European Commission⁸ in order to raise broad academic and political awareness. Until 2001 European private law had not raised much attention among civil law scholars of the Member States, apart from debates regarding the adoption of the Directive 93/13/EEC on Unfair Terms and of Directive

³ The following will be published under the heading of ‘Monistic ideology vs pluralistic reality – on the search of a normative design for European private law’, in L. Niglia (ed.) *Pluralism in European Private Law*, Hart Publishing, forthcoming 2012

⁴ In order to avoid the always awkward reference to one’s own texts, I will limit myself to those of direct relevance: The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration, LAKIMIES, The periodical of the Association of Finnish lawyers, Special Issue on European Integration, 4/1993, 508; The concept of competitive contract law, Penn State International Law Review, The Dickinson School of Law of the University of Pennsylvania 23 (2005), 549; The Visible Hand of European Private Law, in Yearbook of European Law 2009, volume 28, P. Eeckhout/T. Tridimas (eds.), 2010, 3; Failure or Ideological Preconceptions? Thoughts on Two Grand Projects: the European Constitution and the European Civil Code, in K. Tuori and Suvi Sankari (ed.), The Many Constitutions of Europe, Ashgate 2010, 109; (ed.), The Many Faces of Social Justice in Private Law, Elgar 2011; The ECJ between the individual citizen and the Member States – A plea for a judge-made European law on remedies, in: B. de Witte/H.-W. Micklitz (eds.), The ECJ and the Autonomy of the Member States, Intersentia 2012, 349.

⁵ Online edition 2008.

⁶ COM (2011) 635 final of 11.10.2011.

⁷ M. Maduro, Europe and the Constitution: What If This Is As Good As It Gets?, in Marlene Wind and Joseph Weiler (eds.), *Constitutionalism Beyond the State*, (Cambridge: Cambridge University Press, 2003), 74; N. Walker (ed.) *Sovereignty in Transition*, (Oxford: Hart Publishing, 2003), same author, *Out of Place and Out of time: Law’s Fading Co-ordinates*, 14 *Edinburgh L. Rev.* 2010, 13.

⁸ COM(2001) 398 final 11.7.2001 Communication on European Contract Law.

99/44/EC on Consumer Sales.⁹ European private law was perceived as being either a domain of consumer law or of international private law within the Brussels and the Rome Convention, both from 1980. The 2001 Communication set an abrupt end to the long deep sleep into which national private law academia had fallen, largely disregarding the developments in European private law making since the midst of the 1980s. The reactions that have followed bear similarity to the famous discourse between *Savigny* and *Thibaut*¹⁰ on the use and usability of a private legal order for the building of a supranational state. For a decade now, the legal political world in Europe can be divided in two camps. On the one hand, those who ‘believe’ in the codification project as a building block for a united Europe. On the other hand those who ‘defend’ the necessity of national private legal orders within a united Europe. Sometimes the debate bears a strong ideological flavour.¹¹ Perhaps an open discussion about any relevant political and democratic aspects could contribute to overcome this shortcoming.¹²

The proponents of the codification project live their rather techno-bureaucratic dream very much in line with the German *Professorenmodell* of the late 19th century, relying on an alliance between the private law professors across Europe and the European Commission.¹³ The opponents do not hesitate to use nationalistic arguments in order to save their respective national private legal order against an ever stronger intrusion via Brussels.¹⁴ It is in this heated intellectual environment that the debate about pluralism in private law and private legal orders is about to take place.

On the surface, it is very much a debate about who should enjoy formal authority (*Jansen*¹⁵)---the Member States or the European Union. This is due to the overall design, which has triggered and shaped the debate – the construction of the post-1989 European legal order in the institutional design of the nation state. This does not mean that the legal discourse is restricted to the formal authority of law making. Quite the contrary is true. Just as in constitutional law, the pluralistic perspective (*Smits*¹⁶) has initiated deeper reflections and has revitalised a much older discourse on ‘pluralism’ in private law. Using again *Jansen*, the common denominator that unites those who remained outside the ideological-loaded pro/contra European codification project is the growing interest in the ‘informal authority’ of private law making and mixed forms where the formal and the informal come together in new forms of co-regulation. The distinction between formal, informal and mixed forms of authority very much insists on pluralism in legal sources. However, pluralism in sources leads to pluralism of legal systems, of legal actors and of legal norms.¹⁷ Seen this way, it might be possible to unite those who think of European private law under that umbrella; be it as a new form of international private

⁹ St. Grundmann/D. Medicus/W. Roland (Hrsg.) *Europäisches Kaufgewährleistungsrecht - Reform und Internationalisierung des deutschen Schuldrechts*, Köln (Heymanns) 2000.

¹⁰ A. F. J. Thibaut/F. C. v. Savigny, *Ihre programmatischen Schriften*, mit einer Einführung von Hans Hattenhauer, 1973.

¹¹ E.g. F. Yves Lequette, *Quelques remarques à propos du projet de code civil européen de Monsieur von Bar*, *Recueil LeDalloz* 2002, 2202-14; Bénédicte Fauvarque-Cosson, *Faut-il un code civil européen?*, *Revue Trimestrielle De Droit Civil* 2002, 463; also, *Droit européen des contrats: première réaction au plan d'action de la Commission*, *Recueil le Dalloz* 2003, 1171; Ph. Malinvaud, *Réponse-hors délai- à la Commission européenne: à propos d'un code européen des contrats*, *Recueil La Dalloz* 2002, 2542-51; Jean Heut, *Nous faut-il un 'euro' droit civil?* *Recueil La Dalloz* 2002, 2611-14; P. Legrand, *Antivonbar*, *Journal of Comparative Law* 1 2006, 13.

¹² M. W. Hesselink, *The Politics of a European Civil Code*, 10 *European Law Journal* 2004, pp. 675-697

¹³ H. Schepel, (2007), ‘The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law’, *Law and Social Inquiry*, 32 (1), 183- 199.

¹⁴ G. Comparato, *Nationalism and Private Law in Europe*, phd thesis University of Amsterdam 2012.

¹⁵ *Legal Pluralism in Europe, National Laws, European Legislation, and Non-Legislative Codifications*, in L. Niglia (ed.), *Pluralism and European Private Law*, 2012 forthcoming.

¹⁶ *A Radical View of Legal Pluralism*, in L. Niglia (ed.), *Pluralism and European Private Law*, 2012 forthcoming.

¹⁷ D. Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance*. University of Michigan Public Law Working Paper, no. 229. Working Paper.

law (Joerges,¹⁸ Michaels¹⁹), as reaching beyond the state (Michaels/Jansen²⁰), as a governance design (Cafaggi/Muir-Watt²¹) or as a hybrid legal order (Reich²²). There is not yet much clarity as to what is at stake when private lawyers use constitutional language and start speaking of pluralism in European private law. The contributions to this volume provide ample evidence of the variety of approaches. The distinction between formal and informal authority might serve as a starting point to get to grips with the diversity of approaches.

In this paper I will take 1989 or perhaps the late 1980s as a starting point to re-think the interrelation between the reasons for the failure of the two grand projects and what I call the emerging European private law as a self-sufficient legal order. Not the sole but one possible explanation for the failure lies in the changing patterns of the nation state. The European Constitution and the European Civil Code were conceived at a time in history where the nation state entered a new historical arena, the one of the market state. The design of the market state and its impact on the European Union in its constitutional and its private law design is part of a bigger and more long term project I am engaged in with my colleague Dennis Patterson.²³ In a nutshell, we argue that the European Union must be understood as a blueprint for understanding the EU market state as an enabling state.²⁴ The 1986 Single European Act constitutes the break-even point in the development of European integration. The 1985 White Paper on the Completion of the Internal Market²⁵ provided the necessary legitimacy for the European legislator to use and to instrumentalise law as a means to open up and to shape markets. This is where the birth of the EU as a market state can be located. Private law is submitted to the overall objective of the Internal Market. This private law is not the private law enshrined in the big codifications of the 19th century that characterise the state nation and later the nation state. Instead, it is what I call *regulatory private law*. The overall hypothesis is that the transformation of the nation state private legal orders into a market state European private legal order produces a diversification of private law regimes. On the one hand are the nation state private legal orders that loose importance in practice and, concomitantly, as a source of inspiration for the new regulatory design. On the other hand is the market state European private legal order *in statu nascendi* as a self-standing legal order which unites the ‘formal’ and the ‘informal authority’ of private law making; the making of private law through the EU legislator via regulations and directives in combination and in co-operation with non-state actors; the yielding of a new pattern of justice – access justice (*Zugangsgerechtigkeit*).

¹⁸ A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation, in Christian Joerges & Josef Falke (eds.), Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets, 2011, 000 in 2011 with Hart Publishing, Oxford-Portland.

¹⁹ Dogmatising Non-legislative Cofications: Non-legislative Reference texts in European Legal Discourse in R. Brownsword/H.-W. Micklitz/N. Niglia/St. Weatherill (eds.), The Foundations of European Private Law, Hart Publishing 2011, 31.

²⁰ R. Michaels/N. Jansen, Private Law Beyond the State? Europeanization, Globalization, Privatization, (54) American Journal of Comparative Law 2006, p. 843; N. Jansen/R. Michaels, Beyond the State: Rethinking Private Law, Mohr/Siebeck 2008.

²¹ Cafaggi/Muir Watt, F. Cafaggi/H. Muir Watt (eds.), Making European Private Law, 2008; same authors The Regulatory Functions of European Private Law, 2010.

²² N. Reich Horizontal Liability in EC Law – Hybridisation of Remedies for Compensation in Case of Breach of EC Rights, CMLR 2007 (44) 704.

²³ H.-W. Micklitz/D. Patterson, From the Nation State to the Market: The Evolution of EU Private Law, EUI Working Paper 2012/000.

²⁴ With a view to regulatory integration the main features of the EU market state are the following: the shift from private into public – the State outsources its regulatory functions, the shift from law and Regulation to regulation & outsourcing privatisation, such as can be observed in the area of utilities, transportation, healthcare. The bottom line: sovereignty loses its nation state force as the state shifts away from providing top-down regulatory and entitlements welfare to fostering and preserving market conditions for the maximization of economic opportunity.

²⁵ COM (1985) 310 final.

I will develop my arguments in two steps. I will *first* clarify my understanding of private law as economic law. Only such a broadening of perspective allows for understanding the full picture of the development of European private law as regulatory private law. The current debate on the appropriate next step towards the envisaged and promoted adoption of a European Civil Code suffers very much from its narrow understanding of private law as contract and tort law, socially upgraded with consumer and anti-discrimination law but neglecting the much deeper and more fundamental changes to private law in the 20th century.²⁶ This is a characteristic way of thinking that follows nation-state based patterns. The counterpart to the nation state pattern of private law is European regulatory private law to be conceived as a self-standing legal order, which is going to be developed from the making of the law via its substance to its enforcement. Such a broadening of perspective, that is, here the nation states private legal orders and there the self-standing European regulatory law, is crucial for a deeper analysis of the inter-relationship between nation state private legal orders and EU market state private law, between the formal and the informal authority of the private law in the making and the enforcement. This constitutes the second step of my analysis. Four parameters - conflict and resistance, intrusion and substitution, hybridisation and convergence – shall serve to get a clear picture of the multiplicity of legal regimes and the way in which the nation state private legal orders and the EU market state private legal order interact.

Traditional Nation State Private Law vs. Modern European, Market State Private Law

There is a constitutional link between the changing patterns of statecraft from nation to market state and the function and purpose of the private legal order. This assumption requires clarifications with regard to what I understand by European Constitution and by private law. I start from the underlying distinction between the constitutional charter, in the words of the ECJ,²⁷ and the private legal order as two distinct though inter-related fields that altogether form the European legal order. The link comes clear in the role and function of constitutional competences for the adoption of a European private legal order. Private law is being understood as economic law,²⁸ covering not only contract and tort or systematically speaking the continental codifications but also public and private regulation of the economy. This needs to be developed.

The broad concept of private law is crucial for the development of a deeper understanding of the ongoing transformation process of nation states to market states as well as the particular role and function of the European Union. The traditional national private legal orders with their focus on contract and tort represent the *state-nation* and later the *nation-state variant of private law*. They have emerged and they are deeply rooted in the state nation and nation state building process of the 18th and 19th century in continental Europe. The starting point is private autonomy, freedom of contract, *la liberté de la volonté*. The actors are private individuals, private economic actors originally and largely operating within the territorial boundaries of the state. The states claim the authority to adopt private legal rules in their territory. Local law and *droit commun* should no longer be applicable side by side. Private law became nationalised. The grand codifications of the early 19th and late 19th century were meant to overcome the informal authority of private law as it stood in the 17th and 18th century. The result was an enormous gain in economic efficiency and legal coherence. Legal pluralism, as diffuse it might be, challenges this progress and might bring Europe back to the Middle Ages.²⁹ In the early 19th century, international private law constituted the conceptual answer to the building of national private

²⁶ See for an account of the debate, H. Micklitz/F. Cafaggi, Introduction, in: H.-W. Micklitz/F. Cafaggi (eds.), *The European Private Law after the Common Frame of Reference*, 2010, iv-xlvi.

²⁷ Since ECJ 26 September 1984, Case 294/83 – *Les Verts* [1986] ECR 1339 at 23.

²⁸ Assmann/G. Brüggemeier/D. Hart/Ch. Joerges, *Zivilrecht als Teil des Wirtschaftsrechts*, 1980.

²⁹ See the distinctively different positions of N. Jansen (stressing the risk of legal pluralism) and J. Smits (promoting the disconnection of jurisdiction and applicable law) in L. Niglia (ed.), *Pluralism and European Private Law*, 2012 forthcoming.

legal orders as means and technique to decide on the applicable law in cross-border transactions. Today, international private law is again at the forefront in the search for handling the growing pluralism of private law in Europe and the world.

European, I should more correctly say, European Union private law is different. As is well known, the European Union is not a state, at least not a nation state or a state of nations, neither a ‘United States of Europe’. What makes the discourse on the European Constitution with a big or a small ‘c’³⁰ so difficult is the fact that, the conceptual design of the EU legal order is so deeply entrenched in nation state constitutional patterns, overlooking the potential of the ongoing transformation process.³¹ The now more than ten years old debate about the feasibility of a European Civil Code³² fits neatly into such a strangely distorted perspective. The discussion on the feasibility of a European Civil Code provides a mirror image of the constitutional debate. Constitutional pluralism paved the way for taking a fresh look at the constitutionality of the EU, at its particularities, which makes them distinct from a national constitution.³³ A change in perspective is needed to free from old patterns of legal thought. I will demonstrate the narrow-minded approach of the current mainstream European private law discourse in looking into the EU competence on private law making, and the design of European private law, as it shows up in the 2001 Communication which has shaped the debate until today.

EU Competence as a Conflict over the Design of EPL

As it is well known, the EU has no genuine competence in the field of private law, comparable to the competence that you may find in the Federal German Constitution. The competence for the adoption of private law measures had to be ‘borrowed’ from Art. 100 a EEC, later Art. 95 EC/EU and today Art. 114 TFEU---a regulatory technique which the ECJ has accepted so far.³⁴ Interestingly enough, even the boldest draft of a European Constitution left private law competences unaffected. I do not recall any attempt in the last twenty years to transfer competences of the Member States to the EU in order to empower the EU to craft a European Civil Code. Why is that so? *H. Collins*³⁵ argues in favour of a European private law to be developed bottom up out of the emerging European civil society and he is not the only one. *Walter van Gerven*³⁶ with the *Ius Commune Project* and *Jan Smits*³⁷ promoting *Law 2.0*. have taken a similar position. Although each of the three starts from different premises, they are united in the conviction that the European private law making is not a matter of competence. On the other end of the spectrum are the EU organs which cannot act without competence. The missing explicit competence might help to understand why the European Commission did not get into these questions when it launched its 2001 Communication. The European Commission never was an amateur of the European Civil Code so forcefully promoted by the European Parliament. It was dragged into the project by the European Parliament, who advocated a European Civil Code for a United Europe in the *Thibaut* sense.

³⁰ N. Walker, ‘Big ‘C’ or small ‘c’’, (2006) 12 ELJ 12-14.

³¹ J. Habermas, *Zur Verfassung Europas*, Ein Essay, 2011, Edition suhrkamp.

³² The official start might be dated back to the Communication of the European Commission, although the European Parliament had been advocating for a European Civil Code already since the early 1990s.

³³ M. Maduro, *Europe and the Constitution: What If This Is As Good As It Gets?*, in Marlene Wind and Joseph Weiler (eds), *Constitutionalism Beyond the State*, (Cambridge: Cambridge University Press, 2003) pp. 74-102.

³⁴ With the exception of Case C-436/03 *EP v Council* [2006] ECR I-3733.

³⁵ *The European Civil Code, the Way Forward*, 2008.

³⁶ *The different Casebooks on Tort Law, Private Law, Consumer Law, Anti-discrimination Law*.

³⁷ *Private Law 2.0 On the role of private actors in a post national society*, Inaugural Lecture, University of Maastricht, 30.11. 2010.

What matters in our context is the link between the issues of competences and the design of the European private law: Digging deeper into competence could have yielded the necessity to reflect on the particularities of a European private legal order which is not nation state bound, but market bound. It would have meant to engage into a discourse of the relationship between the constitutional character of the EU and a European private legal order that would take into account the particularities of the EU. I think that the European Commission was aware of the fact that a competence debate could have produced counterproductive effects. It would have brought to light the degree to which the EU had already interfered into national private legal orders, outside traditional contract and tort law issues. I do not argue that the European Commission deliberately decided to gear the discussion into a direction which was less dangerous for its overall aim to complete the Internal Market. But the European Commission (DG Sanco?) might have recognised that concentrating on regulatory private law, would allow her to continue its work independently from the much more political discussion on a fully fledged European Civil Code. European private law making outside contract and tort could thereby be 'shielded' against politicisation through academics and politicians. With CESL, however, the issue of competence is back on the agenda, politically through the seven Member States which raised the subsidiarity complaint, academically via the question whether CESL can be based on Art. 114 TFEU or must be based on Art. 352 TFEU. The ongoing debate might very well affect EU private law making outside the core areas of nation state private legal order, the genuine field of European regulatory private law. This could lead to a drawback of the evolution of a genuine European private legal order – as I understand it.

The 2001 Communication Translated into the Struggle over the Design of EPL

By now it suffices to insist on one point: that the discussion triggered by the 2001 Communication, the work of the study group and of the *acquis* group, the merging of the two initiatives, the development of the DCFR in 2008/2009 and later the CFR in 2011 under the auspices of Commissioner Redding – also called FS Feasibility Study, all of this took place in a constitutional *competence vacuum*. The debate was framed by the European Commission. The European Commission sets the tone, defines the agenda and supervises the activities. The already existing European private law rules, the so called private law *acquis communautaire*, formed the major source of inspiration. In essence, the 2001 document of the European Commission enumerated European international private law and consumer contract law directives. The first category is conceptually speaking no more than a European variant of long lasting attempts at the international level to agree on common standards on how the applicable law should be determined. Consumer law had raised more awareness, being the gateway for the European Union to instrumentalize consumer contract law for completing the Internal Market, long before the discussion on a European Civil Code started. Translated into the narrative of the nation state vs the market state, the Communication is very much designed along the line of a nation state private legal order. Two major areas are missing which obviously belong to the *acquis* but which are not mentioned. The first is the impact of primary community law, in particular the market freedoms on national private law,³⁸ but also the impact of fundamental rights on national private law and, since 2009, on secondary Community law.³⁹ Opening the debate over the *acquis*, also resulting from the ECJ case-law in these areas, would have given the codification project a totally different direction. It would have paved the way for building a link between the European Constitution and the European Civil Code, it would have shed a different light on how the rules might look like that could be enshrined into a European Civil Code. The second is the large set of rules the EU has adopted in the

³⁸ E. Steindorff, *EG Vertrag und Privatrecht*, 1996; Ch. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union*, 2010.

³⁹ 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; ECJ 1.3.2011, Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des Ministres* nyr.

field of services in order to build a European market (financial services) or to transform public services into competitive markets (energy, telecommunication, postal services, transport, health care, education). Although the narrow approach has been criticised right from its beginning, neither the European Commission nor the *acquis* group which was established to execute the mandate demonstrated any preparedness to change or to enlarge the working programme.

It is hard to understand why the narrow approach chosen in 2001 survived ten years of internal and external discussion. I have already speculated about the possible motives of the European Commission. What is missing is an attempt to understand the role and function of the academics involved in the project. We have to recall that the *acquis* group was composed of traditional nation state private lawyers. There was obviously no preparedness on the side of the European Commission to take professors of EU law, or of energy, internet or telecommunication law on board. The merging of the free standing Study Group and the *Acquis* Group brought a new dynamic into the drafting process. The Study Group continued the work started by *Ole Lando* which eventually led to the adoption of the Principles of European Contract Law. They both distilled out of a comparative analysis of different private legal orders a set of principles that could and should find common support not only in the academic environment but also in courts. The Study Group gave the codification project a new direction, one which the European Commission obviously had not in mind, and it extended the mandate beyond European Contract Law to the development of a fully-fledged European Civil Code. Services were included into the project but not the services where the EU had most actively changed the legal rules. *Summa summarum*---the merger of the two groups had even strengthened the nation state understanding of a future European private law. The overall group of academics was rather homogeneous, all trained in their respective nation state private legal orders. The internal homogeneity finds its counterpart in the external pressure from those of the private law community which were not involved in the drafting process. The Study Group and the *Acquis* Group had to demonstrate the feasibility of a European Civil Code shaped along the line of nation state private legal orders and respecting the *droit commun*.⁴⁰ Inside and outside pressure favour a monistic view on private law, one where a European Civil Code is discussed as a means to replace national and nation state private legal orders, at least in the long run.

The Innovative Character of European Regulatory Private Law

Thinking and discussing in categories of the nation state means to turn a blind eye on the development of private law outside nation state formed categories. Elsewhere I have tried to show the breadth and depth of European private law making, if one is ready to change the perspective, from traditional forms of private law to the new forms that do not fit into our nation state trained legal minds. There is a price to pay for the long deep sleep of private lawyers in Europe. They entered the European field rather late and, due to their lack of understanding of the European legal order as a ‘genuine’ legal order – to use the language of the ECJ in *van Gend & Loos*⁴¹ – they transposed nation state thinking and nation state concepts to the European level, as if they could start from scratch, largely disregarding the tremendous changes that the whole legal system, including private law, has undergone in the last twenty to thirty years through the European integration process. I will not reiterate the whole story, but I will pinpoint to the major steps in the development, in order to make my argument that European private law must be understood as economic law and that only such a shift in perspective allows the discovery of the singularity of European private law.

Not being a state, the European Union was never concerned with the underpinnings of establishing private law as a national legal order, based on private autonomy or freedom of contract. The overall

⁴⁰ See Eidenmüller, Faust, Grigoleit, Jansen, Wagner, Zimmermann, The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems, Oxford Journal of Legal Studies 28 (2008), S. 659.

⁴¹ Judgment of 05/02/1963, C-ase26/62 Van Gend en Loos / Administratie der Belastingen ECR 1963,p.3.

project of the European integration process was first the common market, later the Internal Market and only gradually the building of a legal order that reached beyond mere economic transactions, the shaping of a *social order*, a citizen order or even a constitution. Private law – aside from family law – may be by and large associated with economic transactions with a social outlook as enshrined in consumer law and anti-discrimination law. However, the kind of justice provided through private law differs from patterns of national social justice. In European private law, the Internal Market rhetoric sets the tone. Here the European Union appears as a *regulator*, be it through the ECJ which is challenging national economic rules that hinder free trade of products, services, capital or persons or be it through the EU legislator which is adopting horizontal or vertical market related rules on private transactions, often by way of new modes of governance.⁴² The regulatory private law, in its negative variant through the impact of the four freedoms on the private law and in its positive variant through the bulk of EU rules that have been adopted in the aftermath of the Single European Act outside Consumer and Anti-discrimination Law, deserve outmost attention. This is the *European regulatory private law*, in which the *modern variant of the European Union as a market state* comes clear. This private law is different from national private legal orders based on private autonomy and free will. This private law takes its form, procedure and content from being instrumentalised for building and shaping markets,⁴³ yielding its own pattern of justice. It covers the setting of the regulatory frame through the EU institutions, the EU driven building of new market surveillance authorities, the fine-tuning of the rules through intermediary forms of co-operation between EU and Member States institutions – be they called comitology, Lamfalussy, open method of co-ordination, – the development of new substantive legal mechanisms that reach beyond traditional private law rules and, last but not least, the enforcement of the self-standing rules through the sectorial regulatory agencies and through new forms of alternative dispute settlement mechanisms.⁴⁴

There is an obvious argument against the distinction between *nation* states being equated with contract and tort law, with freedom of contract and private autonomy and *European* private law being regulatory in nature and meant to design markets. Regulation in private law is a matter that has been discussed already for more than one hundred years. *Otto v. Gierke* belongs to those who defended the need for a distinction between private law and private law regulation, although, at that time, with a clear highly political message. His analysis of the development in the late 19th century German law is as relevant today as it was hundred years ago.⁴⁵

„Man erhält nun zwei von ganz verschiedenem Geist beherrschte Systeme: ein System des gemeinsamen Civilrechts, in welchem das ‚reine‘ Privatrecht beschlossen liegt, und eine Fülle von Sonderrechten, in denen ein vom öffentlich Recht her getrübt und mit öffentlichem Recht vermisches Privatrecht waltet. H i e r lebendiges, volkstümliches, sozial gefärbtes Recht voll innerer Bewerbung – d o r t eine abstrakte Schablone, romanistisch, individualistisch, verknöchert in todter Dogmatik.“

(One receives two systems, which are dominated by a totally different philosophy: a system of a common civil law, which enshrines the pure private law, and a bulk of special rules, which is governed by a cloudy mixture of public and private law. Here a vivid, popular, socially coloured law, full of inner dynamic; there an abstract model, romanistic, individualistic, ossified in dead legal doctrine)

⁴² Cafaggi/Muir Watt, F. Cafaggi/H. Muir Watt (eds.), *Making European Private Law*, 2008; same authors *The Regulatory Functions of European Private Law*, 2010.

⁴³ In the German understanding private law as economic law, *Privatrecht als Wirtschaftsrecht*, see for Europe Ch. Schmidt, *Die Instrumentalisierung des Europäischen Privatrechts durch die Europäische Union*, 2010.

⁴⁴ I have given a much clear picture of both the substance and the enforcement in the report I wrote for the German Juristentag 2012 to be held in Munich, *Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?* To be published 2012. An English translation is under the title of ‘A new architecture for consumer law’ is under preparation.

⁴⁵ *Otto v. Gierke, Die Soziale Aufgabe des Privatrechts*, 1889, at 13 [translation of H.-W.M.].

In comparison to the beginning of the 21st century, there are, however, major differences in terms of substance and in terms of institutions which justify to maintain the equations---nation states = the traditional concept of private law (contract and tort law (common law and/or codifications)) and the European Market State = the modern concept of private law (European regulatory private law). So my argument is that the late 19th century and the early 21st century may each be associated to a particular stage of development, in terms of nation state vs. market state and in terms of traditional vs. modern private law.

The regulatory law at that time was mainly labour and social law which was kept outside the BGB. The German BGB provided only for a basic set of rules on the contract for services, the so-called *Dienstverträge*, aside all the social concerns of labour lawyers who were fighting for a better protection of the legal position of dependent workers. This is what v. Gierke was referring too. Today's regulatory private law cuts across all sectors of the economy and accross policies. It lies at the heart in particular of service contracts on financial services, on telecommunications, on energy (electricity, gas), on (the increasingly privatised) health care services, more and more on educational services, last but not least on transport. Services amount for 70% of the gross income in the EU. The driving force behind all these rules that aim mainly at opening up markets, at establishing competition, at liberalising former public services, at promoting privatisation in former areas of public services, is undoubtedly the EU, more precisely the European Commission. Private law issues tie in only inbetween other more 'important aspects' of the appropriate market design. This private law is regulatory law, but regulatory should not be equated with rules that restrict private autonomy and freedom of contract. Its instrumental character saves it against easy classification. Regulatory private law contains both elements, establishing market freedoms, therefore increasing private autonomy, whilst at the same time providing for rules that set boundaries to the newly created competitive market autonomy. The White Paper on the Completion of the Internal Market⁴⁶ provided the European Commission with the necessary legal mandate and legitimation to initiate legislative measures which aimed mainly at establishing markets, which inter alia, however, contain a whole series of private law rules, being understood as economic law.

The regulator, about one hundred years ago, was the nation state which used regulation to shape national markets for national economies. Implicit in this assumption is the understanding that 'legislative' or, more broadly, 'regulatory' meant to shape markets is not an invention of the market state. Regulatory private law existed already in the late 19th century. This is particularly true for the then emerging new industries, such as the chemical industry and, in today's terminology, the telecommunication industry. At that time, however, the firms were national, they were deeply anchored in the nation state, economically and culturally.⁴⁷ They were operating on the national markets, which was the case both of the old industries and of the the new. The establishment of European Economic Community in 1957 has changed the economic, the political and the social environment. The *regulator* which is setting the agenda in todays' time has become the EU. All that the European Commission as the major driver needs is a competence in the Treaty and the majority in the European Parliament and in the Council. There are only a few examples where the European Commission suffered from a severe setback, such as in the legislative history of the Service Directive 2006/123/EC. In most cases the European Commission managed to get the necessary support at all institutional levels to implement its policies to complete the Internal Market, even in the sensitive area of health care. It then remains for the Member States to implement and to enforce what has been decided at the EU level. The here relevant pieces of secondary Community law focus on the shaping of a genuine European market. They address economic actors, business and consumers, who are ready to invest into a market that offers more opportunities and better choices on both sides. The legislative

⁴⁶ COM (1985) 310 final.

⁴⁷ C. Torp, Von Junkern und Schlotbaronen. Zur Interpretation des deutschen Protektionismus vor 1914, in: Saeculum 60. 2010, S. 143.

means and regulatory tools, not to speak of the particular content of the rules, inherently bear a cross-border dimension. This might explain why the EU has to ‘invent’ new devices that fit to overall policy objective. In short, the EU regulator differs from the national regulator 100 years ago.

There is no clear-cut moment, which allows for making the point when exactly the transformation from shifting away from the national to the building of a European market started. In Europe, the Single European Act may be identified with the break-even point for the visibly instrumental use of private law to market building purposes. Transformation is a process. The new European private legal order still bears elements of the old one and is indeed built on the old one. A deeper look into the service sector which lies at the heart of the European regulatory private law would easily reveal the differences. It suffices to underline the differences between the telecommunication and the energy markets. So there are transitional periods, where the two orders are hard to separate even analytically. In Europe, the differences are not only linked to the history of the EU, but also to those of the Member States.⁴⁸

The Multiplicity of Private Law Regimes in the EU

For the analysis of the interaction between nation state private legal orders and the EU market state private order I will use four normative models which are meant to capture the set of variants available in the relationship between European private law and national private law. They reflect my understanding of European private law,⁴⁹ the formal, the informal and the mixed authority of the law.

The four categories share a common theoretical background. I incorporate in my analysis legal theories on the transformation of private law into economic law⁵⁰ with theories analysing private law beyond the state.⁵¹ In order to fully grasp the change in paradigm, I draw on institutional economics as an analytic framework. The concept of ‘institutions’⁵² that I use in order to get to grips with the ‘substance’ of European regulatory private law – understood as the rules regulating the structure of human interaction, composed of formal (legal) and informal (social) constraints and their enforcement – complies with the institutional design of legal orders, notwithstanding their origin, be it European or national. In this light, legal theories help to understand and to explain the transformation process on a more abstract theoretical level. The insights of institutional economics allow for an analysis of how exactly the transformation process of the two legal orders occurs or, in the language of institutional economics, how the ‘institutional change’ reaching beyond national political economies manifests itself. I have identified four parameters which tentatively allow me to describe and analyse the interaction between national private law regimes and European private law regimes: conflict and resistance, intrusion and substitution, hybridisation and convergence. Without any attempt at explaining the deeper reasons behind each category, I will use them in a rather pragmatic way so as to demonstrate how nation state private law and market state European law interact.

⁴⁸ S. Steinmö, *The Evolution of the Modern States*, CUP 2010.

⁴⁹ The following is no more than a snapshot of the theoretical background that guides my analysis. This is not the right place to explain the deeper reasons that in my view explain the theories. For the purpose of this paper, I will simply ‘use’ and ‘apply’ what I have developed elsewhere.

⁵⁰ L. Raiser, *Die Zukunft des Privatrechts*, 1971.

⁵¹ R. Michaels/N. Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, (54) *American Journal of Comparative Law* 2006, p. 843.

⁵² “Institutions: The rules of the game: the humanly devised constraints that structure human interaction. They are made up of formal constraints (such as rules, laws, constitutions), informal constraints (such as norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics”, <http://www.coase.org/nieglossary.htm>.

Conflict and Resistance

Conflict and resistance⁵³ is suggested as one of the possible reactions of the Member States. The perspective is that the Member States do not give way to the intruding European regulatory private law. Instead, they provoke a clash between the European regulatory private law and the traditional national law and set limits to where the intruding law ends and where the national laws begin.

In defending the national private legal order, more precisely national civil codes, Member States defend nation states patterns and habits. The political and academic reactions in the Member States on the feasibility of a European Civil Code provide ample evidence for such an understanding. Even the academic world is divided between the ‘believers’ and the ‘opponents’. With the adoption of the draft Regulation on a Common European Sales Law (CESL) the codification project has reached the political agenda in the Council of Ministers, in the European Parliament, but also in nation states. The national parliaments of seven Member States have raised objection against the draft Regulation mainly for lack of competence.⁵⁴ Whilst this does not suffice to stop the initiative, it provides evidence for the strong resistance in a considerable number of Member States against any attempt of the EU to intervene into the core of the national private legal orders, i.e. into sales law.

The objections from the Member States, can be broken down into three different legal categories: competence, subsidiarity and proportionality.⁵⁵ Member States argue that the EU has no competence and that Art. 114 TFEU is not the appropriate basis for the introduction of a Common European Sales Law. So far the EU has only used Art. 114 TFEU for the adoption of consumer law directives and for the adoption of sector related rules in various service markets. Art. 81 TFEU provides for a special legal basis for matters of international private law. With CESL it is the first time that the European Commission is using Art. 114 TFEU to intervene into the core of the nation state private laws, that is, the law of obligations and sales law. An analysis requires to engage into the case-law of the ECJ, the rules of the Treaty and to define the reach of Art. 114 TFEU. The essence of the debate turns around the question whether different nation state private law rules detrimentally affect trans-border trade. The European Commission is relying on self-produced impact assessments whose expressiveness and added value is challenged in national governments, for good reasons. Let us assume that the EU has no competence. What does this mean for the interaction between the two legal orders, the nation state and the EU private legal order? It means separation and it implies that the two should remain side-by-side. Does the competence argument help to understand the ongoing transformation of private being understood as economic law? The answer is a clear no.

The subsidiarity argument, the second one very strongly promoted by the national parliaments is much more political, in that it claims the Member States level to be better suited to handle trans-border consumer sales in combination with an Europeanised international private law mechanism.⁵⁶

Its legal value still needs to be determined. The ECJ had no opportunity to give shape to the subsidiarity principle. As a political argument, it suggests that nation state private legal orders, built on autonomy and freedom of contract are the appropriate means to handle all sorts of conflicts which result from the rise of regulatory private law at the European level. This avoids considering that

⁵³ See for a deeper understanding B. Tamanaha, *Understanding Legal Pluralism, Past to Present, Local to Global*, (30) *Sydney Law Review*, 375; D. Caruso *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, *ELJ* (3) 1997, 3; L. Niglia, *The non-Europeanisation of Private Law ERPL* 4 (2001) 575.

⁵⁴ The seven complaints are on file with the author, not all are publicly available, but see for the UK Published in Council Doc. 18547/11 of 14 Dec 2011, for Germany BT-Drucksache 17/800, for Austria 8609 der Beilagen zu den stenographischen Protokollen des Bundesrates.

⁵⁵ This is not the right place to discuss whether CESL can be based on Art. 114 TFEU or not. My point is different.

⁵⁶ See for the origin of the subsidiarity principle the message of Pope Pius XI, *Quadragesimo Anno*, London Catholic Truth Society, 1936, 31 para 79, where he referred to the subsidiarity principle to defend the key role of the church against an ever more intruding fascist state.

regulatory private law largely operates outside the national courts, that is, that regulatory agencies play an key role and that the vast majority of conflicts are solved within or through the agencies and the newly established dispute settlement mechanisms.

The proportionality argument, quite to the contrary allows for looking deeper into the reasons that might justify or not (!) the adoption of an optional instrument for transborder sales.⁵⁷ The test, as set out in *Gebhard*⁵⁸ requires that the adoption of CESL must be justified by imperative requirements of the general interest, must be suitable for securing the attainment of the objective it is designed for and must not go beyond what is necessary in order to attain that objective. It is only at this level, that is, after having discussed the competence and the subsidiarity argument, that it is possible to bring into the debate less formalistic reasons, that is to say, in the language I use, the interaction between the nation state and the market state private legal order. The general interest test allows for discussing the changing patterns of the state, from nation to market state and the needs and possible justifications for the development of a new private legal order. Taking the test seriously, it would reveal straight away that CESL is NOT in the general interest as it does not tackle the most basic question of what kind of European private law is needed for an EU market state. It is neither suitable nor necessary for the very same reasons. A viable alternative might well be a soft-law instrument that reduces the set of rules to what is really needed and links it to an appropriate ODR procedure.⁵⁹

Intrusion and Substitution

Intrusion and substitution⁶⁰ is suggested to be the perspective of the current EU law-making and law enforcement strategies, enshrined in the idea of a self-sufficient order composed of three major elements: (1) the horizontal and vertical sectoral rules; (2) the general principles enshrined in the horizontal and vertical sectoral rules; (3) the general principles of civil law. In my paper on the 'visible hand of European private law' I tried to give shape to the horizontal and the vertical sectorial rules; in 'competitive contract law' I tried to show that it is possible to derive a set of 'principles' out of the regulatory private law, however incremental that might still be; in 'universal services: a nucleus for a social European private law' I argued that the EU has introduced, or is going to introduce, a new lawyer of principles into the shaping of horizontal contract law rules.⁶¹ When I wrote these papers the ECJ had not yet introduced the 'general principles of civil law',⁶² - the third element - which may close possible gaps resulting from the horizontal and vertical legal rules. This new approach of the ECJ has provoked strong reactions in the legal discourse, as it is easy to imagine. In the context of my analysis, I am concerned with the role that 'the general principles of civil law' might play in the

⁵⁷ N. Reich, How Proportionate is the Proportionality Principle? Some critical remarks on the use and the methodology of the proportionality principle in the internal market case-law of the ECJ, in H.-W. Micklitz/B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, 2012, 83.

⁵⁸ ECJ Case C-55/94 (1995) ECR I-4165.

⁵⁹ See for a first attempt for such a design with regard to b2c relationship: *Optional Soft Law Instrument on EU Contract Law for Businesses and Consumers*, Study for BEUC, prepared by G. Howells/H.-W. Micklitz/N. Reich, 2011; <http://www.beuc.eu/BEUCNoFrame/Docs/1/ODIJBMBNCEILOJPPMPNDENNBPDWY9D7G219DW3571KM/BEUC/docs/DLS/2011-09955-01-E.pdf>.

⁶⁰ The link to system theory is obvious, though not sufficient, see G. Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law*, 72 MLR 2009, 1.

⁶¹ For a different vision, R. Michaels, *Of Islands and the Ocean: The Two Rationalities of European Private Law*, R. Brownword/H.-W. Micklitz/L. Niglia/St. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, 2011, 139.

⁶² ECJ 10.4.2008 Case C-412/06 – Hamilton, at 42; AG Trstenjak, Case C-489/07 Messner, at 91 and 108, ECJ at 29; 15.10.2009 Case C-101/08 – Audiolux ECR 2009 I-nyr; J. Basedow, Mangold, *Audiolux und die allgemeinen Grundsätze des europäischen Privatrechts*, Festschrift für K. Hopt 2010, 27; St. Weatherill, *The 'principles of civil law' as a basis for interpreting the legislative acquis*, ERCL 2010, 74; A. Hartkamp, *The General Principles of EU Law and Private Law*, *RebelsZ* 2011, 241.

shaping of a self-standing European private legal order. Here I will not discuss the (dubious) informal authority of both the DCFR and the OI, which are already used today by Advocate Generals as a source to give shape to the general principles of civil law.⁶³

‘Regulatory private law’ is the blueprint for understanding the transformation process that private law has been and is undergoing in the last 25 years. The EU is by-passing the nation states and developing its own design for a market based private legal order, an enabling legal order. The standard model for private law as a self-sufficient order is the sectorial rules on telecommunication, energy, financial services and transport. Self-sufficiency means the whole process of law-making up to law enforcement follows sector specific patterns. The Member States have given way to substitution and intrusion by adopting three generations of secondary community law (1st, 2nd and 3rd) rules which aim at establishing a European market for telecommunication, for energy and for transport, thereby promoting a distinction between the average and the vulnerable consumer. The EU rules, when implemented into national law, are usually kept distinct from the codified national private legal orders. They are enshrined in national acts, which do not alter the structure of the EU regulatory approach, that is, the going together of market access rules and private law rules.

In order to understand the concept of self-sufficiency, it is crucial to take the full spectrum of EU law making and EU law enforcement into account. The making of the EU unites the formal and the informal authority of the law. Formal, in that the EU is the legislator which sets the frame for the institutional design – in particular the building of regulatory agencies – and in that the EU is laying down the procedure which public and private actors have to observe in the rule making. These are the new modes of governance, here in the form of co-regulation. The substantive rules, which are yielded in this process, are often on the borderline between ‘mere’ technical standards and ‘binding’ legal rules. They produce a genuine model of access justice. They cover public and private rights, such as access, price transparency, price adequacy and price control, quality and information, continuity, change of the service provider, advice and responsibilities of intermediaries and new remedies. They reach beyond the traditional understanding of private law and more narrowly beyond contract law rules, which were underdeveloped already in all 19th century codifications. The implementation process yields ‘strange’ scenarios of mixed powers, such as administrative enforcement of private law or administrative enforcement of collective actions or administrative complaint management and settling of conflicts. The national courts are largely kept outside the conflict management. They intervene only in situations of severe conflicts, when the regulatory approach, jointly promoted by the EU legislator, the national legislator, the competent administrative authorities and business organisations and actors meets strong and organised resistance of those who have not been involved in the making and the implementation of the rules. An illustrative case, though of regional importance only, is the ‘fight’ of consumers organised by the consumer advice centre, in the city of Hamburg against dramatic increases of gas prices. After a quite heavy and burdensome litigation, the civil courts seem ready to smash the EU promoted objective of competitive prices meant to replace regulated prices.⁶⁴

⁶³ See H. Eidenmüller/E.-M. Kieninger/N. Jansen/G. Wagner/R. Zimmermann, The Proposal for a Regulation on a Common European Sales Law: Shortcomings of the Most Recent Textual Layer of European Contract Law, SSRN 25.1. 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991705, German version to be published in JZ 2012.

⁶⁴ See the most fascinating documentation of the history and the story behind the litigation, <http://www.vzh.de/energie/30047/eon-will-die-75000-euro-nicht-zahlen.aspx>; P. Derleder, Der Stopp der Gaspreiserhöhungen durch die Zivilrechtsprechung. Vorstellung und Analyse eines wundersamen Eingriffs, KJ 2010, 292.

Hybridisation

Hybridisation⁶⁵ is suggested to be an overall normative model of a composite legal order, within which the European and the national legal orders both play their role in some sort of merged European-national private legal order. Hybridisation means that the legal character of the respective rule is neither European nor national. It bears elements of both legal orders and is therefore supposed to be hybrid. I admit that the concept of hybridisation is under-theorised and that it has become a fashionable concept to circumscribe phenomena which we do not understand.⁶⁶

In a historical perspective, hybridisation is an old form of the co-existence of different legal orders. The colonial experience provides ample evidence for hybrid legal orders, from inter-penetration to the side-by-side co-existence of the old local law and the imported colonial law. In a EU perspective, hybridisation characterises the relationship between national private legal laws and European private law and/or national private legal orders and higher ranking constitutional rights, fundamental freedoms and fundamental rights. In view of the envisaged analysis one might understand hybridisation as a means to leave space for nation state private legal orders and self-standing market state private legal order(s). A prominent field of analysis where hybridisation has raised concern is consumer law. The EU directives and regulations do not provide for a complete order, not even with regard to particular problems that should be solved via EU law. Whenever courts engage in interpreting harmonised private law, they must combine European and national legal requirements. National private lawyers often complain about the sketchy European private law rules that shatter national private law doctrines. A more promising view would be to speak of ‘creative destruction’ (Schumpeter). Nation state private law patterns have to be reconstructed in a market state European perspective.

The second form of hybridisation covers what has been termed constitutionalisation of private law. The development started already decades ago in the Member States, when national courts referred to constitutional rights to intervene into classical private law cases, mainly in order to enhance the importance of social rights in private law matters.⁶⁷ A similar development can be observed in the interplay of national/European private law and primary EU law. It started with the impact of primary Community law on national private law, the forgotten dimension in the *acquis* project of the European Commission. Nowadays the attention should be drawn to the ECJ and the ECtHR which have begun in an ever stronger form to use human rights and, since 2000, fundamental rights as a means to enhance the position of the individual be it against his or her state, be it horizontally in private law relations.⁶⁸

I would like to use remedies as the most prominent example of hybridisation, where the different levels of the private law are coming together, national law and European private law, national constitutional law and EU fundamental rights. The European legal order is designed in a way so as to leave it to the Member States to designate the appropriate institutions and to define the appropriate remedies, which should secure the uniform application of EU law. The procedural autonomy of the Member States, so amply underpinned by the ECJ, is, however, bound to two major restrictions---for national measures to implement EU law must be *equivalent* to those meant for the implementation of

⁶⁵ Th. Duve, An Early Globalization of Justice? Historical observations on mechanisms of creating normative coherence in the Age of Discovery, paper presented at the University of Helsinki, September 2011; I.-J. Sand, Hybrid Law – Law in a Global Society of Differentiation and Change, in: Galf-Peter Calliess; Andreas Fischer-Lescano; Dan Wielsch and Peer Zumbansen (eds.): *Soziologische Jurisprudenz: Festschrift für Gunther Teubner*. Berlin: Walter de Gruyter, pp. 871-886.

⁶⁶ I owe thanks to my colleague K. Tuori, University of Helsinki, who made this deficit crystal-clear.

⁶⁷ 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*, doctoral dissertation – Utrecht University, 2008; Ch. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn: Kluwer Law International, 2008.

⁶⁸ N. Reich *Horizontal Liability in EC Law – Hybridisation of Remedies for Compensation in Case of Breach of EC Rights*, CMLR 2007 (44) 704.

national law and they must be *effective*. In light of Art. 47 Charter of Fundamental Rights, a new principle of ‘adequate’ legal protection might be available.⁶⁹ The ECJ has deduced from primary Community law three remedies: injunctive relief, state liability, compensation for antitrust injuries. But even here the European remedies have to be complemented by the respective national legal rules as *U. Bernitz* and *N. Reich* have amply demonstrated.⁷⁰ In secondary Community law, the European legislator is rather reluctant to introduce remedies. The standard formula found in secondary community law requires that Member States make sure that national remedies, meant to implement EU law, are effective, proportionate and deterrent. It is by no means clear to what extent fundamental rights and human rights can promote the development of appropriate European remedies that build on national law or that reach beyond national law. So far, the ECJ is not ready to accept that remedies must not only be equivalent and effective but ‘adequate’.⁷¹ Only such an opening of legal doctrine would pave the way for a new wave of hybridisation of remedies. I happily confirm that I sympathize with such a development, which would enhance hybridisation. Finally, even if secondary Community law provides for remedies, such as in the directive of consumer sales, the concrete shaping is the result of a going together of EU law and national law. The *Putz/Weber* judgment⁷² and its implementation by the German Supreme Court is just another example of the hybrid character of remedies in EU law, here at the level of secondary Community law read together with national private law.

Convergence

Convergence⁷³ means a process of mutual approximation of the two different legal orders, of nation state based legal orders and market based legal order(s). They are not merged as in the case of hybridisation, for they still exist side by side, but they are drawing nearer to each other. Convergence is not bound to mandatory standards and default rules. It instead enshrines in particular the new modes of governance, co-regulation and self-regulation, which are enhanced by limited and limiting state powers.

The market state opens up space for private regulation, i.e. for private actors and private regulation.⁷⁴ The theoretical debate on convergence is very advanced; however, it focuses maybe too much on statutory law making or, more precisely, on EU law making via directives and regulations. The inherent assumption in all EU law making is that harmonisation of private law rules via top down binding directives and regulations increase *convergence*. The counter-position is most prominently documented in the *Jus Commune Series* edited by W.v. Gerven. Here the idea is that the courts are the key players in paving the way for convergence via a mutual learning process. I start from the premise that convergence is easier to manage and to realise in areas where private actors dominate. Private regulation is older than the state nation (*lex mercatoria*). It brings a wealth of research to the fore

⁶⁹ Schwensfeier, *Individuals Access to Justice*, Diss. Groningen, 2009; N. Reich, *Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht-Von der „Nationalisierung“ zur „Konstitutionalisierung“ von Rechtsbehelfen*, Vortrag vor der Juristischen Gesellschaft Hannover, 2012.

⁷⁰ U. Bernitz, Case Note, CMLR 2011 (48), 603.

⁷¹ W.v. Gerven, *Of Rights, Remedies and Procedure*, CMLR 2001, 485.

⁷² ECJ joined Cases C-65/09, C-87/09 2011 ECR I-nyr, German Supreme Court, BGH VIII YR 70/08, 21.12.2011, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=c14173842e2643ad5aec4fa239f05e47&nr=59258&pos=0&anz=2>.

⁷³ W. van Gerven, *Private Law in a Federal Perspective*, in R. Brownword/H.-W. Micklitz/L. Niglia/St. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, 2011, 337; P. Legrand, *The Impossibility, of Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111 1997, Th. Wilhelmsson, *The Contract Law Acquis – Towards More Coherence Through Generalisation*, *Europäischer Juristentag*, 4 (1), 111-145.

⁷⁴ F. Cafaggi(ed.) *Reframing self-regulation in European private law*, 2006; F. Cafaggi/C. Scott/L. Senden (eds) *Transnational Private Regulation: Conceptual and Constitutional Debates*, Oxford: Wiley-Blackwell, 2011.

mainly dealing with the international legal environment. Of particular interest with regard to private regulation of services is the research of *L. Bernstein*⁷⁵ on the diamond and cotton industry, revealing a particular form of a closed shop rule-making and enforcement via private actors. Conceptually speaking, private regulation as a form of convergence requires the analysis of not only nation state but also state nation patterns and their combination with the emerging European market state.⁷⁶

The dominating pattern in the area of services is co-regulation. This is true with regard to telecommunication, energy, transport and financial services, where the EU legislator sets a regulatory frame that needs to be completed via rules that have to be developed in close co-operation with the business sector concerned. Due to their right regulatory frame, these rules fit much more into what I have termed *intrusion* and *substitution*. *Convergence*, however, can be observed in an area of European law making which has not yet raised much attention in the academic environment, where the regulatory frame is rather loose and leaves much space for private actors – standardisation of services via national and European standard bodies. The Service Directive is meant to provide a common legal ground for those services that are not subject to sector related rules, such as telecommunication, energy, financial services, health care and transport. It bears a strong horizontal dimension, providing a kind of competence net for all those services for which no specific European rules and requirements exist. Art. 26 paves the way for private rule making within the framework of standardisation. The EU has successfully used this technique in the 1985 ‘New Approach on Technical Standards and Regulations’,⁷⁷ combining mandatory framework regulation with voluntary rule making in standard bodies. A largely unnoticed development, the European Commission, the national and European standard bodies and the respective business sectors have engaged in the development of ‘technical standards for services’ which design rights and obligations for a whole series of services bearing a cross border dimension. Currently, we know little about the practical effects of these standards, let alone their legal quality and the possibilities of judicial review. However, it is suggested that standardisation of services is a most prominent field of convergence via private regulation.

The Current State of Affairs and some Tentative Conclusions

The current state of affairs, the intermingling of nation state private legal orders and the emerging EU market state, could be summed up with the chart below. The chart demonstrates that we are observing an ongoing process of change with different patterns and different variations of the state that stand side by side, and with a multiplicity of legal regimes that exist. This underpins the hypothesis that, without taking into account the new European regulatory private law, the discussion on and over European private law remains incomplete. I am using the four parameters of analysis which are meant to cover the major forms of inter-action between the nation state private legal orders and the EU market state private legal order. The chart allows for understanding that different forms of statecraft can be observed at the same time, depending on the parameter of analysis. In such a light, it is possible to assign to each parameter and each form of statecraft a particular area of private law here being understood as economic law.

⁷⁵ Private Commercial Law in the Cotton Industry, Creating Cooperation Through Rules, Norms and Institutions, Michigan Law Review 2001, 1724.

⁷⁶ See on this issue N. Jansen, Legal Pluralism in Europe, National Laws, European Legislation, and Non-Legislative Codifications, in L. Niglia (ed.), Pluralism and European Private Law, 2012 forthcoming.

⁷⁷ 85/C 136/01 of 7 May 1985.

| | Conflict and resistance | Intrusion and substitution | Hybridisation | Convergence |
|----------------------|--|---------------------------------|---|--|
| Private/economic law | Maintenance of the national private legal orders | European regulatory private law | EU private law/ national private law EU triggered constitutionalisation of national private law | Lex mercatoria, private regulation Standardisation of services |

Much research still has to be done. What is needed is a hard look at the full picture of private law, one which is not guided by nation states ideologies but which is prepared to study the developments which occur at the boundaries of traditional private law, contract and tort law, but which affect more and more the core of private law. The tentative outcome of the analysis is European private law pluralism in action. The transformation of the state, from nation state to market state yields new forms of legal regimes cutting across the distinction between formal and informal authority. The role and function of values within the transformation process deserve a separate and deeper discussion.

W(H)ITHER PRIVATE LAW IN THE FACE OF THE REGULATORY DELUGE

Yane Svetiev*

Introduction

A question that is central to the underlying concerns of the project is how to conceptualise the relationship between European law and national private law? And a key aspect of that question is the impact on national private law and institutions of the growing corpus of EU regulation of important services sectors of the economy. In that context, we might ask are national regulatory or administrative authorities, now increasingly networked in EU regulatory networks, an interface between the European and the local, or are they co-opted as arms of European regulatory law?

In this paper, I begin with the observation that the sidelining of traditional private law, together with adjudication and courts as its principal institutions, was a longer-term process, resulting from transformations of society and its knowledge base and the inability of the traditional institutions to cope with those transformations. In the post-industrial society of networks, some prominent commentators have foreseen a role for the re-emergence of private law as the institution that mediates or translates various fragmented social rationalities. Yet I argue that private law has not risen to this task of orchestrating various stakeholders because, even if such a task of translation is possible, private law institutions are not well-adapted to perform it with traditional tools. By reference to examples from the regulated sectors, I argue that conceptions of European law as hierarchical “intrusions” into national space may be oversimplified. At the EU level we witness attempts to overcome the limitations of standard interventions through proceduralised mechanisms for joint learning: both between administrators at different levels and between administrators and private actors (both regulated entities and other social stakeholders). The advantage of EU level interventions is that they are not as steeped in tradition and habitual patterns as national private or public law institutions, so they are more open to experimentation with heterodox approaches. The disadvantage is that EU interventions can self-consciously define their mandate as narrow or their objectives as limited. In such cases, those whose perspectives are excluded by the narrow mandate may, in the absence of other ways of redefining that mandate, seek redress through the national courts. The local and generalist nature of national courts can be their advantage in providing a venue that amplifies the voice of small scale communities and their apparently small scale problems.

The discussion of the Europeanisation of private law has in recent times usually focused on the project of drafting a European Code.¹ This tendency is understandable, since in most EU member states, the national codes have been seen traditionally as the principal source of national private law. As Micklitz has argued, this was the private law counterpart of the “constitutionalisation” of the EU project and shoring up the Union’s “state-like” status. Yet a “codification” perspective has a certain “back to the future” quality even in the more traditional state context. Even more so for the EU, given that EU has already heavily intervened in various non-traditional aspects of private law, such as consumer protection, as part of the process of market-making and re-regulation. Thus, the process of intrusion and substitution of local rules can be said to have commenced quite early, beginning with seminal EU cases, such as *Cassis de Dijon*.

More recently attention is increasingly focused on the various (EU) regulatory regimes in sectors such as food safety, financial services, energy or transport increasingly affecting the conduct of private

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¹ See the contribution of Micklitz in this working paper.

actors and restructuring private relationships. A mixture of competence limitations, subsidiary concerns and the inexistence of “traditional” institutions produces institutional innovation at the EU level, which incorporates member state actors. Does this mean that a self-standing European functional law now governs many if not most key economic activities with little or no reference to national private law and courts? Once eager agents of European integration, by taking up with enthusiasm the power afforded by the preliminary reference procedure, have European courts dealt themselves out of the adjudication game? Are there good reasons for such a process of distancing and autonomisation to take place?

One common view from private lawyers in the member states might be that this distancing of European law and marginalisation of traditional institutions is driven by the high-jacking of the functionalist logic of integration by European institutions, such as principally the Commission and the Parliament aided and abetted by the ECJ. But the trend away from private law adjudication of disputes had begun much earlier and independently of EU integration, as a combined result of transformations in the economy and society as well as the increasingly more encompassing definition of the public interest pursued by the state. While EU integration, and the creation and re-regulation of the common market have exacerbated that process, it bears emphasizing that the EU, even if this were at all feasible, does not have the capacity or resources to act as a formal hierarchy.² Instead, EU institutions must engage with (in the sense of “collaborate with” as opposed to “give orders to”) private actors, national administrations and even courts, to achieve their policy goals.

The aim of the paper is both to identify the different dimensions and the reasons for which the European legal order may be becoming “self-sufficient”, situating these developments in on-going debates about European law and governance and exploring the possible residual role that might be played by national private law and courts in that context. Specifically, I am sceptical that private law can re-emerge as a mechanism for review and discipline over private self-regulatory systems and of translating and orchestrating various social rationalities. Yet there may be spaces and functions to which the local and general nature of national private law courts can provide them with an advantage so as to be synergistic with European regulatory private law (ERPL) in the EU multi-level order.

Background – Private Law in the Nation State and Beyond

National private law is usually seen to comprise contract and tort law as its main pillars, and in most Member States of the EU following the civilian tradition, these bodies of law have traditionally been compiled in the form of comprehensive codification of general rules.³ Schematising broadly, the principal features of private law rules were that they were general in scope and facilitative in function. Private (civil and common) law is general in scope because it does not typically differentiate between different fields or sectors of activity. Instead, the rules are meant to apply generally (or “horizontally”) across all different kinds of activities and sectors. Moreover, private law can be regarded as facilitative in the sense that it is meant to support the autonomy of private actors. Thus, private law rules ordinarily did not mandate substantive outcomes, but instead aim to facilitate private

² Simon, “The Architectures of Complexity”, *Proceedings of the American Philosophical Society*, (1962) 106 (6), pp. 467-482, at 468 (defining a formal hierarchy as “a complex system in which each of the subsystems is subordinated by an authority relation to the system it belongs to”).

³ Much has been made of the distinction between the common law and the code legal orders, including the violence that a European code would do to the common law. Eg, Legrand, “Antivonbar”, *Journal of Comparative Law* (2006) 1(1): 13. But this argument may well be overstated from a practical point of view. Even in the common law, private law is systematized in treatises which are not unlike codes and which often provide the first point of reference for practitioners and judges before any search of the caselaw. In fact, Ladeur argues that codifications can often be viewed as an ex post “stabilization” of emergent practice in any event. Ladeur, *The Emergence of Global Administrative Law and the Evolution of General Administrative Law*, 2010, available at: http://works.bepress.com/karlheinz_ladeur/1 (“Emergence and Evolution”).

ordering, such as for example in economic and commercial affairs. Thus, we might say that contract law provides the background default rules for cooperation, while tort law supplies the default rules for bearing the risk from interaction between private parties.

Ladeur points out that the rules of private (as well as public law) were based on what he calls “social knowledge”, which together with “conventions and professional practices” was “enshrined in the public order at large or in social and technical experience”.⁴ Thus, from the institutional point of view, these rules could be applied by generalist judges (and even juries), who could easily access this generalised knowledge, rather than having to rely on some form of specialised or functional knowledge. Lone judges could resolve private law disputes through adjudicative means and without the aid of specialised knowledge or decisional machinery, both because of their substance, but also because of their “unicentric” nature.⁵ Fuller described as unicentric those disputes which were individualised, localised and self-contained. By contrast Fuller termed as “polycentric” those disputes that have broad and disparate ramifications and ripple effects, on actors other than the parties to the dispute, which might be difficult to anticipate and resolve by ordinary private law remedies, such as simple injunctions or damages to make good the harmed party.

Based on the facilitative conception of private law, principles such as individual “autonomy” of private individuals or their “freedom” or of the “equality” implied by the horizontal application of the rules to all different actors in society are sometimes said to be “foundational tenets” of private law, buttressed by philosophical and moral considerations, separate and apart and quite irrespective of any functions those principles might serve.⁶ Yet, one ought not to forget Dewey’s observation that such apparently foundational principles become salient at specific junctures as a rallying cry for those pursuing particular (functional) objectives (such as the redistribution of power or economic opportunity from some prior equilibrium).⁷ Thus, Wiaecker has argued that the vitality of codes depends “on the social and economic value-judgments which inform them”. While they might appear abstract, the codes were “a result of an alliance between bourgeois society and nation-state”.⁸

Whatever their source, the foundational tenets of private law such as autonomy, the facilitative rather than mandatory nature, and the general horizontal applicability of rules have come under various pressures over the course of the 20th century. A number of such related pressures have been identified in the literature.

One such pressure was the rise of the first regulatory and even more significantly the welfare state, which had explicit redistributive objectives coupled with a recognition that the general and facilitative nature of private law nonetheless systematically favoured certain groups, such as for instance the “repeat-players” in the legal system vis-à-vis one shot players⁹ or even the adjudicative institutions. The redistributive objectives were pursued through various instruments, one of which was a regulatory contract law with numerous mandatory provisions protecting various “weaker” parties and thereby restricting the freedom to contract.¹⁰ This process obviously introduces greater differentiation or

⁴ Ladeur, *Emergence and Evolution*.

⁵ Fuller, “The Forms and Limits of Adjudication”, *Harvard Law Review* (1978) 92, pp. 353-409.

⁶ Basedow, “Freedom of Contract in the European Union”, *European Review of Private Law* (2008) 16, pp. 901-923, at 902.

⁷ Dewey, *The Public and Its Problems* (Swallow, 1954).

⁸ Wiaecker, *The History of Private Law in Europe* (Clarendon, 1995), p. 365.

⁹ Galanter, Why The “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, *Law and Society Review* (1974) 9(1), p. 95.

¹⁰ The extent to which this regulatory turn in contract law actually had protective or redistributive effects may be subject to considerable doubt, given the sporadic and unpredictable ways in which individuals could access the courts, the ability of courts to balance individual considerations (of the case at hand) with unpredictable follow-on effects (on other similar cases, such as with mass produced goods or widely available services) as well as the relative cost and length of court proceedings.

fragmentation within private law, by selecting specific classes of actors (consumers, workers, tenants etc.) to whom special rules and protections apply.

Even more profound differentiation results from the implementation of specialised regulatory regimes pursuing specific substantive outcomes, as a response to problems that might be different in different industries. Such regulatory regimes were often targeted to specific sectors of the economy. This is because the force of the ordoliberalists' preferred disciplining mechanism that undergirds the view of the economy and economic law as autonomous, namely competition, is considerably weakened. As Adolf Berle, the bard of the modern theory of the corporate form, will recognise writing in 1954 "the supporters of capitalism have to recognize that the economic check of competition through the market has weakened and in some cases disappeared. Yet if that check is re-moved, the modern corporation becomes something very close to a center of absolute economic and hence of political power".¹¹ Thus, for example the public service utilities in most European nations were treated as natural monopolies subject to ownership and/or strict regulation by the state.

It was not just the increasing state involvement that diminished the role of private law, but also the capacity of courts, as the principal adjudicative institutions, to handle the problems thrown up as legal disputes. Ladeur describes a transition from a society of individuals to a "society of organisations", whereby individual relationships to the state and the law are mediated via organisations that dominated in production settings, though not only those.¹² The organisations are the "repeat-players" who enjoy an informational advantage both vis-à-vis their customers and the courts and can systematically use that advantage. In such a setting, the use by the adjudicative institutions of "experience as the common societal knowledge basis was no longer sufficient". In other words, Ladeur identifies a fragmentation between the "continuity of the self-reproduction of general experience distributed over the whole of society, and ... the advanced knowledge which is generated by the big organisations both in the economic and the broader sense (including political parties, unions etc.)".¹³

To be able to regulate comprehensively in an organization-dominated landscape, the state itself must pool expertise in bureaucratic structures mimicking the large organisations, to intervene through planning, organised decisions and rules that apply prospectively. Through such interventions, to take the public utilities as an example, the administration could seek to regulate price charged to final customers. Such an approach could be used so as to achieve – or balance - both technical efficiency and distributional public policy objectives though such an approach requires the ability to access information from deep within the regulated organisations and to remain attentive to the possibility of capture and the risk of stifling dynamic change. While this expansion of the role of the state makes public law more important as a control mechanism in society, in effect (as Ladeur recognises) the emergence of an expertise-based administration led to an overall effective "reduction of judicial control" over substantive decision-making. This is largely for institutional reasons: courts and judges do not have institutional capabilities to access the knowledge generated either by organised firms or organised bureaucracies to engage in substantive oversight or comprehensive planning.¹⁴ Given the intermediation of relationships through large organisations in all different spheres, disputes tend to become polycentric according to Fuller's taxonomy. Both private law and judicial institutions are thus under pressure in such an environment. Moreover, the emergence of sectoral regulatory agencies and regimes leads to a further fragmentation of the once cohesive source of law (whether common law or code) and a distancing of the traditional legal institutions (courts) from the substantive regulation of conduct.

¹¹ Berle, *The 20th Century Capitalist Revolution* (Harcourt, Grace & Co. 1954).

¹² Ladeur, *Emergence and Evolution*.

¹³ Ladeur, *Emergence and Evolution*.

¹⁴ The administrative law discourse in this era focuses on the ideas of deference and controls on procedure, neither of which guarantees either the accountability or the efficacy of regulatory decision-making, conceptually or in actual practice.

The important point to note from our perspective is that these processes largely precede the onset of European integration and the resulting considerable expansion of European regulatory law. This, perhaps unremarkable observation serves as an antidote to two common tendencies, or fallacies, in scholarship on the interaction between supranational and national law as identified by Ladeur. One is the assumption that globalisation somehow “invades” a “stable domestic administrative or private legal system from outside”. This, in turn, leads to a second tendency to both over ascribe responsibility to the supranational processes and to romanticise the efficacy and legitimacy of the national legal order and institutions.

European Integration: Going Beyond the State

It is in this landscape of a growing relative importance of the administration vis-à-vis private law and judicial institutions more generally, that European integration begins to take shape “through law” thereby influencing national legal orders. It bears emphasis that since EU level law-making is of limited competences, this imposes an additional constraint on the process and the resulting forms of the law. Formally the EU does not have competence over private law, and codes are sometimes sentimentally seen as a mark of nationhood and a reflection of domestic social norms and customs or culture (despite a considerable degree of similarity of principles across national codes and the fact that many jurisdictions used transnational (“imperial”) templates as a basis for codification). Moreover, in virtually every sphere of legal intervention, the EU faced an enforcement challenge given the limitations of administrative enforcement institutions at EU level, the inexistence of EU primary courts and the relative unfamiliarity of EU law to individuals and legal practitioners in the member states.

Given those limitations, the most commonly used basis for European legislation in the regulatory sphere was the integration or creation of the common market through the removal of restrictions on cross-border trade. Given the deregulatory tendencies at the national level produced by early cases such as *Dassonville* and *Cassis*, this produced an oft-cited need to reregulate at the EU level. As might be expected the EU regulatory efforts initially mimicked the national formats of regulation that they were supplanting, such as through the introduction of horizontal regimes for consumer protection, including regulatory contract law¹⁵ type provisions, such as cooling off periods, rights of cancelation and so on.

The domain of the public service utilities does not appear to be one where one would have expected to see much activity by the EU, particularly given the perception of their localised monopoly nature and the fact that these were heavily nationally regulated and expected to perform a variety of social functions. However, a number of authors have pointed out, the “output” legitimacy that the EU derives from pushing through successful projects that ultimately benefit the citizens of the Member States.¹⁶ The aim of using the market-making powers to break open national monopolies to competition, allow new entry and lower prices for consumers can be viewed through that lens. However, the combination of limited competences and the use of the market integration powers can produce a tendency to focus on a narrow mandate in designing and implementing the EU regulatory intervention. In particular, the focus would be on the opening up of domestic markets to competition or liberalisation of entry either at all levels of supply or through vertical disintegration. This does not mean that the interventions would be light or limited, given that in many of these markets competitive structures essentially have to be created. Nonetheless, the objectives pursued within a legal regime

¹⁵ Braucher, “Contract versus Contractarianism: The Regulatory Role of Contract Law”, *Washington and Lee Law Review* (1990) 47(4), pp. 697-739.

¹⁶ Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the EU* (Harvard University Press, 2011) (“Eurolegalism”).

can provide another dimension of autonomy; a narrow mandate regime may tend towards self-sufficiency so as to achieve that mandate more effectively.

Yet, the mere fact of privatising or liberalising and opening up these markets does not guarantee that the ultimate outcomes will be beneficial to either consumers or other social groups and policy goals without regulatory intervention. There may well be intermediate periods during which regulatory intervention to protect consumers or to enable them to learn and to take advantage of more competitive structures (to make adequate price comparisons, to switch carriers) would be necessary. Moreover, in the medium to long term there may also be unintended consequences or unpredictable shocks that impede the achievement of the objectives of the reforms or that may even require substantial re-regulation.

In a number of contributions, Teubner has argued that there is an opening within the increasingly globalised environment for private law to re-emerge as an institution (in the broad sense) that plays a key role in the achievement of social order, including specifically in the newly privatised sectors. This, in his view, would “transform private law itself into the constitutional law of diverse private governance regimes which will amount to its far-reaching fragmentation and hybridization”.¹⁷

More specifically, Teubner has suggested that the combination of social or functional “differentiation” and processes of globalisation lead to the emergence of autonomous regimes of norm-production that are trans-national and quite separate from the state and ordinary politics:

“The economy, not just the economy but other social sectors such as science, technology, the mass media, medicine, education or transport are, on their specific path to globalization, developing a massive requirement for norms that is met not by governmental and intergovernmental institutions but by themselves in direct action upon the law. Increasingly, global private regimes are producing substantive law without the state, without national legislation or international treaties.”¹⁸

Moreover, to be effective, according to Teubner, these private regimes build an institutional support frame, including “quasi-private bodies” for dispute resolution, often without prior infrastructure supplied by states: “autonomous global law is increasingly basing itself on its own resources”.¹⁹ He views these regimes as relatively effective at self-organisation, despite the fact that they are largely spontaneous, thereby turning many of the hierarchical aspects of traditional law on their head.

There are two important underlying ideas that lead to Teubner’s observations cited above. One is the recognition that the emergence of networked architectures, in production, economic and in social relationships enables channels of communication that connect normative communities, whereby these are no longer mediated through the state or state institutions²⁰ or other formal hierarchies. Ladeur notes that the emergence of the “society of networks” is a “reaction to a further rise in complexity of the knowledge base of society”, given “the importance of information as the principal resource of production” and the fact that technological knowledge “is no longer concentrated in stable expert communities, but is distributed in overlapping project-oriented ‘epistemic communities’ which combine general and specific knowledge production in hybrid forms of communication”.

¹⁷ Teubner, “After Privatization: The Many Autonomies of Private Law”, *Current Legal Problems* (1998) 51, p. 393, at 394 (“After Privatization”).

¹⁸ Teubner, “Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors”, in *Public Governance in the Age of Globalization* (Ladeur, ed, Ashgate, 2004), p. 73 (“Global Private Regimes”).

¹⁹ Teubner, *Global Private Regimes*, at 74.

²⁰ Eg, Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

A second and related recognition is that this transformation in the “knowledge base of society” enhances the capacity of private actors, economic and social, to self-organise in order to solve common problems and thereby create normative communities. Moreover they can and they do do so across state borders so that such communities can be sources of global normativity even in the absence of a world state or relevant international organizations or treaties. Since these are private “regimes” unmediated by the state, this form of self-organisation could provide the basis for a renaissance of an autonomy-based (and autonomy-protecting) private law,²¹ thus far sidelined by the growing intervention by the state through hierarchical action and expertise-based agencies.

Teubner envisages that private law will need to “undergo massive transformation”²² in the process of recapturing its role as a tool for facilitating self-organisation in the new society of networks. First, the law must recognise the interrelatedness of relationships in networked regimes, rather than treating them as a multiplicity of bilateral arrangements.²³ Secondly, he suggests that private law should facilitate the self-constitution of these regimes with the appropriate mixture of a “spontaneous” and an “organized” sector,²⁴ but also “develop criteria for their legal review”.²⁵ Finally, and perhaps more controversially, in performing this role, law must maintain the autonomy of the various “spheres” to pursue their own “rationality”,²⁶ while at the same time maintaining the law’s own autonomy. While this does not mean law should completely ignore, or not seek to incorporate, the knowledge generated in such systems, nonetheless it must do so on its own terms and within the pursuit of its own rationality.²⁷

Private Law and European Institutions

While not stated explicitly in the works cited, traditional (though reformed) private law could be the legal order that plays this facilitative function. Teubner’s views have triggered a rich research programme in private regulatory regimes, examining the tools through which private entities self-organise in regimes that regulate their interactions and the mechanisms through which they enforce such arrangements.²⁸

There are two variables that are either missing from or require further elaboration in the foregoing discussion. One is the question of guarding the public interest, since the private regulatory regimes can easily be subverted to the interests of some or all of the participants. Another aspect that requires further exploration is the role of supranational institutions, both administrative and legal, such as the EU, both vis-à-vis the private regimes and vis-à-vis the private law that constitutes and regulates them.

²¹ There are similarities in this argument to the underlying tenor of the work of Lisa Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions”, *Michigan Law Review* (2001) 99, pp. 1724-1790 and Robert Scott, “The Case for Formalism in Relational Contract”, *Northwestern University Law Review* (2000) 94, pp. 847-876.

²² Teubner, *After Privatization*, at 394.

²³ Eg, Teubner, “*Coincidentia Oppositorum*: Hybrid Networks Beyond Contract and Organisation”, in *Networks. Legal Issues of Multilateral Cooperation* (Amstutz/ Teubner, eds, Hart, 2009) (“*Coincidentia Oppositorum*”).

²⁴ See Teubner, *Global Private Regimes*, at 84-86 (“For law there accordingly arises a new role of institutionalizing a dual constitution in the various sectors.”); Teubner, *After Privatisation*, at 394 (“to transform private law itself into the constitutional law of diverse private governance regimes”).

²⁵ Teubner, *Global Private Regimes*, at 80.

²⁶ Teubner, *After Privatisation*, at 394 (“make private law responsive to a plurality of diverse ‘private’ autonomies in civil society”).

²⁷ Teubner, *Coincidentia Oppositorum*.

²⁸ Eg, Caffagi, “New Foundations of Transnational Private Regulation”, *Journal of Law and Society*, (2011) 38, pp. 20-49.

Specifically, Teubner does not appear to envisage any explicit role for the institutions of the EU or European law in the process of facilitating the self-organisation of these trans-border networks of actors. Presumably, based on the idea that the regimes are capable of more or less spontaneous self-organisation, at best any role of the EU institutions is unnecessary. At worst it could be harmful since it might reintroduce (supranational) hierarchy, which might ensnare the spontaneous processes, rigidify them and instrumentalise them to its own purposes (or its own “rationality”).

Yet considering the appropriate role of EU institutions, it is worth observing that the logic of linking the capabilities of actors in network architectures is recently manifested in the trend towards the creation of European networks of regulatory bodies across a number of important regulated economic sectors.²⁹ Perhaps an early example of this practice can be found in the European Competition Network (ECN), which was formalised as a network in 2004, though reflected practices that had developed previously. The ECN was set up as part of the Modernization process for competition enforcement, which decentralised enforcement responsibility for EU law to the authorities of the Member States. As Ottow has pointed out, this model or approach has been extended in other sectors, including financial services, insurance, communications, energy, consumer protection and others. The common design appears to be to link the member state authorities, as well as the Commission, in a common discursive and/or enforcement network, rather than to completely centralise supervision and enforcement through a classical hierarchical European agency.³⁰

There may well be legal competence as well as political constraints in going down the path of forming a European agency in various sectors. Whatever the reason for the choice, this approach towards building regulatory architectures has resulted in a range of hybrid or “mixed administration” forms whereby responsibilities are “shared to differing degrees between the European Commission, new European regulators and national regulatory authorities”.³¹ The European regulatory networks follow the logic of the networked linking of capabilities of actors across borders. In other words, one could argue that a regime is created which links the entities that seek to promote and protect the public interest in the broadest sense.

Importantly, the national agencies that form the networks operate both in the domestic and the European plane, sometimes (as in the case of the ECN) they are charged with enforcing both EU and national law. Two crucial factors in understanding the potential functioning and the outcomes of these networked regulatory regimes in the EU are their “constitution” and their relationship with other stakeholders in the sectors that they regulate, including the regulated entities, customers in general and those with specific characteristics (vulnerable, disabled etc.), labour, groups affected by environmental pollution or organised to pursue environmental goals.

Regulatory Network Constitutions: Formal and Informal

By the constitution of the networks I mean the constituting document of the network, the way in which it defines the mandate of the specific network (and the policy or public interest they are meant to pursue) and the relationships between the network members, as well as the relationship with the European Commission and other EU or national institutions. In considering those “constitutive” issues, attention needs to be paid of course not only at the constitutive document, but also the informal dynamics and practices that emerge and perhaps become stabilised within the agency networks.

²⁹ Ottow, “Europeanisation of the Supervision of Competitive Markets”, *European Public Law*, (2012) 18 (1), pp. 191-221 (“Europeanisation”).

³⁰ Even where a European agency is created, such as EFSA (the European Food Safety Agency), the design involves a networked Advisory Forum, involving the national agencies in the relevant field. Vos, “Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation”, in *Experimental Governance in the European Union: Towards a New Architecture* (Sabel/Zeitlin, eds, Oxford University Press, 2010), pp. 159-160.

³¹ Ottow, Europeanisation.

Within the Network

To begin with the relationship between the EU Commission and national agencies. Formally, none of the sectoral networks appear to follow a typical hierarchical model in which either the network or the Commission has the power to determine or to reverse the action of a national agency. Instead, they are discursive fora that aim to stimulate cooperation between agencies in their efforts to implement the law.

Even within network that have a degree of centralisation in the hands of the Commission, this discursive principle appears to be important. For instance, in the ECN, the Commission can relieve national authorities of the responsibility for a particular case and take up the case itself (Art 11(6)). However, such a decision could require justification before the Advisory Committee on Anticompetitive Practices and Dominant Positions (Art 14(7)). Case allocation is an important determinant of the network dynamics in an enforcement network such as the ECN as well as in setting policy direction. On the issue of allocation, within the determination is based on a flexible standard of the authority best placed to decide a case, which despite its flexibility has not lead to considerable disputes and turf battles.

Within the ECN members “are subject to an obligation to offer persuasive justifications for their actions and positions” to other network members; “further deliberation, not hierarchical action provides the only dispute resolution mechanism”.³² However, given the privileged role of the Commission both historically and within the ECN, the informal internal dynamics may paint a different story.

In the ECN Regulation, a requirement is imposed on national actors (agencies or courts) not take decisions contrary to or conflicting with a decision of the Commission (Art 16). Again to the extent this is meant to prevent the imposition of conflicting injunctions on undertakings in specific circumstances, it makes sense. Beyond that, however, it simply invites the ordinary tool of distinguishing: in other words, offering a persuasive justification for the course pursued which also offers an explanation of any apparent departures from prior practice.³³

Apart from the formal rules of interaction within the regulatory networks, another key consideration are the informal dynamics in the actual operation of the networks both when deciding cases and formulating policy or filling out the details of legislation in general terms. We might call this the “informal” constitution: are the networks and their members delegates of the Commission aiming to propagate a monolithic view? Or are they being used to stimulate and encourage divergent approaches, so as to promote collective learning from pursuing different reasonable courses.

The informal dynamics are important because of the dominant position of the Commission in some regulatory settings due to its past functions or due to its relative capacity, but also due to predilections for mimicry and copying, the public tendency for maintaining surface level consensus.³⁴ Such dynamics cannot always be captured by looking at the formal rules of engagement of networked regulators (for instance, if employment with the Commission is perceived as prestigious, national officials may be of the view that their prospects of joining the Commission staff would be promoted by manifesting agreement).

On the one hand, pursuing a monolithic vision enhances the likelihood of achieving it, but increases greatly the resulting damage if the original vision was wrong or incomplete. On the other hand, as Steinmo has argued, variation in the characteristics of actors and their settings in the various member

³² Svetiev, “Networked Competition Governance in the EU: Delegation, Decentralisation, or Experimentalist Architecture, in *Experimentalist Governance in the European Union: Towards a New Architecture* (Sabel/Zeitlin, eds, Oxford University Press 2010), at p.112.

³³ This is at least how some national courts have described the relationship. Svetiev, *supra* n. 32, p. 113-114 (n. 21).

³⁴ Goffman, *The Presentation of Self In Everyday Life* (Anchor Books, 1959), p. 9.

states would likely lead them to choose from different menus of policy responses.³⁵ However, to the extent that there are general pressures for conformity, such an outcome may require a demonstrated commitment to allowing diversity by the actors present. Moreover, such an approach may be inconsistent with having a narrow mandate regime: there may be one best way to pursue a single objective, if it is being pursued without regard to the constraints imposed by other policy goals or by interaction with neighbouring regimes and systems.³⁶

Relationship with EU Courts

In two important respects, the decision-making within the regulated sectors, both of a regulatory (rule-making) nature and where it impacts and restructures a horizontal relationship between private parties, has been significantly isolated from court review even at the EU level.

First, as already alluded to, the constitutive arrangements for the various regulatory networks ordinarily do not appear to envisage disputes between network members being referred to judicial review by the EU courts. To the contrary, these networks to some extent embody the principle of peer review, even if it is sometimes imperfectly implemented.

Secondly, even where regulatory decision-making impacts or seriously restructures private party relationships, the tendency away from court review can be observed through a preference for non-adversary resolution of disputes. One notable aspect of enforcement practice by the Commission in the exercise of its powers under the new Competition Regulation has been its use of commitment decisions under Art. 9.³⁷ This provision allows the parties following the Commission's expression of concerns with respect to the competitive impact of conduct, in an administrative conversation with the Commission, to restructure their own economic relationship so as to address or attenuate those concerns. In a 2006 case, one undertaking (DeBeers) provided a commitment to the Commission to cease purchases from another undertaking (ALROSA) pursuant to a 2001 contract and a preceding purchasing relationship dating from 1959.³⁸ ALROSA, who was faced with essentially a breach of the 2001 contract, a termination of a long term purchasing relationship and the need to build an alternative effective distribution system sought judicial review of the commitment decisions from the EU courts. Emphasising the "voluntary" nature of this type of resolution, whereby the party proposed the commitment to the Commission, the ECJ has opted for minimal judicial review of this increasingly common type of resolution mode. The Court in refusing to take up the invitation to exercise judicial review in such a case, declines to take on an important private law function to essentially decide whether it was appropriate for DeBeers to breach its purchase contract to address the Commission's concerns, subject to a three year "transitional period ... necessary to build an efficient distribution system" by ALROSA.

One of the areas in which the Commission has used this flexible power to affect private relationships and reshape markets is in the utilities sectors. Specifically, the Commission has used the Art. 9 procedure on a number of occasions to intervene in the energy sector. In one case, the Commission

³⁵ Steinmo, *The Evolution of Modern States: Sweden, Japan and the United States* (Cambridge University Press, 2010).

³⁶ Steinmo argues that one of the sources of variability is the fact that different sub-systems are affected differently by globalizing forces, which in turn means that they respond differently and in turn affect (or transform?) differently sub-systems with which they interact.

³⁷ Schweitzer, "Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law", in *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Ehlermann/Marquis, eds, Hart 2009), pp. 547-580; Georgiev (2007) "Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law", *Utah Law Review* (2007) 4: p. 971; Svetiev, "Beyond Law versus Economics: A Learning Platform for EU Competition Policy", 2011. mimeo.

³⁸ See: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/90&format=HTML&aged=0&language=EN&guiLanguage=fr>

through a negotiated Art. 9 procedure, obtained commitments from E.ON, a key player in the electricity generation and wholesale market in Germany, to divest itself of about one fifth of its generation capacity.³⁹ This approach has left the Commission open to the charge that it is pursuing wider policy objectives, such as liberalization of the energy market, through the latitude allowed in the competition mechanisms, particularly in light of the “German government’s opposition towards the 3 energy liberalization package” and in particular of “ownership unbundling”.⁴⁰ A similar procedure has been used by the Commission with respect to the unbundling of RWE’s gas distribution network.⁴¹ No doubt, the ECJ would have been aware of the Commission’s extensive use of the Art. 9 procedure to essentially restructure essential utility markets at the time of its decision in *Al Rosa*, yet it did not claim a power of review for the EU courts of such decisions, even in a complaint by concerned third parties (rather than the party offering the commitments itself).

Defining the Mandate

The question of how the mandate of EU regulatory networks and actors is defined is quite important issue when considering the relationship between European regulation and national private law and institutions. EU regulation has often been justified formally and based substantively on the criterion of creating the internal market. Even competition law enforcement from its very outset was largely subservient to the internal market dimension and has continued to be so for much of its history in the EU. Thus, not only did EU regulatory regimes favour competition, but in fact they favoured one specific type of competition, that is cross-border competition. This, in turn, means focusing on liberalisation (i.e. removal of government restrictions on entry to an industry) or unbundling so as to introduce additional scope and entry points for foreign operators.

A narrowing of the mandate can of course be one way in which an EU regulatory regime can become autonomous or “self-sufficient” in the sense that it is charged with pursuing a focused limited objective: removing barriers to cross-border competition, while other objectives are pursued through other EU interventions (e.g. consumer protection) or national private law. At the same time, however, this may reduce the scope for learning from diversity⁴² and from the productive, even conflict-generating interaction of different policy instruments and objectives.⁴³ Even more importantly, narrowing the mandate to focus regulatory activity on intermediate policy goals can sometimes obscure the relationship between regulatory interventions and the ultimate outcomes that are of interest presumably both to policy-makers, to economic actors and to citizens.

The case of the competition network discussed earlier is important in this context, both because it is a policy in which competence at the EU level is undisputed and in which the Commission has traditionally played a dominant role. Moreover, it is a policy area that cuts across all of the other sectoral regimes: as part of the ECN there are working groups around the various sectors, such as energy, telecommunications, financial services, transport, food, pharmaceuticals etc. and there is an emergent view that sectoral regulation should be undertaken on the basis of “antitrust principles”. In at least one of the member states, the Netherlands, there is an on-going move to combine all of the

³⁹ Sadowska, *Energy Liberalization in Antitrust Straitjacket: A Plant Too Far?*, EUI RSCAS Working Paper 2011/34, p. 9 (“Energy Liberalization”).

⁴⁰ Sadowska, *Energy Liberalization*, at 10.

⁴¹ Hellström et al “Remedies in European Antitrust Law”, *Antitrust Law Journal* (2009) 76, p. 43. According to Sadowska, the Commission launched at least “fourteen antitrust investigations in the aftermath of the energy sector inquiry”, *Energy Liberalization*, at 1.

⁴² Sabel/Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, *European Law Journal* (2008) 14(3), pp. 271-327.

⁴³ Azoulai, “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization”, *Common Market Law Review* (2008) 45, pp. 1335-1356 (“ECJ and Social Market Economy”) (with reference to the ECJ’s decisions in *Viking/Laval*).

sectoral regulators of the networked utilities (telecommunications, energy, transport) together with the competition authority into a single agency. This horizontal focus on competition may undermine the self-sufficiency of the different vertical regimes from each other. At the same time, however, it may underscore the view of the autonomy of the mandate (or objectives) being pursued through EU intervention.

Focusing on the energy sectoral regulation regime, the objectives of the creation of the internal energy market are said to be “to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains competitive prices, and higher standards of service, and to contribute to security of supply and sustainability”.⁴⁴ Thus, from the perspective of consumers, Lavrijssen, Bordei and Kooij distinguish three principal interests “affordable energy prices achieved by effective competition; sustainable development of energy production, transport, and consumption and security of supply”.⁴⁵ The Agency for the Cooperation of Energy Regulators (ACER) is a “connection between the Commission and the NRAs” and aims to promote “cooperation between national regulatory authorities, within a formalized context”.⁴⁶ Yet ACER’s tasks and powers “have the potential of promoting and/ or affecting the level of investments in cross-border energy infrastructure, the promotion of cross-border trade and the competition on the wholesale markets”.⁴⁷ In other words, they are more imminently connected to the intermediate goal of the completion of an integrated market, and their effect on the promotion and protection of the identified interests of final consumers is more “indirect”.⁴⁸ Wholesale competition may or may not lead to affordable final prices, depending on both cost changes and the competitive structures in retail markets. Investments in cross-border infrastructure may improve reliability of supply while increasing reliance on current fuel sources (e.g. gas), while investments in renewable generation sources may promote sustainability, environmental goals and reliability of supply.

Relationships with other Stakeholders in the Regulatory Process: An Entry Point for Private Law?

Apart from the constitution and the relationships within the networked regulatory regimes and other governmental or EU actors, the process of elaborating and enforcing EU rules also involves receiving and appropriating input from various stakeholders in the regulatory setting, each potentially bearing a different perspective on the regulatory problem. Thus, in describing the role of ACER, Lavrijssen et al note that in the process of regulation, supervision, creation of industry codes ACER must work closely with “the new European transmission bodies; the European Network of Transmission System Operators for Electricity (ENTSOE) and the European Network Transmission System Operators for Gas (ENTSOG)”, which are the cooperation platforms at EU level for transmission system operators⁴⁹ as well as consulting “other relevant stakeholders”. But of course, the multiplicity of rationalities of various social groups or movements can also be manifested in different ways, such as Lindahl’s example of the “occupation of the Brent Spar oil storage and tanker loading buoy by Green Peace activists, and the associated consumer boycott of Shell service stations”.⁵⁰

⁴⁴ Lavrijssen/Bordei/Kooij, “The Role of ACER: A consumer perspective”, 2012, mimeo, p. 1 (“ACER”).

⁴⁵ Lavrijssen et al, ACER, at 1.

⁴⁶ Lavrijssen et al, ACER, at 2.

⁴⁷ Lavrijssen et al, ACER, at 6.

⁴⁸ Lavrijssen et al, ACER, at 8.

⁴⁹ Lavrijssen et al, ACER, at 3.

⁵⁰ Lindahl, “A-Legality: Postnationalism and the Question of Legal Boundaries”, *Modern Law Review* (2010) 73(1), pp. 30-56, at 38 (“A-Legality”).

Therefore, the second key issue to consider is how to integrate these various perspectives in formulating and protecting the public interest in general?

In elaborating the law's role in structuring the "relationship of the subsystems to each other",⁵¹ Teubner has argued for private law to become "responsive to a plurality of diverse 'private' autonomies in civil society".⁵² The "social spheres of autonomy" are spontaneous and self-regulated collectives, which interact with each other and precisely such mutual interaction constrains each regime's pursuit of its own rationality.

"[T]he main attention of global law would then have to be directed towards underpinning the duality of social autonomy in the subsystems, i.e. a mutual control dynamic of spontaneous sector and organized sector..."⁵³

In some way, this appears to be an attempt to mimic the ordoliberal disciplining mechanism of arms-length competition in a world where arms-length relationships are no longer possible either because of the size of the organizations involved or because of the need to cooperate. By maintaining their autonomy both from the economy and from institutionalised politics, the separate social spheres can exercise a private constraint on economic actors in the newly privatised public services:

"Here, in the resistance of social practices to their new economic regime is the source of all kinds of new quasi-political conflicts which now take place within the 'private' spheres. A good indicator for this change is the growing intensity of political fights between regulatory agencies, consumer groups, regulated companies and their shareholders which we are experiencing today..."⁵⁴

Teubner views such conflicts being reflected, at least in part, in private litigation and he foresees an active role of private law in the resolution of these emergent conflicts in the newly privatized settings. But to be able to perform this task successfully, in his view, both private law doctrines and procedures may need to change:

"For the future of private law it is crucial that not just its doctrinal-conceptual structures are prepared for such conflicts. Also different litigation procedures, among other rules of standing for groups, collective representation, multilateralization of the adversary two-party process, and elements of public interest litigation, would need to be introduced to make private law responsive to the new conflictuality caused by privatization itself."⁵⁵

However, in managing or mediating such conflict, according to Teubner, private law too must maintain its autonomy both at a conceptual (doctrinal?) and procedural level, to be able to play this mediating role.⁵⁶ In particular, as a consequence of social fragmentation a "multitude of social sectors require a multitude of perspectives of self-description" and the resulting "multiplicity of social perspectives" needs to be "simultaneously reflected" or "translated" into the law.⁵⁷ This idea of "translation" into private law he has described elsewhere as "an autonomous legal reconstruction of normative social orientations" and a "legal mode of dealing with the collision between different social

⁵¹ Teubner, *Global Private Regimes*, at 84.

⁵² Teubner, *After Privatization*, at 394.

⁵³ Teubner, *Global Private Regimes*, at 87.

⁵⁴ Teubner, *After Privatization*, at 423.

⁵⁵ Teubner, *After Privatization*, at 424.

⁵⁶ Teubner, *Coincidentia Oppositorum*.

⁵⁷ Teubner, *After Privatisation*, at 396.

rationalities”.⁵⁸ Lobel, drawing upon Teubner’s ideas, has spoken of the emergent role of law as one of “orchestration”.⁵⁹

Private Law – Orchestrator or Concertmaster?

In considering the role of private law in the process of European integration, it is worth noting that national private law and national courts do not appear to have emerged as principal actors in the process of either ensuring discipline or coordinating various functionally differentiated autonomous regimes.

In addition, as part of the re-regulation of essential service provision in the EU, there may even be tendencies to reduce further the reliance on national private law courts even for purposes of dispute resolution in regulated sectors. For instance, there is a push to implement alternative dispute resolution schemes, whereby all kinds of consumer related disputes would be channeled through to non-court fora, including online platforms for dispute resolution. At national level, the independent sectoral regulators provide information on out-of-court dispute resolution procedures and sometimes provide the (sector-specific) dispute resolution services themselves.⁶⁰ While there may well be a preference by parties not to channel their disputes via courts, it is also appears that EU intervention facilitates, and even encourages non-court venues for dispute resolution.⁶¹

If this does indeed signal a wider trend away from the use of national courts as dispute-resolution institutions, it also makes it less likely that private law will be the institution through which we will mediate the conflicts that ultimately define the public interest. Which in turn leads us to the question why we might observe a trend away from relying on the courts.

EU as a Vertically Integrated Regime

One possible answer might be that the interposition of the EU as a supranational hierarchy encouraging such a trend is denying this new role of private law. In other words, the EU is following the logic of vertical integration in the implementation of regulatory law, even where it wishes to rely on the potentially powerful horizontal direct effect between private parties as an enforcement tool.⁶² If both law-making and law enforcement proceeds through integrated (i.e., EU) institutions, it is more likely to be seamless and less likely to be impeded by the local peculiarities or interests.

The EU (and in particular the Commission) might find it easier to refashion national administrative agencies into “European” ones through close engagement in various European networks. If the national agencies “internalize” the EU mandate and perspective, they can become delegates of the Commission even in cases where the Commission does not engage in heavy oversight.⁶³ National courts, by contrast, are a more challenging site for intervention for EU institutions, such as the

⁵⁸ Teubner, *Coincidentia Oppositorum*.

⁵⁹ Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought”, *Minnesota Law Review* (2004) 89, pp. 342-470.

⁶⁰ Cantero-Gamito, this working paper, citing Nihoul/Rodford, *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (Oxford University Press, 2nd ed., 2011).

⁶¹ Press Release,
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1461&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁶² Kelemen, Eurolegalism.

⁶³ Slaughter, *The New World Order* (Princeton University Press, 2005), advances a view that socialization in transnational regulatory networks can lead to informal norm enforcement, but see Svetiev, “The Limits of Informal Law-Making: Enforcement, Norm-generation and Learning in the ICN”, in *Informal International Law-Making* (Pauwelyn/Wouters/Wessel, eds, Oxford University Press, forthcoming 2012).

Commission. The sites for interaction with national court judiciary are more limited. This is to a large extent because of the principle of independence (autonomy) of the judicial institutions, which forms part of the constitutional ideology of all the Member States of the EU. As a result, EU intervention in the national courts must always proceed more cautiously. Despite the heterogeneity in the organization, make-up and even general quality of judicial institutions across the different MS, the EU formally treats the 27 legal orders as equal or at least equivalent. There may be softer approaches through programmes for “judicial education”, particularly in the more specialized areas of competition or sectoral regulation, but again the formal independence of judicial institutions may make it difficult to compare outcomes or to assess the efficacy of such education programmes.

If intervention in national judicial institutions is difficult and if the establishment of a comprehensive system of European courts impossible (for political reasons), the European legal order may be more effective if it becomes self-sufficient even at the level of enforcement and dispute resolution. Private parties can be given EU rights vis-à-vis other private actors and those rights can be enforced through European dispute resolution platforms.

But this “vertical integration” perspective, namely that European regulatory objectives are likely to be impeded, both by less than seamless communication and by hold-up, if channeled through national private law courts, may in fact be overstated for a number of reasons.

First, national courts were key protagonists in the emergence of EU law as we know it today. Most key cases establishing the foundational principles of EU law resulted from preliminary references from national courts. National courts fairly enthusiastically took up the invitation extended to them through the preliminary reference procedure.⁶⁴ This provision was a mere “invitation” to national judiciaries, precisely because there is no judicial review or other procedure that can force national courts to make a reference and there are many escape routes through which to avoid such a reference.⁶⁵ Even after the apparently extensive expansion of the scope of EU law in sometimes quite strong and unexpected ECJ rulings, MS courts have continued to make preliminary references to the EU courts.

Secondly, in a number of fields, the Commission has sought to include actions in private law courts as an aspect of enforcement of EU regulatory law in a number of areas, including consumer protection law and competition law. The Commission’s push for the expansion of rights of action in antitrust cases in private litigation before national courts was a reason for one of the recent major political conflicts between itself and the MS governments.⁶⁶

Yet in other fields, the regulatory purpose that is being pursued by the EU intervention may well be frustrated if channeled through formalised court proceedings, because they aim to produce quick local (i.e. on the spot) problem solving. One example might be the rights granted to airline passengers vis-à-vis airlines in cases of delays and cancellation.⁶⁷ The aim of such a regulatory regime would be to offer speedy arrangements for alternate travel and for the intervening period, not to stimulate litigation. Such a regulatory purpose might be relevant in a variety of consumer protection contexts.

Finally, in recent times we have seen innovative ways through which the Commission has sought to establish a more deliberative, or collaborative, relationship with national courts in areas where there is

⁶⁴ Caruso, “The Missing View of the Cathedral: The Private Law Paradigm of European Integration”, *European Law Journal* (1997) 3(1), pp. 3-32.

⁶⁵ Comparato, this working paper.

⁶⁶ Micklitz, Administrative Enforcement of European Private Law, in *The Foundations of European Private Law* (Brownsword/Micklitz/Niglia/Weatherill, eds, Hart, 2011); Micklitz, “Private Rights of Action in Antitrust and Consumer Protection”, 2011, mimeo.

⁶⁷ Kelemen, Eurolegalism.

significant EU law intervention. Thus, Article 15(1) of the Modernization Regulation for competition enforcement (1/2003) provides that “courts of the Member States may ask the Commission to transmit to them information ... or its opinion on questions concerning the application of the Community competition rules.” In addition, under Article 15 (3) the Commission can act on its own initiative, “[w]here the coherent application of [Art 81 or 82] so requires,” to “submit written observations to courts of Member States” and also to make oral submissions with the permission of the local court. There is some evidence⁶⁸ that national courts have understood this as a relationship not of subservience to the Commission, but as one of dialogue.⁶⁹

The Limits of Law’s Capacity for Translation

To the extent that national private law and institutions are not reemerging as key players in the new environment, this may not have anything to do with their being sidelined by EU regulatory law. Instead, in the world of functional and social differentiation as well as epistemic fragmentation, the traditional private (or public for that matter) law institutions may be limited by their own capacity to play the adaptive role of “orchestration”. Precisely the “autonomy” and the “rationality” of law and legal institutions may stand in the way of traditional private law playing such a role. The need for closure, the logic of procedural formality (as opposed to proceduralisation of problem-solving), the translation and subdivision of problems presented into questions that can be answered in a binary way (e.g. yes/no), the limited set of judicial remedies; all of these might impede the law’s capacity to mediate social conflict and translate different social rationalities and public purposes.

The story of courts incorporating the knowledge generated by other systems of knowledge is not necessarily a happy one. In the context of the adoption by US courts of economic analysis in antitrust cases, Lopatka and Page have argued that courts rely only to a limited extent on expert assistance in order to acquire the economic knowledge necessary to resolve antitrust disputes presented to them.⁷⁰ Instead, under the logic of preserving the law’s autonomy or rationality, courts are said to develop “economic authority” through an unstructured method of “pragmatically examining the scholarly literature in the context of existing case law and adopting the most persuasive and plausible accounts” available at the time of decision.⁷¹ Lopatka and Page explain that this process of selection is influenced by “intuitions”, “social visions”, and “ideologies”⁷² of the judiciary, as well as legal process considerations about the institutional capacity of courts to process highly fact specific expert testimony.⁷³ The expert knowledge that courts have to incorporate is itself partial and likely to change over time. Yet following its own rationality (such as for example, the notion of the balance of proof for a proposition) the law ordinarily will seek a level of certainty and coherence that eludes knowledge communities, particularly in cases where the environment is unstable and rapidly changing.

As a result, the translated “economic authority” considered by Lopatka and Page, is recoded in legal-procedural categories of a motion to dismiss a complaint for insufficiency or a summary judgment granted based on an assessment that the available evidence shows no substantial or material dispute.

⁶⁸ Svetiev, *supra* n.32.

⁶⁹ Eg, Thomas Merrill, “Judicial Deference to Executive Precedent”, *Yale Law Journal* (1992) 101, pp. 969-1041.

⁷⁰ Lopatka/Page, “Economic Authority and the Limits of Expertise in Antitrust Cases”, *Cornell Law Review* (2005) 90, p. 617, at 631.

⁷¹ Lopatka/Page, at 632.

⁷² Lopatka/Page, at 636.

⁷³ Lopatka/Page, at 640–41.

Such an approach forecloses “further inquiry to both develop new learning and to incorporate it into decision-making”.⁷⁴

While one might object that the foregoing discussion is based on evidence from the US, arguably it is quite salient in the present context for a number of reasons. First, in the US tradition there has been a much greater openness towards the reliance on courts for the resolution of social problems (including in private disputes, such as the antitrust disputes on which the above observations are based). Moreover, there has also been a relatively high level of trust in the integrity and capacity of courts at least at the US federal level. Secondly, US law and judicial doctrine is said to be relatively open to the incorporation of “extra-legal” knowledge and nowhere has this been the case more so than with respect to economic knowledge in antitrust cases over the past few decades. Thirdly, the above example is based on an attempt to incorporate only a single rationality into judicial decision-making, namely upholding only the value of competition, and this understood very narrowly as allocative efficiency (or short run effects on consumer prices). In fact, in the context of antitrust cases, US courts have emphatically disclaimed any possibility that in the context of antitrust cases, judges could pursue other social or policy objectives, apart from competition, precisely because these different dimensions of the public interest may appear *ex ante* incommensurate and due to legitimacy concerns about the judiciary performing such substantive balancing. We might suspect that any attempt at translation into law of multiple (and incomplete) social rationalities would be all the more challenging.

This might give us reason to doubt the capacity of private law and its traditional dispute resolution institutions to both guarantee the autonomy of various regimes in the pursuit of their rationality or mandate, while at the same time “orchestrating” them into a way that balances their various contributions to the common or public interest.

Conclusions and Ways Forward: Recapturing Private Law

While Teubner’s reemphasis on autonomy is an important shift and represents part of a growing literature that entertains considerable doubt in traditional legal and administrative tools of law-making and law enforcement, advocating instead for alternative mechanisms that can provide a way of (re)accessing the deeply local knowledge of parties interdependent and interlinked in networked architectures, so that it can be used as an input into social and economic innovations. Private governance regimes are certainly one way of accessing such knowledge and structuring collaboration among interdependent parties. However, in light of the foregoing discussion about the limits of law, the question still remains: how to ensure that private networked regimes are not subverted entirely to the (short run) private interests of (some or all) their participants and what role, if any, for law and legal institutions?

One response might be that even if national private law does not rise to the occasion, European courts might step in to play this role. Yet European judicial institutions are subject to similar constraints as national judiciaries and even other ones. Thus, European courts are even more distant from private actors and have to decide across many different contexts to be able to effectively elicit knowledge and translate or recode it into law that then has to also be applied across many different settings. The ECJ’s refusal to claim a more searching mandate of review for the negotiated resolution of competition complaints by the Commission may be treated as one manifestation of self-doubt of the European courts in their capacity to perform such a function.

Nonetheless, the ECJ’s decisions in cases such as *Viking/Laval* point to a more modest role that European courts could play in seeking to include various dimensions of the public interest,⁷⁵ neither

⁷⁴ Svetiev, “Antitrust Governance: The New Wave of Antitrust”, *Loyola University of Chicago Law Review*, (2007) 38(3), pp. 593-569, at 622.

⁷⁵ Azoulai, ECJ and Social Market Economy.

by complete re-judicialisation nor by an attempt to mediate or translate different social rationalities into law. The decision recognizes that the EU has “not only an economic, but also a social purpose”⁷⁶ and as such serves to emancipate social actors by giving them a seat at the table vis-à-vis economic operators who have benefited from European negative integration. As Azoulai has recognized, the “practical problem” relates to the “technical methods” for realizing it.⁷⁷ But the ECJ does not anoint itself as the actor that mediates between these different purposes across different context, turning the tables onto the private parties: they cannot act to take drastic self-help or national legal remedies without taking into account the interests of the other parties involved.⁷⁸ But this, in itself, may be insufficient – just as judicial institutions have a limited capacity of translation, they also have a limited capacity to engage in broad oversight and monitoring. Moreover, EU court interventions are sporadic. Both of these limitations lead to the problem of how to ensure that the possibilities created by the emancipation of different aspects of the public interests are being taken up and effectuated by private actors?

A second response might be that the involvement of the administration would be sufficient to fulfill the function of guarding the broader interests of the public; after all we saw earlier from the discussion of the ACER example that the administration often needs to collaborate with private actor networks to be able to perform its regulatory functions.⁷⁹ In addition in the EU, administrations are increasingly networked, they can rely on each other’s capabilities and they can also engage in learning from each other. They also increasingly exercise a review function over each other’s activities.

One concern might be that there may be tendencies to re-establish the logic of hierarchy in the networked administration regimes. Rigid hierarchies are both an inadequate response to the environment and are easier to capture. They may in fact be impossible as a response,⁸⁰ but this does not exclude the possibility that mimicking the logic of hierarchy may be present in administrative networks.

There is some reason to believe that this is not likely to be the case. As Lavrijssen et al point out, while the Commission can treat the network codes developed by ACER as recommendations only, in practice the Commission is likely to adopt them given that their preparation requires “extended technical knowledge” unavailable to the Commission, based on deep consultation which the Commission would be unable to replicate.⁸¹ Yet these are not designed (in the sense of fully specified) regulatory systems and they cannot be, which often implies reliance on ad hoc provisional arrangements. By good fortune, this may result in an effective solution, but this is not necessarily going to be the case always.⁸²

⁷⁶ Case C-438/05 *Viking* [2007] ECR I-10779-10840 at [79].

⁷⁷ Azoulai, ECJ and Social Market Economy, at 1338.

⁷⁸ Azoulai, ECJ and Social Market Economy, at 1343.

⁷⁹ According to Lavrijssen et al, the first experiences of the operation of ACER in developing non-binding frameworks and guidelines has led to “substantial impact on market parties”, including with respect to capacity allocation in gas for example “giving more flexibility to the seller in deciding how to meet his contractual obligations”, ACER, at 5.

⁸⁰ See Brousseau/Glachant, “Reflexive Market Regulation: Cognitive Cooperation in Competitive Information Fora”, in *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, (De Schutter/Lenoble, eds, Hart, 2010) (“What is feasible, thanks to information revelation mechanisms and learning in a (relatively) stable world, becomes impossible to implement in an innovation-based economy. ... The government and regulator can no longer calculate the costs and benefits of alternatives. They also cannot access in time the information requested to implement incentives.”)

⁸¹ Lavrijssen et al, ACER, at 3.

⁸² The Commission’s tendency to rely on expert consultancy input for data gathering may be one such example. Micklitz, *supra* n. 66.

A further concern from over-reliance upon the administration is that of capture. While a networked multi-level administration would be more difficult to capture, this is not impossible. But a subtler, and somewhat analogous problem has already been alluded to earlier. This is the problem of the narrow definition of the mandate of administrative networked regimes,⁸³ or more specifically the interest or interests they seek to promote, including a focus on intermediate goals rather than the ultimate objectives of policy. Sometimes this can be the unintended consequence of excessive fragmentation, whereby certain policies are assigned to different regulatory instruments.

Such an approach can have the effect of restricting the interests that fall within the purview of the regulation and the regulatory regime:⁸⁴ by defining the boundaries of intervention, they exclude a particular group or perspective from the decision-making processes.

In such circumstances, both the generalist jurisdiction, the breadth of the rules and principles, as well as the proximity of national private law institutions can serve a useful counterpoint function for national actors. They provide a place to which those unrepresented in the administrative “mandate” can turn in order to seek to redefine “in whose name” and for whose interests the regime acts.⁸⁵ The story of the consumers turning to the local courts in Hamburg to seek relief from the ultimate effects of the gas liberalization at EU level may provide an example of such a use of the national institutions, in a situation where they can neither impose their will upon, nor be ignored by EU actors.

⁸³ As Van Hoecke argues “the higher the systemic autonomy, the lower the autonomy as to content”. Van Hoecke, “Legal Orders Between Autonomy and Intertwinement, in *Public Governance in the Age of Globalization* (Ladeur, ed, Ashgate, 2004), at 185.

⁸⁴ Lindahl, A-Legality.

⁸⁵ Lindahl, A-Legality.

THE LAW OF THE MARKET SOCIETY: A POLANYIAN ACCOUNT OF ITS CONFLICTS AND DYNAMICS

*Sabine Frerichs**

Introduction: Taking Polanyi to the Law

The aim of this contribution is to elucidate the law of the market society, its inherent conflicts and dynamics, and in doing so, to put the conflicts-law approach (developed by Christian Joerges and his team) in a Polanyian perspective. What follows from this basic commitment, or commission, to the work of Karl Polanyi – namely, “The Great Transformation” (1957 [1944]) – is the two-fold need to adjust his approach to the “postnational constellation” (Habermas 2001) and to enrich it, at the same time, with legal categories. In other words, we have to turn from “nineteenth century civilization” and its ultimate “collapse” in World War II to the market society of the (early) twenty-first century and its inherent conflict patterns. Moreover, while Polanyi did not elaborate much on the legal dimension of the political-economic developments dubbed “The Great Transformation”, the elective affinity between his work and the conflicts-law approach, which is suggested by Joerges and Falke (2011), requires carving out the law of the market society – both now and then. In light of these somewhat overstretched ambitions, two disclaimers seem in place: Being a sociologist and not a historian, my account of historical developments of the law of the market society is ‘second-hand’ and very selective. Furthermore, as I am no lawyer (or legal theorist) either but approach the law from a sociological point of view, I will take the tension “Between Facts and Norms” (Habermas 1996) as given, and make no effort to resolve it. Nevertheless, I hope that the following experiment will open some avenues for discussion across the disciplines.

The cross-disciplinary challenge already begins within the sociology of law, which is a sub-discipline both of sociology and jurisprudence. As such, it is split in its identity and divided in its loyalties. But this is not what Polanyi’s work is about. His main concern is not in the intricacies of *law* and society but in the “interior” relationship of *economy* and society (Krippner and Alvarez 2007). While he can thus be considered a classic of economic sociology, references to his name are – despite a rising interest – still a curiosity in legal sociology. Nonetheless, there is no blame in taking Polanyi back to the law since this is where he once started from: as a doctor of law (Múcsi 1990). However, it is less his biographical background than his ‘holistic’ approach, which also qualifies Polanyi as a pioneer of the “economic sociology of law” – if not actually, so at least potentially (Swedberg 2003; Frerichs 2009). Polanyi’s work forms part of the classical, historical tradition in sociology, which aims at the ‘whole’ of society (Frerichs 2012, forthcoming). Accordingly, modern Western societies are collective entities – or complex institutional constellations – which developed in a certain space and time and can be compared with other, traditional or non-Western, societies. They encompass and ‘integrate’ not only a vast number of individuals but also a variety of differentiated social spheres. Ideally speaking, a ‘holistic’ account of modern society is thus historically and globally comparative, puts individuals in their social context, and highlights the interdependencies of different social spheres. The latter aspect is emphasized in the economic sociology of law, whose subject-matter is, namely, law *and* economy *in* society.

In the following, we will, first, have a closer look at Polanyi’s writings, and notably focus on what he describes as the institutional and ideological preconditions of “nineteenth century civilization”, which is the prototype of the modern “market society”. Drawing on Polanyi’s historical treatise “The Great

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Transformation” as well as a shorter, conceptual piece entitled “The Economy as Instituted Process” (2001 [1957]), I will offer two different readings or reconstructions of the law of the market society, which is hidden in Polanyi’s account. However, what is ‘hidden’ is not so much the law as such than law as a sociological category. In the analytical framework offered by Polanyi this is notably law as an institution (among others) which “institutes” the economy, and law as a “commodity” (among others) which is subject to market forces. These two different readings lay the ground for mapping the conflict which is *inherent* to the law of the market society inasmuch as the law is also *constitutive* of the market society.

Moving from law’s conflict to conflicts-law – and, notably, conflicting ideals of market law - we will, then, engage in a discourse on the modern history of market law from “nineteenth century civilization” to contemporary society, that is, the market society of the (early) twenty-first century. Combining different voices from different fields of law - which nevertheless seem to share a somewhat ‘holistic’ approach to the law and its history – a historical narrative will emerge, which offers a legal (or socio-legal) supplement to, and update of, Polanyi’s approach. In line with the cited literature, I will schematically distinguish between three stages, or generations, of modern market law: its universalist origins in the nineteenth century, its national closings in the twentieth century, and its transnational openings in the twenty-first century.

Framed in Polanyian terms, these developments exemplify law’s great transformation. Inasmuch as law’s inherent tensions are thereby perpetuated, the continuous transformation of the law contributes to the “re-formation” of the market society (Streeck 2009). While this is already an outlook on the conclusion, the introduction should end on a more promising note: The story to be told in the remainder of this article will - perhaps somewhat counter-intuitively - link three Karls (Friedrich Carl von Savigny, Karl Marx, Karoly Polanyi) and two Kennedies (Duncan and David). Whatever their respective credits and authorities, all blame remains of course with the weakest link in the chain, which is the present author.

1. The Law of the Market Society: Two Readings

In the present section, we will go back to the work of Karl Polanyi, whose writings have already inspired a volume on the “potential” of – a reconceived – conflicts-law in “transnational markets” (Joerges and Falke 2011). My aim is still to find the law in the market society that Polanyi describes in his book and that continues to exist, in more or less contained forms, until today (Frerichs 2011b). Since this means discovering something that was not in the focus of Polanyi’s enquiries, the present section goes beyond exegetical work, properly speaking. In extrapolating Polanyi’s approach to the law, it is thus a constructive exercise. It constructs - or reconstructs - the law of the market society, which is implied but not explicated in “The Great Transformation”. In other words, I will add the law (or the legal dimension) where it seems to be missing: notably, as a ‘fifth’ institution, and as a ‘fourth’ commodity. However, in doing so, I will stay within Polanyi’s conceptual framework. While the two readings offered below are thus creative, they stop short from rewriting what has become, with good reason, a sociological classic.

Before turning to the role of institutions and commodities in Polanyi’s approach, and extending them to the law, it seems useful to briefly summarize the three (ideal-typical) stages of “The Great Transformation”, which can also be depicted in legal terms (Frerichs 2011b, 82). In a nutshell, the first stage is characterized by “social embeddedness”, the core principle of pre-modern economies. In this stage, market exchange is still embedded in “custom and law, magic and religion” – and the gain motive thereby kept in check (Polanyi 1957 [1944], 55). The second stage is marked by a gradual but radical “disembedding” of the market, that is, its liberalization and prioritization in modern market economies. Normatively speaking, market exchange is then no longer restricted by “human laws” (ibid., 125) – or by a natural law of divine origin – but left to “the laws of Nature” (ibid., 114). These quasi-natural laws, which are rationalized and popularized by liberal economics, notably include the

new norm of profit-seeking behaviour in markets of whatever kind. In the third stage, social countermovements work towards the “reembedding” of the market in a framework of social regulation, which can either resort to traditional (conservative) or modern (progressive) means. In political terms, Polanyi promotes a liberal form of socialism, which directly challenges the presumptions and pretensions of economic liberalism. The naturalist and axiomatic language of the latter would thus be replaced with an agenda which includes law as a malleable social institution. Thus understood, Polanyi was a legal realist.

1.1 Law as Institution

The first step will be to re-read the overture of Polanyi’s “The Great Transformation”, which describes the historical and institutional background of the market society and notably its insertion into “The International System” (ibid., part one). Accordingly, “[n]ineteenth century civilization rested on four institutions”, namely the “balance-of-power system”, the “gold standard”, the “self-regulating market”, and the “liberal state” (ibid., 3). Without much commentary, Polanyi notes that “[c]lassified in one way, two of these institutions were economic, two political” and that “[c]lassified in another way, two of them were national, two international” (ibid.). Analytically, he thereby draws a line between economic and political, national and international institutions. Empirically, his focus is, however, on how these institutions were actually intertwined in nineteenth century civilization. Already at this stage, we note that the law is not singled out as an institution, even though some form of law, both of national and international scope, seems to be implied by the interplay of gold standard and balance-of-power system, self-regulating market and liberal state. This is supported by Polanyi’s notion of the “organization” of the world, which he conceives not in terms of “centrally directed bodies acting through functionaries of their own” but in terms of the “universally accepted principles” and the “factual elements” on which the international order rests (ibid., 18). Law can thus be understood as the missing link between the above mentioned institutions, or as the hidden constitution of the overall system.

In the following, Polanyi lays special emphasis on the two economic institutions. On the one hand, “the self-regulating market” is presented as “the fount and matrix of the system” (ibid., 3). In this regard, nineteenth century civilization can be considered the prototype of a modern market society, in which market exchange plays a key role as principle of social organization. On the other hand, Polanyi also notes that the gold standard “proved crucial” for the functioning of the international political economy of that time. With hindsight, its collapse can even be considered “the proximate cause of the catastrophe” of World War II (ibid.). At the same time, the gold standard (a monetary system based on the currencies’ convertibility into gold which guaranteed a fixed exchange rate between the participating countries) is qualified as “an attempt to extend the domestic market system to the international field” (ibid.). The two political institutions, namely the balance-of-power system and the liberal state, are understood as closely related to, if not dependent on, their economic counterparts. “[T]he balance-of-power system was a superstructure erected upon and, partly, worked through the gold standard; the liberal state was itself a creation of the self-regulating market.” (ibid.) While Polanyi is thus well aware of the interdependencies between the different institutions, he privileges nonetheless the self-regulating market (both on the national level and – via the gold standard – on the international scale). In conclusion, “[t]he key to the institutional system of the nineteenth century lay in the laws governing market economy” (ibid.). Again, we can assume that the quasi-natural laws of the market also found expression in man-made law.

In the remainder of this section, I want to dwell on the role of the gold standard, which can not only be understood as an economic (or even political) institution but also as a legal institution – namely of international economic law. Furthermore, it highlights the role that (convertible) money plays in the international political-economic regime, which will be of relevance in the next section. As Polanyi argues, “the hundred years’ peace” enduring by and large from 1815 to 1914 (ibid., ch. 1) cannot be attributed to the balance-of-power system alone (that is, the ‘Concert of Europe’ established in 1815

after the defeat of Napoleon). Instead, the relative political stability of that time can also be explained through “the emergence of an acute peace interest” of a more economic nature (ibid., 7). This peace interest was notably embodied by international finance, whose “powerful social instrumentality” was itself premised on the gold standard (ibid., 9). Polanyi pictures international finance as “an institution *sui generis*, peculiar to the last third of the nineteenth and the first third of the twentieth century, [which] functioned as the main link between the political and the economic organization of the world” (ibid., 10; original emphasis).

Through the gold standard, and the disciplining influence of international finance, “[t]rade had [thus] become linked with peace” (ibid., 15). In other words, the political (or peace) organization of the world became anchored in its economic organization and, hence, contingent on a reliable system of foreign trade and currency exchange. At the same time, the international monetary system was no longer a “purely economic institution” but had itself developed a “political function” (ibid., 20). The effects of this regime of the gold standard and international finance are depicted in terms which seem as topical today as they were in the late nineteenth century: “By the fourth quarter of the nineteenth century, world commodity prices were the central reality in the lives of millions of Continental peasants; the repercussions of the London money market were daily noted by businessmen all over the world; and governments discussed plans for the future in light of the situation on the world capital markets.” (ibid., 18) In short, the power and wealth of the nations ultimately became “functions of currency and credit” (ibid.). When the gold standard collapsed, the whole system thus became obsolete. In Polanyi’s words, “[t]he snapping of the golden thread was the signal for a world revolution” (ibid., 27).

1.2 Law as Commodity

The second step will be to recapitulate Polanyi’s argument in the main part of the book with a view on the liaison of the self-regulating market and the liberal state, which was somewhat neglected in the introductory part. Bearing in mind that the liberal state was characterized above as a ‘creation’ of the self-regulating market (ibid., 3), Polanyi’s enquiries into “The Rise and Fall of Market Economy” (ibid., part two) should also yield insights into the fate and fortune of its political counterpart. The liberal state is typically seen as wedded to the ‘rule of law’, which is one entry-point for the law in Polanyi’s argumentation. Alexander Ebner summarizes in this respect: “the rise of the market as a set of hegemonic institutions which shape the modern exchange economy coincides with the rule of law, which implies a reduction of social relations to the regulation of property and contract” (2011, 22; reference omitted). Another option is to study the interface between the self-regulating market and the liberal state in terms of Polanyi’s “fictitious commodities”, notably labour, land, and money, which can also be conceived as legal fictions. Both avenues will be explored in the following. In order to do so, we can start from the chapter entitled “The Self-Regulating Market and the Fictitious Commodities” (ibid., ch. 6), which introduces the market economy as “an economic system controlled, regulated, and directed by markets alone” (ibid., 68). Accordingly, “order in the production and distribution of goods is entrusted to this self-regulating mechanism” only (ibid.). At first, market exchange thus appears to be a self-contained economic institution which is detached from all politics. In fact, the market economy rests on assumptions of political non-interference into the formation of markets and notably the price mechanism (ibid., 69). In positive terms, “only such policies and measures are in order which help to ensure the self-regulation of the market by creating conditions which make the market the only organizing power in the economic sphere” (ibid.).

This paradox is also expressed in the policy of “*laissez-faire*”, which was “enforced by the state” (ibid., 139; original emphasis). Accordingly, the nineteenth century was not only characterized by “an outburst of legislation repealing restrictive regulations” but also by “an enormous increase in the administrative functions of the state” (ibid.). Polanyi highlights in this respect that “the introduction of free markets, far from doing away with the need for control, regulation, and intervention, enormously increased their range” (ibid., 140). In the end, this means that the liberal state is ‘liberal’ only in its

aims but not necessarily in its means - which can, according to Polanyi, reach from law to war. "The economic liberal can, therefore, without any inconsistency call upon the state to use the force of law; he can even appeal to the violent forces of civil war to set up the preconditions of a self-regulating market." (ibid., 149) Following this argument, the 'rule of law' is less to be understood as a formal prerequisite of the market economy than as a powerful instrument for its implementation. The transformation of certain aspects of (economic) life into commodities appears to play a central role in this respect. Moreover, within the process of commodification the law can both act as a 'commodifier' and become itself a commodity. In order to make this point, we will first have a look at the (other) fictitious commodities.

At the outset of his study, Polanyi distinguished somewhat inconclusively between economic and political institutions. Later on, he points to the novelty of this arrangement: "A self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere." (ibid., 71) To the same effect, he claims elsewhere in the book that "[e]conomic society had emerged as distinct from the political state" (ibid., 115). But this only concerns the institutional form of the market society. In terms of its substance - "the human beings [...] of which every society consists and the natural surroundings in which it exists" (ibid., 71) - the market society was anything but self-sufficient in Polanyi's view. This is where the fictitious commodities come into play, which are 'fictitious' in that they are traded on the market but have not been produced for the market in the first place. As to the production factors of land and labour, Polanyi argues that "labor is only another name for a human activity which goes with life itself" and "land is only another name for nature, which is not produced by man" (ibid., 72). In other words, commodification turns the natural productivity of man and nature into land and labour. In contrast, the 'substance' of money seems harder to define.

On the one hand, Polanyi distinguishes between money as mere purchasing power and money as a marketable commodity. According to this, "actual money" is "merely a token of purchasing power which [...] comes into being through the mechanism of banking or state finance" (ibid.; cf. ibid., 196-197). On the other hand, he relates money to "capitalistic production" (ibid., 132). This seems at least to be suggested by the chapter on "Man, Nature, and Productive Organization" (ibid., ch. 11), which thus replicates the well-known distinction between real capital and money capital. Both definitions seem to be backed by the idea or fact that the international gold standard - a "self-regulating mechanism of supplying credit" - furthers the commodity form of money (that is, its exchange function), whereas national central banking is premised on its "manipulation", that is, the management of currency exchange and money supply (hence, its payment and investment function) (ibid., 195). What we end up with can, again, be framed in terms of international economic law, which strikes a balance - however skewed - between economic self-regulation, backed by the gold standard, and political regulation in the context of central banking. In the final analysis, nineteenth century civilization was thus characterized by a law which allowed for "the organization of world commodity markets, world capital markets, and world currency markets under the aegis of the gold standard" (ibid., 76).

Going beyond international economic law, we can claim in more general terms that the process of commodification works on the grounds of economic fictions which are translated into legal fictions. In other words, the law responds to the ideas of economic liberalism and helps to implement and enforce them. In this regard, it acts as a commodifier. Furthermore, we can conceive of the law itself as a fictitious commodity in analogy to money - and notwithstanding other 'fourth' commodities such as knowledge (Jessop 2007), culture (Macneill 2009), or even market competition (Block 2012). This intuition is based on similarities between law and money as social forms, or media of communication, which also 'mediate' between political regulation and economic self-regulation, and which are as such closely linked to the market society. This will be further elaborated in the next section.

1.3 Mapping Law's Conflict

The third step is to systematize the claims made above and to illustrate how the law, by instituting the economy, may itself become commodified. This time, our point of departure is Polanyi's essay on "The Economy as Instituted Process" (2001 [1957]). Under this title, he advances a 'substantivist' approach to the economy which acknowledges "the transcending importance of [its] institutional aspect" (ibid., 35). Whereas liberal economics (and notably, neoclassical economics) adheres to a 'formalist' understanding of frictionless markets, Polanyi thus conceives of the economy in terms of its 'institutional embeddedness' (ibid., 36). In this perspective, law would only be one of the institutions which provide the economic process with "[u]nity and stability, structure and function, history and policy" (ibid.). But, again, the legal institutedness of economic life is not specifically mentioned. Instead, money – the third fictitious commodity in "The Great Transformation" – is explicitly introduced as an institution in the substantivist meaning of the term (ibid., 32). As such, it can also be defined independent of markets, and of the modern market economy in particular (ibid., 45). Polanyi distinguishes in this respect between different functions, or uses, of money, including the "payment use", the "standard, or accounting use", and the "exchange use" (ibid.). As to the latter, he claims that "[i]n the absence of markets the exchange use of money is no more than a subordinate culture trait" (ibid., 46). However, in a market economy which works according to the price-mechanism this specific function becomes predominant.

Money is a means of exchange which has – in the commodified state – itself a price. As a 'quantifiable unit for indirect exchange' which consists in "mere verbalizations or written symbols" (ibid.), money can be considered the fictitious commodity par excellence. Law does not have a price but it is certainly a means of exchange. This unlikely comparison between law and money can be made on the grounds of sociological systems theory - from Parsons to Luhmann and Habermas (Frerichs 2011c, 243-262) - which specifies, besides money, also other media of exchange, which are 'symbolically generalized' and 'functionally specific' at the same time. These media condense an otherwise very complex sequence of communications in the form of abstract symbols which often work as binary codes. Importantly, the notion of 'exchange' is here not reduced to market exchange but also encompasses other forms or contexts of communication. Nevertheless, in the market society, law becomes indeed closely linked to market exchange and can even itself become subject to market decisions. This is at least the lesson of "The Law Market" (O'Hara and Ribstein 2009), in which different jurisdictions compete for customers (not: citizens), who diligently compare the respective costs and benefits. A certain legal rule or regime can then be marketed and shopped for – within a federation or even world-wide. In this context, the idea of law as a fictitious commodity seems not so far-fetched anymore. Under certain conditions, political and legal regulation thus become part of an international economic regime which imitates the logic of a self-regulating market.

In a nutshell, my argument is the following: While it would make sense to start with the role of the law in the decommodification of land, labour, and money, it seems to make even more sense to me to start with its role in the commodification process. If the fictitious commodities are basically legal artefacts which create the 'reality' of the market society, law is a commodifier and potential decommodifier at the same time. This idea is not entirely original but derived from Marxian lines of thinking, which have also inspired Polanyi's work. In linking one Karl to the other, we can thus claim that the relationship between the "economic structure of society" and its "legal and political superstructure" (Marx 1845) resurfaces, in Polanyi's approach, in the ways the fictitious commodities 'institute' the self-regulating market. Alain Supiot speaks of the "dogmatic foundations" of the market in this respect – notably its foundation in *legal* dogmas (2007, 94). At the same time, he also notes a tendency towards "law shopping" on the "market for legislative products", which makes law a matter of choice and subject to competition (2010, 156). The relationship between law and economics is thus twofold: The market is shaped by legal institutions, but the law is also shaped by economic thinking. Not surprisingly then, lawyers and economists do share certain concepts – such as 'person' (subject), 'property' (object)', 'contract' (exchange) - which are all fundamental to the functioning of the market

society. Somewhat paradoxically Polanyi's notion of the instituted economy thus includes not only the embedded but also the disembedded market, which is instituted with the help of the commodity fiction. The substance (man, nature) and symbols (law, money) of economic life - its material values as well as its means of exchange - are then reduced to mere numbers in cost-benefit calculations. Hence, we are left with two conflicting roles of the law: as commodifier and decommodifier, as institution and commodity. Arguably, these conflicting laws can also be found in conflicts of law, or conflicting laws of conflicts-law.

1.4 Example: Contested Persons

To illustrate what I mean by the nexus between legal and economic fictions, and how it can work either towards commodification or decommodification, let us consider different concepts of personhood as they appear at the interface of law and economics. The background for the following is Ngaire Naffine's distinction between 'legalist' and 'realist' concepts of the legal person (2009). From a legalist point of view, the legal person is an entirely fictitious concept: "The 'person' is the formal subject of rights and duties: a legal idea or construct, not to be mistaken for a real natural being." (ibid., 1) Accordingly, the law may define anybody or anything as a subject of rights and duties, at least "as long as it is compatible with the purpose of any particular law" (ibid., 21). In contrast, realist understandings draw on substantive conditions of legal personhood which are imported from outside the law: from philosophy, religion, science - or, as we may add: economics (or even sociology). In practice, both lawyers and economists oscillate between formalist-legalist and substantivist-realist notions of personhood, as the following two examples show. Under this condition, 'the purpose of the law' becomes pivotal for what kind of fiction is actually chosen.

The first example concerns the fictitious legal person par excellence: the firm - and notably the stock company. Philipp Klages (2010) demonstrates how the legal understanding and social function of the latter developed in Germany and the US throughout the twentieth century. Most importantly, he finds an "oscillation" (ibid., 193) between contractualist and institutionalist views of the firm. These resonate with both Naffine's distinction between legalism and realism and Polanyi's dialectic of (liberal) movement and (social) countermovement. Accordingly, the firm is either conceived as a creation of contracts only, or it is defined as a collective entity with manifold institutional effects in society. Whereas the contractualist view emphasizes the interests of individual shareholders, the institutionalist view equally considers the interests of all stakeholder (with a view on 'financialisation' cf. Zumbansen 2011, 187-190). In this context, an understanding of firms as contracts has commodifying effects, while an understanding of firms as social institutions works towards decommodification. Company law can thus play both roles. Moreover, private investors may compare and choose between different corporate law regimes according to their respective costs and benefits (e.g., within the US or the EU). Similarly, public regulators may reform company law to boost economic growth and international competitiveness, and to reduce market failures and social externalities - all these motivations surface in Klages' study (2010). In the final analysis, both views of the firm draw on economic rationalities. While the commodity character of company law seems more obvious on the microeconomic than on the macroeconomic level, "the regulation of business conduct and corporations" is as such strongly affected by "globally interdependent activity spheres (marketisation), fundamentally changing national political economies (privatisation), and a dramatic expansion of issue-driven, functionalist regulatory regimes (scientisation)" (ibid., 205). Thus understood, company law is more exposed to market forces today than in the heyday of the national welfare state. Its instrumentalization for economic goals seems therefore more probable than before.

The second example concerns 'real humans', as they have recently been advocated for in behavioural economics, from which they made their way into consumer law. The starting point is simply that "[r]eal people [...] are not homo economicus" (Thaler and Sunstein 2009, 7). In other words, they are not rational utility maximizers which always act in their own best interest. Instead, they are prone to cognitive biases, social influences, and human failure, which make their decisions far from optimal

(and sometimes outright disastrous). What we can observe in the present debate is thus a trade-off between rationalist and behaviouralist views of the consumer, between the fiction of *homo economicus* and 'real' market behaviour. Yet commodifying and decommodifying functions are less clear than in the previous example. To be sure, *homo economicus* is a fairly disembedded concept of the (legal) person to begin with. Being more 'realistic' about his limitations may thus point to a more contextualized understanding of economic action. However, behavioural economists rather draw on our ('hard-wired') universal human nature than on our (malleable) cultural identities. In other words, they tend to reify our selves. Interestingly, this reification seems to be linked to commodification. As a case in point, "libertarian paternalism" (*ibid.*, 5-6) does not really subtract from economic liberalism but rather adds to it. In other words, the 'visible hand of the state' is less used to curb or contain market forces than to complement or compensate for individual failure. By 'nudging' consumers into more rational decisions, they are thus not shielded from but rather adjusted to the markets, which have become inescapable in many matters of life. Hence, the 'purpose of the law' is not simply consumer protection - or even decommodification - but to increase market participation at lowest possible individual and collective costs. (Frerichs 2011a) In this sense, the market utility of certain models of the consumer only exemplifies the commodity character of consumer law. And it demonstrates it much better than the occasional 'law shopping' by sufficiently sophisticated consumers.

In the law of the market society, legal persons are thus ultimately meant to fulfil economic functions. In other words, legal personhood is attributed and qualified in ways which serve the ideal of the "one big self-regulating market" (Polanyi 1957 [1944], 67). The conceptual adjustment of legal persons to the market sphere can not only be interpreted as the commodification of man (as worker and consumer) and of 'productive organization' (as firms and stock companies) but also as the commodification of law itself, which institutionalizes and enforces these very fictions. In its commodifying function, law thus appears to be 'cognitively embedded' in economics (Frerichs 2011b, 69-71). It becomes a means which serves the ends of the market, of creating competition, increasing efficiency, and furthering growth. In this general equation, law becomes a 'production factor' just like labour, land, and money/capital. We can thus speak of law as a commodity first of all in the macroeconomic sense. However, whenever regulatory competition allows a 'law market' to arise, its commodity character also materializes in the microeconomic sense, and law becomes a variable factor in individual production (or consumption) functions.

2. The Modern History of Market Law: A Discourse

The previous section provided us with a conceptual framework to recount the history of the law of the market society from its emergence in the nineteenth century until today. It goes without saying that the story to be told in the present section will be highly simplified and selective. Instead of accuracy, I am aiming for a schematic account, which will notably be framed in Polanyian terms. This is not an unprecedented project. In the following, I will build on various contributions which address related questions of how the law evolved in the last two centuries, what conflicting rationalities it adopted, and how this is reflected in the narratives of today's lawyers and legal scientists. Importantly, the law of the market society includes all types of law that constitute or regulate the (allegedly) self-regulating market. This definition cuts across different legal fields and disciplines, namely public and private law, national and international law (including transnational and supranational law). It thus seems legitimate to draw on authors with different backgrounds and ambitions, which address, in one way or another, the historical and institutional dynamic of 'market-constitutive' and 'market-regulative' forms of law. Mirroring Polanyi's interest in the 'organization' of the international political economy, it seems most suitable to summarize these different fields and forms of law under the label of international economic law. According to David Kennedy (1999, 38), this "is defined not by the subjects it governs, but by its regulatory terrain – the law, of whatever origin, which governs international economic transactions". As such, it transgresses common lines of demarcation within legal scholarship: "It mixes national and international law, and is rooted in private law – both national

regimes of contract or property and international regimes of private law unification and conflict of laws.” (ibid.)

This rather broad definition of the law of the market society is still lacking a Polanyian element which would be indicative of its inner conflict. The tension between commodifying and decommodifying functions, which was suggested above, can actually be translated into a ‘dialectical’ principle of development which Polanyi specifies as “double movement”. What he has in mind are “two organizing principles in society”, which compete with each other, both synchronically and diachronically (1957 [1944], 132). One is characterized as the “principle of economic liberalism, aiming at the establishment of a self-regulating market”; the other as the “principle of social protection[,] aiming at the conservation of man and nature as well as productive organization” (ibid.). One is marked as “utopian” (ibid., 142) and a “peril to society” (ibid., 150), the other as “realistic” (ibid., 142) in that it defends the “interests of society as a whole” (ibid., 162). Our narrative of the development of international economic law – from its ‘universalist’ origins in the nineteenth century to its national ‘closings’ in the twentieth century, and to its transnational ‘openings’ in the twenty-first century – is thus meant to exhibit a certain dynamic of “movement” and “countermovement” (ibid., 130).

2.1 Nineteenth Century Origins

Our reconstruction of the history of market law begins with the nineteenth century, that is, the time-frame which Polanyi set for his study. David Kennedy (1996, 391) - albeit critical of the stories lawyers tell each other about this century (and about how they have made a leap ahead since then) - characterizes its dynamic in the following terms: “If the century has a direction, it is simultaneously from Europe outwards and from politics to commerce. The move to commerce brings a move from public to private order, and foreshadows a move from the imperial capitals of Paris, London and Berlin to the financial centers of London and New York.” If this is the liberal movement in Polanyi’s terms, the countermovement is announced in the following: “Nostalgia for a peaceful Central European order, before the explosions of nationalism.” (ibid.) The international political economy thus sways from a pronounced liberalism to sweeping forms of nationalism. Whereas the beginning of the ‘long’ nineteenth century is given with the year 1789, the conventional legal narrative focuses on its last few decades only - “from roughly 1870 (the Franco-German war of 1871 will do) until 1914” (ibid.). In other words: “For international law, as for much of the rest of twentieth century legal thought, it is really only the last five minutes of the nineteenth century that counts.” (ibid.) What is referred to here is namely the “triumph” of positivism over naturalism (ibid., 398), or the “classic synthesis of the late nineteenth century” (ibid., 397).

Similarly, Duncan Kennedy begins his narrative of the “Three Globalizations of Law and Legal Thought” (2006) with an account of “the rise of Classical Legal Thought between 1850 and 1914” (ibid., 19), which he sees connected to “the liberal attack on mercantilist or ‘early modern’ economic and social policy making” (ibid., 20). The response is given as the rise of “socially oriented legal thought between 1900 and 1968” (ibid., 19), which is thus already considered characteristic of the twentieth century. Whereas Kennedy’s overall focus is on the latter, socially oriented law, he classifies the former, classical conception, not least in terms of “the creation of a first global system of international economic law, based on free trade, the gold standard, and private international law (often applied by arbitrators) to settle disputes” (ibid., 29). Moreover, he explicitly points to the “process of social transformation” brought about by this political-economic regime, and notably refers to the work of Karl Polanyi in this respect (ibid.). However, another name seems much more important in reconstructions of nineteenth century legal thinking: Friedrich Carl von Savigny. Kennedy attributes “his seminal importance” to the paradoxical “combination [...] of a universalizing legal formalist will theory with the idea that particular regimes of state law reflect diverse [...] societal normative orders” (ibid., 27). Von Savigny could thus become a patron of both - the liberal movement and its nationalist countermovement.

Moreover, he cannot only be considered the founding father of German historical jurisprudence but also of private international law, or the modern conflict-of-laws methodology. This is emphasized by Florian Rödl, whose short history of the “Law of Conflict of Laws” (2011, 31) – and its inherent dialectic – inspired much of this chapter. Rödl distinguishes between “Universal Free-trade Law” in the nineteenth century (ibid., 32) and “(National) Private International Law” in the twentieth century (ibid., 34), dividing the latter into two distinctive periods of “Nationally-organised Capitalism” (ibid., 35) and “‘Embedded Liberalism’” (ibid., 38). To account for the ‘long’ nineteenth century in the time-frame mentioned above, we can thus speak of a development from universal free-trade law (in the international political economy) to national private international law (under the regime of nationally-organized capitalism). As Rödl points out, von Savigny was not yet preoccupied with national interests but propagated a systematic (rationally deduced) form of conflicts-law instead, which would serve the interests of all nations in a world of free trade. Von Savigny’s methodology, which dates back to the year 1849, thus supported the agenda of economic liberalism. Or, in Rödl’s words, “[h]is push for a universalistic form of law of conflict of laws was an adaptation to the prevailing theoretical conceptions and hegemonic practical endeavours towards the desired international integration of national economies” (ibid., 33). This early universalism notwithstanding, his references to the “spirit of the people” also paved the way for more nationalist interpretations (ibid., 34-36). In the end, “national-particular and international-universal creeds” within the discipline could thus draw on the same legacy. (For a more comprehensive account see Rödl 2008.)

The “domestication of private international law” is also the focus of Horatia Muir Watt’s history of the field (2011, 20). The ‘domestication’ of the law of conflicts of law precisely consists in framing its contents in national, private, technical terms and thereby separating it from the international, public, political sphere. For Muir Watt, this means leaving the transnational market, or the “informal economic empire” (ibid., 35), largely unattended – as it would then remain outside of both public and private international law. One of her historical reference-points is “the middle of the nineteenth century”, when von Savigny developed his ‘universalist’ methodology, which is also labelled as “multilateralism” or “monism”. Muir Watt points out that the legal universe, within which this conflict-of-laws methodology could be applied in a more or less technical manner, was the “Romanist legal community” only and not the wider world society (ibid., 41). With regard to the global dimension, she therefore points to another, “minoritarian methodology” which existed side-by-side with Savigny’s ‘Roman’ multilateralism and could in contrast to the latter also deal with “‘true conflicts’”, that is, culturally or politically particularly sensitive issues (ibid.). This alternative methodology, which allows “opening the legal order to other normativities on their own terms”, is labelled “unilateralism” or “pluralism” (ibid.). The paradox is that it is more universalist (going beyond Roman law nations) and particularist (emphasizing domestic legal perspectives), at the same time. However, this “pluralist counter-narrative, left over from the era, before the nation-state” (ibid., 34 [sic]) also reminds of a more political and potentially cosmopolitan function of conflicts-law. To “reappropriate” this function (ibid., 53) is what Muir Watt understands as a “re-embedding” countermovement, both now and then (ibid., 47).

Another, even older reference point of hers is the *ius gentium*, which preceded the separation of public and private international law and is notably introduced as “as an overarching system of legality and morality, integrating relations both as between princes, and as between merchants” (ibid., 11-12). This brings us back to the two Kennedies. Duncan Kennedy (2006, 30) links nineteenth century legal thinking both to von Savigny’s idea of a universalist Roman legacy and to the universalist ideal of *ius gentium*: “[Classical Legal Thought] affirmed that every country with a Western legal heritage shared the Roman legacy along with Savigny’s Germans, [...] and that every nation that participated in the global order of commerce and finance participated in the *ius gentium*.” (ibid., 30) David Kennedy (1996) explains how princes and merchants ended up in different, yet analogically structured legal orders. Accordingly, “[i]nternational legal positivism is simply the working out of the private law metaphor of contract for a public legal order” (ibid., 398). The positivist understanding of sovereignty, whose development is attributed to nineteenth century legal scholarship, thus mirrored private law

relations: “By the end of the century, sovereignty described a relation to territory parallel to the contemporaneous understanding of the relationship between individuals and their property, and the analogy became ever more explicit.” (ibid., 408) In other words, public international law owes its methodological individualism to private law. At the same time, private international law owes its ‘domestication’ to the methodological nationalism of its public counterpart, which came to be dominant in the late nineteenth and early twentieth century. How this affects private law more generally will be discussed in the next section.

2.2 Twentieth Century Closings

Nineteenth century civilization was thus characterized by classical legal thinking which reflected - in its universalism, formalism, and positivism - the ideological and institutional requirements of classical economic liberalism. However, towards the end of the ‘long’ nineteenth century, the international political economy increasingly moved from liberalism to nationalism. This conflict inherent to the normative and factual ‘organization’ of the world is also handed over to the twentieth century. In other words, while Polanyi explicitly speaks of “the rise and fall of market economy”, the market economy has not come to end in the two world wars, but is reinvented as a more ‘social’ type of market economy in the postwar decades. Wolfgang Streeck’s above-mentioned study of “Institutional Change in the German Political Economy” (2009) – which is the model case, in this respect – can accordingly be read as a Polanyian account of the rise and fall of the *social* market economy. The story of the twentieth century is thus the continuation of the market society with different legal means but similar political-economic tensions.

For the new law of the market society - which can be understood as ‘neo-liberal’ in the widest sense of the term – we can draw on Duncan Kennedy’s characterization of the second ‘globalization’ of law and legal thought. Accordingly, legal thinking “[b]etween 1900 and 1968” is preoccupied with “The Social”, that is, with reinventing the law “as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations” (1996, 22). Instead of laissez-faire, there is thus a clear perspective of social engineering. And while Kennedy does not identify the ‘social’ critics of classical legal thinking with any “particular political ideology” (ibid.), he sees a commonality between the legal realist (my label) and the Marxist critique in “that they interpreted the actual regime of the [legal formalist] will theory as an epiphenomenon in relation to a ‘base,’ [which is] in the case of the Marxists, the capitalist economy and in the case of the social, ‘society’ conceived as an organism” (ibid., 38). However, other than radical Marxists, “the social people” did not want to replace capitalism with socialism, in Kennedy’s account, but “to save liberalism from itself” (ibid.). Strictly speaking, he thus equates the new mainstream of legal thinking with the social reform movement, “leaving out only Marxist collectivism at one extreme and pure Manchesterism at the other” (ibid., 39). In contrast to the “‘conflict ideology’” of Marxism, and to the competitive rationality of laissez-faire liberalism, “the social” is notably characterized as a “‘harmony ideology,’ preaching a function for each organized interest, and the existence of a ‘public interest’ in the coordination of their interdependent activities in order to maximize social welfare” (ibid., 42).

To highlight the discontinuities between nineteenth and twentieth-century legal thinking, but also to remind of the continuities in the law of the market society, we will dwell on Kennedy’s picture of the new legal consensus a little longer. The end of the ‘long’ nineteenth and the beginning of the twentieth century – notably, in the two world wars and the world economic crisis - is marked by the “rejection of the nineteenth-century ‘gold standard/free trade/private international law’ regime” and its replacement with a “‘national strategy’ based on bilateral agreements and then on the formation of blocs, first those of the empires and then those based on ideology in the confrontation of liberalism with fascism and communism” (ibid., 56). However, this is not the end of capitalism: after the Second World War, a new regime of a “nationally and internationally regulated market economy” was created between the “capitalist core countries” of the Western hemisphere and, with the “globalization of the Bretton

Woods system”, also exported elsewhere (ibid., 57). Whereas the Bretton Woods institutions form thus the international backbone of the “highly regulated mixed capitalist economy”, which is characterized by “pursuing a strategy of social peace through economic development” (ibid.), its national form is given by the economic and social regulation of the welfare state. In contrast to the classical liberal ideal, “[s]ocial legislation meant expanding the regulatory functions of the state, carving out and redefining as public law vast areas that had fallen safely within the domain of right, will, and fault” (ibid., 43). The market economy was thus discontinued in its (legal) form only but not in its (economic) content. While the idea of the self-regulating market was not abandoned, ‘market-constitutive’ forms of law came to be more balanced with ‘market-regulative’ forms, such as “labor legislation, the regulation of urban areas through landlord/tenant, sanitary and zoning regimes, the regulation of financial markets, and the development of new institutions of international law” (ibid., 38-39).

Reflecting these developments, Florian Rödl characterizes the “Law of Conflict of Laws in the 20th Century” (2011, 34) as moving from “Nationally-organised Capitalism” (ibid., 35) to “‘Embedded Liberalism’” (ibid., 38). This is the era of “national private international law”, that is, a nationally premised form of conflicts-law: “Throughout the Twentieth century, nothing changed in the authority of the nation state over private international law.” (ibid.) While the national prerogative, or bias, of conflicts-law was thus upheld, the changes in the international economic order, and the emergence of the modern welfare state, entail new problems in reconciling the given methodology with the new social goals of the law. What results is a “conceptual crisis” of private international law, which is not yet prepared to take into account the “substantive social regulatory concerns” of the reformed national private laws (ibid., 39). Both the ‘national’ and the ‘social’ challenge to the universalist methodology of private international law, as once envisioned by von Savigny, are expressed in tensions between “general conflict-of laws norms” (ibid., 37) on the one hand, and “prohibitive norms” (ibid.), or “norms of intervention which are only in favour of one’s own law”, on the other (ibid., 39). However, there is a tendency in conflicts-law scholarship to counter the social challenge, if not in universalist, so at least in more systematic terms: by conceptually reintegrating “special conflict-of-laws norms [such as] for consumer, labour and insurance contracts” into the system of general conflict-of-laws norms (ibid.).

Similarly, Horatia Muir Watt (2011, 24) characterizes the development of private international law “during the second half of the 20th century” as a “turn from the dogmatic to the functional, from the private to the regulatory”. Furthermore, she highlights and compares the ‘federalist’ context of the United States and the ‘quasi-federalist’ context of the European Union, which both shaped the conflict-of-laws methodology in ways that allowed giving “greater attention to the needs of the community of Sister or Member States, but closed off the global horizon” (ibid., 24-25). While the conflicts-law thus becomes more functional, regulatory, and pragmatic in the “more cosmopolitan second half of the twentieth century” (ibid., 42), it is still oriented towards a group of like-minded (culturally and politically similar) states, and not to the world polity. Muir Watt’s vision and project of “a re-embedding of the global” through a more pluralist definition of conflicts-law is thus left to the twenty-first century (ibid., 48).

Also in international law more generally, twentieth century legal thinking is, according to David Kennedy (1996), generally equated with pragmatism. The respective narrative indicates the ‘progress’ which legal thought has made since the ‘classic synthesis’, and notably since the internationalist liberal movement gave way to nationalist countermovements: “If we choose pragmatism over formalism, we will have chosen the international over the national, the modern over the classical, order over chaos, exactly as we have moved from the nineteenth to the twentieth century.” (ibid., 419-420) This can also be understood as a (relative) move from ‘rule’ to ‘policy’. With an eye on the United States, Kennedy (1999, 27) claims in this respect that compared to their public international law colleagues “[t]he inheritors of the private international law tradition – conflicts of law, international business transactions, comparative law, and international economic law – are all policy embracers”.

To complement this picture, and to follow up on the idea that ‘the private is political’, we will finally turn to national private law in the European context.

Christian Joerges summarizes the history of private law in Germany with a view on the relationship of “The Science of Private Law and the Nation State” (2000 [1994]). Accordingly, the twentieth century is marked by three different periods, or generations, of private law scholarship. The first is the “Private Law of the Volksnation” (ibid., 8), which reflects the instrumentalization of private law in the name of the (racially defined) ‘national community’ by National Socialism. The second is the “Private Law of the Staatsbürgernation” (ibid., 23), which refers to more enlightened ideas of a ‘nation of citizens’, which is conceived as an open civil society and based on a strong, liberal and democratic constitution. The third is the Europeanized private law, or a private law “Beyond The Nation State” (ibid., 37), which already marks the transition from the twentieth to the twenty-first century. All in all, Joerges’ account thus addresses “three aspects of nation-statehood” and the respective challenges they pose to (the science of) private law in and beyond Germany (ibid., 7). One problem of twentieth century scholarship was thus to come to grips with the nationalist heritage of the discipline. At the same time, it could not simply return to the – discredited – legal formalism and economic liberalism of the previous century but also had to cope with its new, regulatory role in the social welfare state (not yet mentioning the latter’s downscaling towards the end of the century). These characteristic tensions are illustrated by the fact that “the programmatic idea of the social market economy [...] seemed open to a variety of contents” (ibid., 8). To wit, the idea could equally be embraced by a new movement and a new countermovement whose “Models of ‘Materialised’ Private Law” (ibid., 15) are far from identical. On the one hand, the ordoliberal theory of private law considered “a State-guaranteed competitive constitution” which would bring about a well-functioning ‘private-law society’ “an attractive model for the reconstruction of the economic and legal system” (ibid., 16). On the other hand, the emergence of the national welfare state motivated “an alternative social model of private law” which starts from a “theoretical, sociologically oriented reconstruction of the social functions of private law itself” (ibid., 28).

2.3 Twenty-First Century Openings

As to the situation in the late twentieth and the early twenty-first century, Duncan Kennedy (2006, 63) speaks of an “unsynthesized coexistence of transformed elements of [Classical Legal Thought] with transformed elements of the social”. In a language which is itself remindful of the ‘double movement’, he illustrates this as follows: “There is a substratum of positively enacted classical contract law everywhere, and a superstructure of positively enacted social labor law.” (ibid.) While this example specifically refers to the different layers of universalist and instrumentalist (private) law, Kennedy contrasts and connects market law and social regulation also in more general terms: “There are multiple administrative agencies dealing with a host of socially problematic areas, everywhere; and everywhere there is the law of the free market (itself more or less internally ‘socialized’) governing beneath and between and among the regulatory regimes” (ibid.). To be sure, this lack of an integrative - or hegemonic - consensus could still be framed in terms of pragmatism, which David Kennedy (1996) found to be characteristic of twentieth century legal thinking. In order to explore what seems to be ‘new’ about the twenty-first century, I will begin with Florian Rödl’s account of recent developments in private international law, which suggest less that the private is political than that the political increasingly tends to be privatized.

In his succinct review of conflicts-law history, Rödl’s (2011) section on the “Law of Conflict of Laws for the Twenty-first Century” thus points to the “Privatisation of the Function of Law” (ibid., 40). Accordingly, the new challenge after the nationalisation and ‘materialization’ of private (international) law is its transformation “into a framework law in which private actors should be able to choose as freely as possible which national legal norms should, in each case, apply to the private legal relations that concern them” (ibid., 41). This implies not only the de-politicization of the nation state – or, to speak with Muir Watt (2011, 24), of the federalist (US) or quasi-federalist system (EU) in question –

but, more specifically, its subjection to private economic choices, which may then undermine the political choices of a collective. What was a ‘nation of citizens’ - as Joerges’ (2000 [1994], 23) depicted German constitutional democracy in the second half of the twentieth century - thus dissolves into a world of “buyers and sellers” (Kennedy 1996, 45) which handle law as a commodity. This privatization of the political by means of regulatory competition is, as Rödl (2011, 31) points out, “diametrically opposed to our venture here”. The reconstruction of conflicts-law in terms of its decommodification and re-politicization can thus be understood as the latest countermovement to an ongoing trend in private international law. Both the privatization of conflicts-law on the one hand, and its re-politicization on the other, take place in the “postnational constellation”, that is, a markedly trans- and supranational context (Habermas 2001).

As to the supranational dimension of twenty-first century market law and its social complements, we can more specifically resort to developments in the realm of European law, starting with the Europeanization of private law. In a terminology which appears to be compatible with the present chapter, Ralf Michaels distinguishes between “The Two Rationalities of European Private Law” (2011). One is the formal, “juridical” rationality (ibid., 142) exemplified by classical legal thought and the *ius commune*. The other is the functional, “instrumentalist” rationality (ibid.) which is characteristic of ‘materialized’ private law, including its competing ‘ordoliberal’ and ‘social’ interpretations. The respective regulatory context does not have to be given by the nation state only but can also be defined by the European Union. Michaels’ version of a “European Private Law History” (ibid., 149) gives an intriguing account of the dynamics of these conflicting – and “perhaps even [mutually] constitutive” – rationalities (ibid., 143). Accordingly, the juridical rationality, which was originally perceived as universalist, was ‘nationalized’ in the course, or aftermath, of national codification projects (ibid., 151-153). In this respect, a Europeanization of private law would mean to uncover the shared (or imagined) heritage of the transnational *ius commune* and to streamline its domestic variations (ibid., 157). In contrast, the instrumentalist rationality, which was once perceived as a national prerogative, has now found its equivalent in the European Union (ibid., 154-155). In this case, the Europeanization of private law amounts to a transfer of regulatory powers from the national to the supranational level. In both cases, the ‘denationalization’ of substantive private law can be perceived as ‘de-politicization’ – here including the identity politics of the member states (ibid., 155). If these are the ongoing projects and practices of European Private Law, it comes as no surprise that the respective countermovement works towards a re-politicization of private law, either on a national or supranational level.

Arguably, the *ius commune* is thus for European private law, what the *ius gentium* is for public international law: a universalist idea based on the generalizability of formal rules; moreover, a reference-point in the past, which is at times still taken as a model for the future. This raises the question if one can ‘bracket’ the nation state in a way which allows presenting the nationalisation of private law, and the domestication of private international law, as historical exceptions. However, the nation state is and was intricately linked with (legal expressions of) ‘the social’, notably in the form of the national welfare state. A historical demise of the nation state would thus also endanger the social embeddedness of private law achieved within its borders. In Christian Joerges’ early account of “The Europeanisation of Private Law” (2000 [1994], 44), this problem is condensed as follows: “[t]he integration process forces renewed grappling with the universalizability of private-law principles and rules, with the meaningfulness of legislative activities - but also with the erosion of the nation State and its political institutions” (ibid., 45).

Going beyond the confines of European private law, Polanyian patterns have explicitly been claimed for the development of European market integration and concomitant social regulation by means of law. While it seems not difficult to find a ‘liberalizing’ movement in the market-building project as such (as it is exemplified by the four freedoms with their far-reaching legal effects), there are clear differences in what is considered, or counted, as a legal countermovement which would provide for the reembedding of the market in social relations or rationalities. Alternative suggestions include

global soft law, European case-law, and postnational conflicts-law. A fourth example will be considered more elaborately in the subsequent section: European regulatory private law as applied to regulated network markets.

In their piece on “Polanyi in Brussels”, James Caporaso and Sidney Tarrow (2009) suggest that something “analogous to [...] the movement/countermovement dialectic that Polanyi perceived” (ibid. 615) is also at work in the European Union: “The EU uses its regulatory tools not only with the aim of market-making, but to engage in both market-making and market modification” (ibid., 599). The main example they draw upon is the extension and consolidation of cross-national social rights of EU citizens in the case-law of the European Court of Justice - hence, market integration/regulation through judge-made law. In Caporaso and Tarrow’s view, the double movement involves a ‘disembedding’ of social rights and relations from the national context and their ‘reembedding’ in the supranational context: “one kind of solidarity (among nationals and their political institutions) was weakened and another was strengthened (between EU institutions and foreign workers)” (ibid., 609). Martin Höpner and Armin Schäfer (2010) object in their critical reply that this gives a “much too optimistic” picture of the ‘realities’ of integration through law (ibid., 22). In their view, liberalizing measures with market-enhancing or market-enforcing effects clearly outweigh market-correcting or market-shaping social policies in the EU, and the overall setting seems thus more “Hayekian” than “Polanyian” in spirit (ibid., 7-11). At the end of the day, the selective upgrading of social rights on the European level could thus come along with a general downgrading of social policies on the national level, or what Höpner and Schäfer refer to as “welfare state retrenchment” (ibid., 24).

Furthermore, whereas Caporaso and Tarrow concede that “the ECJ is indeed cut off from popular politics”, they also hold that “its jurisprudence is thickest in those areas in which social-economic demands are strongest and where interest groups, nongovernmental organizations [...], and social movements are most active” (2009, 613; reference omitted). In contrast, Höpner and Schäfer are doubtful if judicial activism makes a proper example for a Polanyian countermovement, not least since the political conflict arising from economic liberalization would then be considered in legal terms only, in this case as trading off individual economic and social rights (2010, 25).

Another Polanyian interpretation of legal integration, or rather legal innovation, in the European context, locates the countermovement not in ‘hard law’, that is, in the trias of legislation, adjudication, and enforcement, but in ‘soft law’, or so-called new modes of governance. Marc Amstutz (2011) namely interprets “European efforts [...] to establish a viable [Corporate Social Responsibility] model” (ibid., 377) as an instance of “world law”, which is considered “the [spontaneous] medium from which the Polanyian counter-movement to globalisation arises” (ibid., 365). In his view, the countermovement is “no longer a matter of political communication, but one of *legal* communication” (ibid., 363; original emphasis). Following a Luhmannian rather than a Habermasian line of argument, law is thus considered part of the functionally differentiated world of systems, while being disconnected from anything like a lifeworld (as a background condition for *social* movements). Reflecting the systems-theoretical emphasis on the cognitive or adaptive orientation of both world society and world law, Amstutz emphasizes that, “in establishing the European Alliance for [Corporate Social Responsibility], the [European] Commission created a legal institution that produces *cognitive resources*” (ibid., 384; original emphasis). These learning opportunities were capable to inform, irritate, and influence corporations (notably via the effects of “market, reputation, public opinion”; ibid., 392), without however imposing formal legal restrictions or sanctions on them. In the end, Amstutz claims that “world law is civil society law” and, as such, “not the product of any (state or other) organisational will, but the fruit of blind evolution, what von Hayek terms a spontaneous order” (ibid., 391; emphasis omitted).

Christian Joerges agrees with Amstutz’ account and also with Caporaso and Tarrow’s approach only inasmuch as law is understood as a (possible) site, or means, of a Polanyian countermovement, which seeks to reembed European market-building in social policies, purposes, and responsibilities. However, as an instance of the ‘discourse theory of law’, Joerges’ three-dimensional conflicts-law is

committed to the principle of a democratic rule of law and complementary deliberative arrangements within and beyond nation states. Conflicts-law is thus understood as a *legal* countermovement which nevertheless brings politics – and even the state – back in. “Indeed, the state has to remain present as a forum and organization form of democratic processes and a democratically legitimate law.” (Joerges 2012, 73; my translation) Accordingly, political and legal communication remain closely linked, and also backed up with the legitimating potential of the (rationalized) lifeworld. At the same time, Joerges indicates that it would be misleading to interpret Polanyi’s ‘spontaneous’ countermovement – as Amstutz did – in a Hayekian sense of ‘blind evolution’ only. The key difference between the two accounts can thus be found in the envisioned form of the law. For Amstutz, the source of reembedding is a “self-validating global law” (2011, 367). For Joerges, this is a new type of conflicts-law which is adjusted to the ‘postnational constellation’, but which requires nevertheless the ‘organization form’ of the state: in order to ‘constitutionalise’ governance arrangements, such as the corporate social responsibility practices studied by Amstutz, but also to rectify the “de-coupling of [European] economic and [national] social constitutions” (2009, 538), which the recent case law of the European Court of Justice only laid bare.

2.4 Example: *Regulated Markets*

The outlined development of the law of the market society culminates – at least *pars pro toto* – in “European regulatory private law”, which thus seems suitable to summarize the present argument. Let us briefly resume: If a universalist private law with a “juridical” rationality was characteristic of formal legal thought in the nineteenth century, the hallmark of the twentieth century was socially oriented legal thought as expressed, not least, in the “instrumentalist” rationality of ‘materialized’ private law. Whereas the former was constitutive of the liberal movement, the latter can be understood as a result of a ‘reembedding’ countermovement, which laid the foundations for the social market economy in liaison with the national welfare state. At the same time, one can already distinguish between a regulatory (efficiency-based) and a redistributive (equality-based) orientation of ‘social law’ in the most general sense – movement and countermovement *within* the regime of “embedded liberalism”. If the early twenty-first century is now characterized by a heightened role of European “regulatory” private law, this means that a specific type of regulation has been generalized on the European level: namely market regulation (including the law of ‘regulated markets’ as one of its key examples). Within the realm of private law, this shift of emphasis is expressed in what Micklitz calls a “transformation of European private law from autonomy to functionalism in competition and regulation” (2009, 6; emphasis omitted).

Micklitz clarifies that European regulatory private law, thus understood, “may contain both elements, establishing market freedoms, therefore increasing private autonomy, while at the same time providing for rules that set boundaries to the newly created market autonomy” (Micklitz and Patterson 2012, 22). In this regard, he also distinguishes between its “negative variant”, which stems from the effects of the four freedoms (free movement of goods, services, capital, and persons), and its “positive variant”, which includes “the bulk of EU rules that have been adopted in the aftermath of the Single European Act outside Consumer and Anti-discrimination Law” (ibid., 21). However, his point is not so much a tension between negative and positive variants of European regulatory private law, but the latter’s distinctiveness and apparent ‘self-sufficiency’. “This private law is different from national private legal orders which based on private autonomy and free will, it is a private law which takes its form, its procedure and its content from being instrumentalised for building and shaping markets.” (ibid., 21; emphasis omitted)

A Polanyian perspective on European regulatory private law would have to question and contextualize this very assumption of self-sufficiency. This analytical step will be illustrated, in the following, with regard to one special objective of European market regulation: the creation of regulated network markets and their integration into “a single market for network services (such as electricity, gas, waters, telecoms, transport and retail banking)” (Gual 2008, 161). Due to the externalities of these

network industries, and the resulting oligopolistic or even monopolistic market structures, they were typically organized by the government sector in the twentieth century. A precondition of the new regulatory arrangement is thus the commodification of the respective government activities: their redefinition and reorganization as marketable ‘network services’.

Hence, there are two points to be considered: the *commodification* of network services by means of (private) law, and the *self-sufficiency* of the new branch of regulatory (private) law. As to the commodification of ‘services of general interest’, which then become subject to (transnational) market competition, we can draw on Krajewski’s (2011) and Batura’s (2011) respective studies of the liberalization of health services and telecommunications services, which are both framed in Polanyian terms. Krajewski (2011, 237) points out, that “the commodification of an activity requires a fundamental change in the ideas underlying that activity, its legal and institutional framework, and the actual modalities of its production and consumption”. While the first step implies a redefinition of formerly governmental activities in commercial terms, the second step involves a change in the law governing these ‘services’, and notably a shift from mandatory to voluntary contractual relationships. “The final and third stage of the commodification process is reached with the actual establishment of markets as systems of voluntary exchanges of products [or services].” (ibid., 238) Batura emphasizes in turn that “[t]ransnational telecommunications services markets were a legal construction in which a (competitive) market was created from scratch by using a holistic concept of what such a market had to look like” (2011, 258-259). Accordingly, the liberalization of telecommunications services was less about European market integration, that is, about removing national barriers between already existing service markets. Instead, it was an unprecedented “market-building project which started at international level”, with Japan, the UK, and the US being “named as its initiators” (ibid., 258).

So far, liberalization and commodification seem to follow familiar patterns. At the same time, the “regulated” network markets appear to be at odds with the “self-regulating” markets that Polanyi had in mind. Nevertheless, they do rely on the commodity fiction, which can only be upheld with massive regulatory intervention (Gual 2008, 166). In this respect, they only replicate the paradox of self-regulation already pointed out by Polanyi. His historical account is thus still topical and also applicable to network markets: Just as the introduction of free markets by so-called *laissez-faire* polices entailed “an enormous increase in the administrative functions of the state” (1957 [1944], 139-140), the essence of European regulatory (private) law is the active management of (network) markets, which cannot be left alone. Instead, there is a permanent “need for control, regulation, and intervention” (ibid., 140). It seems the emphasis has only shifted from ‘self-regulating markets’ two centuries ago, to ‘self-sufficiently regulated markets’ today.

If the law of the market society of the twenty-first century is thus exemplified by European regulatory (private) law, which appears to be increasingly self-sufficient - what does that mean from a Polanyian point of view? I will offer two alternative interpretations. The first and normatively preferable interpretation would be that the countermovement is already expressed in the social objectives of the law in question. In fact, European regulatory private law was introduced above as combining both market-making and market-shaping functions. If social purposes and responsibilities thus form part of the law of regulated markets (e.g., by granting vulnerable consumers access to commercial network services), this may appear as formally or substantially (relatively) self-sufficient. Both Krajewski (2011, 241-242) and Batura (2011, 261) point in this regard to aspects of decommodification in the regulation of services of general interest in the EU, with the question remaining how this social-policy content made its way into the law (supranational anticipation or national resistance?).

The second, more critical interpretation builds on the above argument of law as a commodifier or even commodity, not least in the sense of the “commodification” of “private-law relationships” on the European level (Joerges 2012, 68). My point is here that decommodification is in the context of regulated markets not an end in itself but also a means to uphold the commodity fiction and, thereby, to bolster the respective market activities. As Krajewski (2011, 238) rightfully emphasizes, the third and decisive step in the commodification process is that consumers and suppliers of network services

“are not only able to choose, but also exercise this choice to a considerable extent, and create opportunities for competition on markets”. In other words, only when there is enough activity or exchange on the markets (however fictitious or regulated they are), the market forces can properly work and bring about the desired efficiency. Inasmuch as regulatory (private) law assumes this activating function, it acts a production factor in bringing about a competitive network economy. Its ‘self-sufficiency’ is derived from this overarching goal, and thus has nothing to do with what Polanyi understood as the ‘substance’ of economic life. To find the ‘externalities’ of European regulatory private law, we would thus have to look elsewhere – just as for the fictitious commodities of land, labour, and money. However, one of the first aspects to be considered is its distinctiveness, disconnectedness, and disembeddedness from other forms or branches of law, and notably its strictly economic (rather than social, political, or even juridical) outlook.

Conclusion: Law’s Great Transformation

At the beginning of “The Great Transformation”, which spans several centuries of economic history, Polanyi (1957 [1944], 4) emphasizes: “Ours is not a historical work; what we are searching for is not a convincing sequence of outstanding events, but an explanation of their trend in terms of human institutions.” In the present contribution, we tried to do something similar: to give an account of the law of the market society, which is ‘historical’ only in the way we trace its institutional development in constituting and regulating the market. Just like Polanyi’s study, this exercise cuts across “the field of several disciplines” (*ibid.*) and falls prey to the respective limitations. To conclude, I would like to recapitulate the main steps of the above argument and reflect them on a more general level.

First we suggested two different readings of “The Great Transformation”, which shed light on the law of the market society. One way was to conceive the law as the ‘fifth’ institution next to the economic and political, national and international institutions which Polanyi found characteristic of nineteenth century civilization (namely, balance-of-power system, gold standard, self-regulating market, and liberal state). In more substantive terms, the law of the market society was equated with the normative and factual ‘organization’ of the international political economy of that time, and thus specified as international economic law. The other way to find the law was to take a closer look at how the self-regulating market was eventually institutionalized. Considering that the so-called ‘fictitious commodities’ are not only economic but also legal fictions, the law seems indeed to play a crucial role in this respect – both as a commodifier and a decommodifier. Moreover, law can itself be pictured as the ‘fourth’ fictitious commodity next to labour, land, and money. Similarly to money, it mediates between economic and political functions and oscillates between embedded and commodified forms. This basic tension was marked as a conflict inherent to the law of the market society. For illustration, we referred to divergent concepts of the legal person, which can - despite their differences - all be made functional to the ‘needs’ of the market.

We then argued that this basic conflict also explains the dynamics of the law of the market society, that is, its changing forms and functions over time. Against this background, the modern history of market law was reconstructed in terms of Polanyi’s ‘double movement’ – of (liberal) movement and (social) countermovement. Building on different yet compatible narratives of law’s development, we separately addressed the nineteenth, twentieth, and twenty-first centuries. The nineteenth century exhibits the tension between universal legal forms, which are supportive of the agenda of liberalism, and national specifications (or exceptions), which rather serve protective means. Moreover, public international law came to mimic private law relations, and private international law was adjusted to the national/territorial differentiation of public law. In the twentieth century, the domestication of private international law is complemented by the ‘materialization’ of substantive private law. Within the new paradigm of ‘the social’, law’s basic conflict takes the (exemplary) form of ordoliberal private law versus social private law, which may also be conceived as a continuation of the conflict between a more ‘juridical’ rationality and a more ‘instrumentalist’ rationality under new premises. The twenty-first century is characterized by new efforts in the privatization of the law, this time working towards a

private choice of law in a transnational context, which fuels the commodification of law. The cosmopolitan counter-project combines instead the denationalization of the form of the law with a re-politicization of its substance. With regard to the European level, the liberalization and integration of markets can easily be framed as an act of ‘disembedding’ them from their social and national context, first and foremost by legal means. However, as to the ‘reembedding’ countermovement, and notably the legal form it takes, the Polanyian accounts in the literature differ. Equally discussed were global soft law (with regard to corporate social responsibility) and European case-law (with regard to free movement rights), which are both in contrast with the project(ion) of a postnational conflicts-law. Adding to this, I put the ‘self-sufficient’ European regulatory private law in a Polanyian perspective, using the example of regulated network markets.

What all this demonstrates is that Wolfgang Streeck was very insightful in choosing for his (implicit) follow-up study to Polanyi’s “The Great Transformation” the ambivalent title “Re-forming Capitalism” (2009; cf. Frerichs 2010). In a nutshell, his argument is that the ‘social reform’ of the market economy – which brought about the model case of the ‘social market economy’ in Germany – could not prevent the reformation of capitalism at its core. In other words, however ‘instituted’ or regulated the *social* market economy was at the beginning or at its heyday, it remained a *market* economy after all. In this institutional context, social obligations (or what Streeck calls ‘Durkheimian institutions’) tend to be replaced by individual choices (or what is referred to as ‘Williamsonian institutions’). Accordingly, it is the “slowly grinding force” (ibid., 146) of private interest which also gnaws on the law of the market society. The ‘legal embeddedness of the market’ may thus end up as ‘economic embeddedness of the law’. Or as Streeck argues: “*Polanyian institutions* that are market-breaking rather than market-making probably need to be Durkheimian in character: public rather than private, obligatory rather than expedient, and political instead of economic.” (ibid., p. 252; original emphasis). The result of the ‘free’ interplay of the law and the market often appears to result in the opposite. Law becomes private, voluntary, and economic. In that respect, countermovements – smaller or bigger ones, inside or outside the law - seem inevitable.

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Section II: FOUR SCENARIOS

1) Hybridisation

ON LEGAL HYBRIDS

*Kaarlo Tuori**

In my paper, I invoke legal hybrids at three levels: at the level of individual legal phenomena and concepts; at the level of fields of law; and at the level of legal orders or systems. In addition, I refer to what have been called hybrid legal spaces. My central argument is that there are no legal hybrids as such but only as seen through a particular conceptual and systematizing framework. What we today call legal hybrids are legal phenomena which cannot be caught by the traditional systematization and conceptual ordering of nation-state law or the complementary black-box model of the relations among national legal orders and international law. EU law as the most developed epitome of transnational law – law beyond the dichotomy of national and international law – is a veritable gold mine of legal hybrids, among these the branch of law called European regulatory private law. Legal hybrids are – or at least should be – merely temporary creatures, awaiting their extinction through novel ways of legal conceptualising and mapping of our legal universe. But legal hybrids can also be instrumental in evoking the need of redefining the very point of legal conceptualisation and systematizing: in showing the necessity of abandoning the objective of total coherence in favour of mere local coherence; in illuminating the inevitable perspectivism in law; in accentuating the heuristic function of legal concepts; and in prompting us to perceive the mutual relations among legal concepts in terms of clusters and networks.

1.

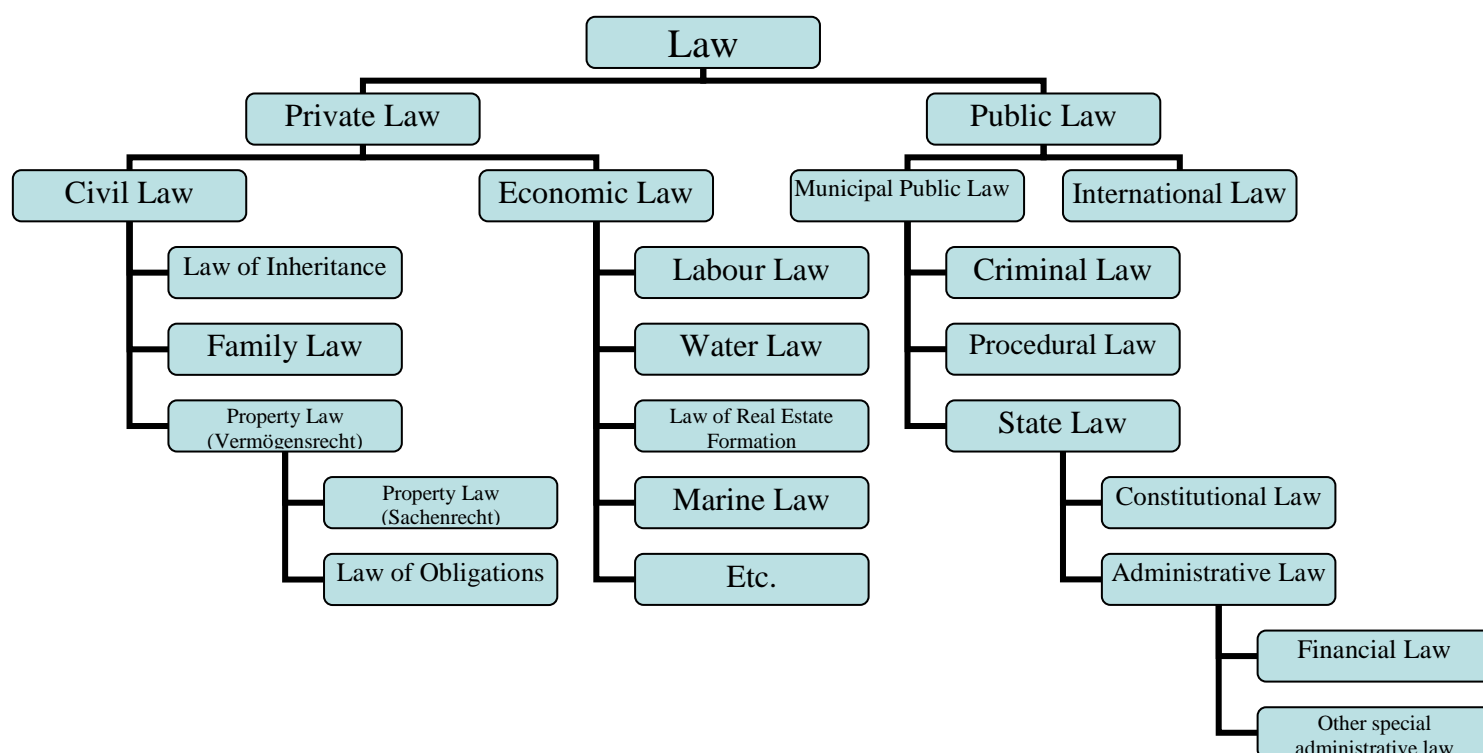
Our legal universe used to be so nicely organised, every legal phenomenon finding its "natural" conceptual department; the legal universe was ordered in a quasi-Linnean way into kingdoms, classes, orders, genera and species. In Continental Europe, the law's systematization, which was brought into perfection by German *Begriffsjurisprudenz* in the 19th century, had its origins in (the reception of) Roman Law. The basic division between public and private law derived from Justinian's *Institutionen*. Classification of the law's objects into persons (*personae*), things (*res*) and actions (*actiones*) went back to Gaius (130-180), and the further division of things into material (*res corporales*) and immaterial (*res incorporales*) was also found in Roman sources. These divisions were reiterated in the five books of the German 19th-century private-law *Begriffsjurisprudenz* – Pandect law (*Pandektenrecht*): the general part, the law of obligations, property law (*Sachenrecht*), family law, and the law of inheritance. Within public law, the 19th century brought about the differentiation of state law into constitutional and administrative law. This basic systematisation was conceived from a nation-state perspective; despite the legal-cultural transnationalism derived from common Roman-law roots, especially in private law, systematization stemming from the efforts of 19th-century legal scholarship focused on the national legal order.

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The basic systematization of law was complemented by two branches which crossed state-boundaries: public and private international law. But these fields of law did not dispense with the nation-state perspective, either. Both private and public international law regulate relationships between nation states or their legal orders. International private law comprises the rules of choice determining what norms are applied to an issue bearing on more than one nation-state municipal legal order. Private international law itself is part of the municipal legal order of the respective nation state. And when nation states opt for either the monistic or dualistic model in the relationship between municipal law and public international law, they also define the latter's place in the law's system. What is important is that according to the traditional view, public international law did not interfere in the domestic legal order. This fell under the exclusive jurisdiction of the state; there were no rival legal orders within the space of the nation-state, claiming for authority.

The traditional mapping of our legal universe gave expression to a *state-sovereigntist* view of modern law. On the global scale, this view leads to what William Twining (2000) has fittingly termed the *black-box model*. This model is premised on the (co-)existence of territorially differentiated nation-state legal orders, each of them claiming exclusive jurisdiction within their respective territorially defined social spaces, and international law, confined to regulating external relations between sovereign states. In internal legal relations, the sovereign nation states, are supposed to treat each other according to the principle of exclusivity, that is, as black boxes. In this conception, both national legal orders and international law are treated as self-contained and self-sufficient normative wholes.

The following figure summarizes the systematization of (municipal) law which Lars Björne, a Finnish legal historian, still considered valid three decades ago (Björne 1979, 15). When complemented by the black-box model of national legal orders and international law, it provides us with a gapless charting of the legal universe.



Legal systematization within the boxes of national legal orders did not stop at the division of the law into distinct branches. Under the systematic ideal of 19th-century German legal scholarship, each branch of law was to be ordered through its specific general doctrines (*allgemeine Lehren*). Actually, it was the general doctrines with their general legal concepts – such as contract in the law of obligations or competence and administrative act in administrative law – which rendered legal fields their identity and further systematized the legal "raw material". In the division of labour between the three main actors of modern law – the legislator, the judges and the legal scholars – it was the legal scholars who produced the law's systematization and, hence, played an active role in the development of law. A strict classifying conceptual hierarchy or pyramid, often attributed to Georg Friedrich Puchta, is probably an invention of the critics of *Begriffsjurisprudenz* – as is the very term *Begriffsjurisprudenz*, too – but there is no doubt of the systematizing and conceptualizing urge so typical of the 19th century and early 20th-century continental legal scholarship. In the USA, it had its parallel development in the conceptualism of what has been called the Classical Legal Thought, the main object of ridicule of American legal realists (as *Begriffsjurisprudenz* was the object of derision for German *Intressenjurisprudenz* and Scandinavian legal realism).

2.

Today, the traditional order of our legal universe is threatened by strange creatures, legal hybrids. In biology, hybrids are defined as offsprings resulting from cross-breeding. Biological hybrids break out of the nested hierarchy of the Linnean taxonomy. Correspondingly, legal hybrids defy the conceptual compartmentalization of the traditional systematisation. To put it in the shape of a definition: legal hybrids are legal phenomena which our inherited conceptual framework is unable to capture and to imprison in a determinate conceptual box.

Contemporary legal literature abounds with examples of legal hybrids. Legal concepts are organised in line with the law's division into distinct branches; each branch of law possesses its specific concepts, which are vital for its very identity. But because of the different temporality of the law and the society it regulates, it may well be that problems awaiting legal translation do not respect but cut across the boundaries separating branches of law. In recent decades, public administration has in all Western countries been subject to extensive *privatisation*. Administrative tasks have been assigned to private-law organisations, and the administrative management of society has taken recourse to private-law means, such as contracts. Traditional general doctrines of administrative law, premised on hierarchical power relations between the parties, are no longer able to catch all legally relevant problems in public administration's external or internal relationships. New concepts opening channels between public and private law are needed. "Administrative contract" is a representative example of such a conceptual renewal; but, seen through the lenses of traditional legal systematization, it is a typical legal hybrid, an offspring of cross-breeding of private- and public-law concepts.

Privatisation of administration manifests the typical late modern expansion of market mechanisms. This development has extended the relevance of *competition-law* considerations: competition law traverses almost the whole legal order, including domains traditionally reserved for administrative law. This, too, can be deemed hybridization, incursion of foreign elements into the citadel of public law, shaking its traditional hierarchical model. But, in effect, even competition law as such, as viewed from the perspective of the law's traditional systematization, is a legal hybrid: it brings together elements from both sides of the principal division of public and private law.

3.

Thus, legal hybrids exist not only at the level of individual legal phenomena and tentative concepts trying to come into grips with these – such as administrative contracts – but even entire branches of law can be examined as resulting from hybridization. Present-day debates on the law's divisions have

moved far from the traditional systematization. Interest in the law's differentiation into specific branches has not vanished or even diminished. On the contrary, we are witnessing a revival of classification debates. The focus, however, has shifted, so that 19th-century discussants would have a hard time in orienting themselves in present debates on such putative departments of law as social law, medical and bio-law, sports law, information law, or communications law. Characteristic of recent interventions is that they are no longer concerned with the law's overall systematisation. When labour law, some decades ago, waged its battle for independence, it was, at least on the Continent, still considered important to ponder its place with regard to the basic distinction between private and public law. Present discussants do not seem to be troubled by the location in the law's comprehensive system of the new fields (and disciplines) they are advocating. Instead of *total coherence* of the law, their aim is more modest: to bring about *local coherence* into a particular body of law.

It may even be argued that the local coherence sought in contemporary debates stands in contradiction with the aspiration for total coherence. As already was the case with labour law or with environmental law, the putative new branches of law typically combine normative material which, within the traditional divisions, would fall into several compartments.

In our table, labour law and environmental law are treated as sub-fields of economic law or special private law, as it was also called. If the power relations between private and public law had turned out differently, new bodies of law could have found a convenient place on the public law side, too: in the category called special administrative law. In German-influenced legal systematization, economic law and special administrative law are late comers which were introduced to address the consequences of welfare-state regulation, in particular the increasing intrusion of public-law elements into the domain of private law. But at the same time they shook the premises of the system; economic law or special administrative law could not display such unifying general doctrines which, according to the basic idea of the traditional systematisation, conferred on relatively independent fields of law their identity.

Yet economic law and special administrative law as new residual categories also made continuity possible. As I have argued, the traditional divisions were meant to classify the legal order of the sovereign nation state, although they in part relied on the legal tradition predating the rise of nation states. The welfare state has been a political project of the nation state, and the regulations that were included in economic law and special administrative law were still attached to the monocentric perspective of the nation-state legislator. Present pretenders to the status of an independent field of law throw a more profound challenge to the traditional system. They are no longer tied to the nation-state legislator but attest to the *polycentrism* of legal sources and the *pluralism* of legal orders, perhaps even legal systems. They also blur the sharp boundary between legal and other social norms which, in Max Weber's (1978, 657) view, was indispensable for the law's formal rationality. Environmental law, medical and bio-law, information law, or sports law introduce breaches into the system based on the fundamental distinction between private and public law and gather together norms which, in traditional divisions, are dispersed across several fields. But this is not all. Besides norms issued by the domestic legislator, they include EU norms, as well as other norms of international or transnational origin. Finally, *soft law* material, such as recommendations or codes of good practice adopted by international and national organisations, also plays an important role in the self-conception of would-be new branches of law. Thus, not only can the new fields of law not be unequivocally inserted into the traditional system; they also renounce its nation-state premises and even question the very separateness of law from other social norms. Here we could perhaps speak of multiple hybridization!

4.

Our brief discussion of new branches of law points to a third level of legal hybridization, complementing the levels of, first, individual legal phenomena and concepts, and, second, branches of law. The third level is that of legal orders and legal systems. The black-box model of national legal

orders and international law has proven to be incapable of mapping the present global legal landscape. This is largely due to the rise of *transnational law*, the true El Dorado of legal hybrids.

In effect, the very idea of transnational law is an epitome of legal hybridization. Transnational law is law beyond the dichotomy of nation-state law and international law which has emerged as a reaction to the spatial and temporal shortcomings of the black-box model in front of the cultural and social changes often enough examined under the notion of *globalisation* or – to use a less pretentious expression – *de-nationalisation*. The distinctive features of transnational law can be attached to either norm-formation or norm-application. Transnational norm giving assumes other forms than bi- or multilateral treaties between nation states. In norm-application, in turn, the establishment of dispute-solving or sanctioning bodies beyond the control of nation states suggests the emergence of transnational law.

EU law is the most conspicuous but not the only epitome of transnational law; other examples include European human-rights law and WTO-law. These examples display a similar pattern: they all have their background in international law but have subsequently severed their international-law moorings and, by the same token, largely escaped from the control of nation states. But, they still bear traces of their origin, as can be seen from, for instance, the debate of the dual nature of the foundational treaties of the EU. From the internal perspective of the EU they are treated as giving expression to constitutional law, with legal effects analogous to those of nation-state constitutions. But they have also retained their character of international treaties, as have Member States their position of *Herren der Verträge*. The abortive Constitutional Treaty further accentuated the dual nature of the founding treaties and even spelled it out in its very title: an international treaty which contained the constitution of the EU! This is typical legal hybridity beyond the grip of the black-box model with its underlying the state-sovereigntist premises.

The hybrid nature of our examples of transnational law relates them to recent debates among international lawyers. In fact, from an international law perspective the above-mentioned examples can be examined as instances of *fragmentation* which, in the view of some observers, worryingly threatens its cogency. Particular court-like bodies that do not defer to the precedents of the International Court of Justice shake its position as a guarantor of international law's unity. The qualified approach of some special courts, including the European Court of Human Rights, to the Vienna Convention on International Treaty Law, has also been seen as a danger to the coherence of international law.

But whether we conceive of the on-going process as fragmentation of international law or as the dawn of transnational law, the growing plethora of legal sources, legal orders, and even legal systems does not mesh with the dichotomy of municipal and international law. The municipal legal order has lost its monopoly on determining legal relations involving private individuals. Even in states whose constitution defines the status of international law according to the dualistic model, transnational norms have an immediate effect, regardless of a transformative act of the national legislator. This is the case in Finland, for instance. Art. 95 of the Constitution lays down that international treaties and other international-law obligations are to be incorporated into the domestic legal order through an Act of Parliament or a presidential decree. Nonetheless, this constitutional provision cannot prevent the direct effect of, for instance, EU regulations, preliminary rulings of the European Court of Justice, or precedents of the European Court of Human Rights; here, no prior decision of the national legislature is needed.

The deficiency of the black-box model is even more conspicuous with regard to transnational regulation that altogether lacks a background in international treaty law and that has – if we are to lend credence to Niklas Luhmann's disciples in autopoietic systems theory – emerged as a result of autonomous operation of de-nationalised social sub-systems. Examples are provided by the *lex mercatoria* of international trade, the *lex sportiva* of international sports, and the *lex digitalis* of the Internet. In each of these transnational legal systems, the applicable norms have been subsumed by

neither municipal legal orders nor international law, while disputes are settled and sanctions imposed by designated transnational bodies.

5.

The rise of transnational law entails that municipal law has lost its monopoly of jurisdiction within the territorial confines of the nation-state. We have arrived at a situation where we have rival legal orders or even legal systems competing for authority in the same territorial and social space; this has led some observers to talk of *hybrid legal spaces*. This is the backdrop to the at least potential fundamental conflicts of authority between transnational courts, such as the Court of Justice of the European Union, and domestic courts, such as constitutional courts of EU Member States.

Conflicts between legal systems are not excluded under the black-box model of self-contained territorially differentiated legal systems, either. But under the dominance of this model, the default assumption is that at issue are mere boundary disputes, few in number and manageable by private international law and the choice-of-law doctrine. Boundary disputes of this character can, of course, also crop up in the relations between transnational law and nation-state law. But here a much more momentous conflict, extending to the very foundations of legal authority, remains at least a latent possibility.

In the black-box model, legal systems and the reach of their respective claims of authority are differentiated along *territorial* criteria; within its territory, the claim of authority of the nation-state legal system is universal and exclusive. It is *universal* in the sense of covering all substantive fields of regulation; and it is *exclusive* in the sense of not acknowledging any rival legal authority. In contrast to legal systems adhering to state-sovereigntist premises, transnational law does not follow territorial but *functional* or substantive criteria of differentiation. This is true even of EU law, in spite of its notorious expansionist tendencies. As a rule, transnational law's claim of authority is not exclusive or exhaustive, either. There are, though, exceptions to this rule, as is proved by Treaty provisions on the EU's exclusive legislative competence. Transnational law contends nation-state law's claim to both exclusivity and universality, and clashes arising from contradictory principles of attribution of legal authority seem inevitable: transnational law's functionally or substantively limited claim of authority disputes nation-state law's universal and exclusive claim. A particularly acute crisis in the relations of transnational and nation-state law may erupt if the former claims authority in issues which the latter has reserved for the competence of constitutional law.

EU law provides us with illuminating examples of such at least potential fundamental conflicts between transnational and nation-state law. National constitutional courts, the German one as arguably the most prominent among them, have contested EU law's – and, at the institutional level, the ECJ's – claim of authority in three interrelated issues: the *Kompetenz-Kompetenz*; the monitoring of fundamental rights; and (other) fundamental constitutional principles. But the possibility of fundamental conflicts of authority is not a specificity of EU law's relation to the Member States' legal system. Thus, the reservations expressed by the German Constitutional Court with regard to the rulings of the ECtHR, for instance, imply a similar contest of authority

6.

EU law as the most developed instance of transnational law deserves a closer examination. EU law is a veritable gold mine for a researcher digging for examples of legal hybrids at the three levels of individual legal phenomena and concepts, branches of law and legal orders or systems. Not only is EU law as a whole a legal hybrid breaking out of the black-box model, but it also ignores the traditional division into relatively independent branches of law which has provided the general framework for systematizing municipal, nation-state law. EU legislation cannot be compressed into the compartments of the traditional systematization. What has been christened European regulatory private law is clearly

an instance of legal hybridization as well, not only because of its obvious transnational character but also because the very expression “regulatory private law” intimates cross-breeding of elements which in the traditional systematization are located on opposite sides of the watershed separating private and public law.

Our inherited legal concepts, which our national legal cultures have taught us to employ when tackling with legal issues and which constitute an integral element of our legal *Vorverständnis*, are organized according to the traditional divisions of law – we have private-law concepts, criminal-law concepts, administrative-law concepts and so forth. Their applicability to legal phenomena with an EU law background cannot be taken for granted. Rather, it is to be expected that EU law increasingly generates legal phenomena that cannot be caught in the conceptual net elaborated in the context of nation-state law. In legal proceedings before national courts, this gives rise to what Thomas Wilhelmsson (1997) has memorably called the Jack-in-the-box effect of EU law. Some of the most recent examples of legal hybrids stem from the rather improvised responses to the sovereign debt crisis. Here I shall be content to invoke only one of them: the Framework Agreement on the European Financial Stability Facility which combined aspects of private law, public international law and EU law.

Even when we presume that a normative whole corresponding to a particular branch of the traditional systematization can be distilled from EU law, the pertinence of concepts tailored to nation-state context may still be contested. The adoption of the Charter of Fundamental Rights and the drafting of the Constitutional Treaty intensified the discussion of the EU and its law in constitutional terms. As many clear-sighted participants have noted, the discussion is dogged by conceptual difficulties and paradoxes. The constitutional concepts available to us have received their present established meanings in the context of modern nation states, although they may originally date from the pre-modern period. “State”, “sovereignty”, “constitution”, “democracy” and “*demos*”, “separation of powers”, “civil society” and “public sphere”, as well as “citizenship”, all suggest the nation state as the governing structure. But the EU cannot be equated with a modern nation state, although our unexamined and even obstinate patterns of thinking often lead us in a quasi-automatic way to describe and assess it with conceptual and normative tools tailored to this particular type of polity. Among scholars, no agreement exists on a positive characterisation of the EU. What, by contrast, is generally accepted is its negative portrayal as a non-state: the EU is not a federation that shares its sovereignty with its Member States, nor is it a confederation of sovereign states.

7.

What conclusions should we draw from the present disorder generated by legal hybrids? We still need conceptualization and systematization in order to bring about order and coherence in our legal universe. However, the traditional comprehensive systematization of the national legal order and the complementary black-box model have proved to be incapable of achieving this objective. There are no legal hybrids as such but only as seen from the perspective of a particular conceptual and systematizing framework. What we today call legal hybridity is a sign of our conceptual confusion: new conceptual and systematizing grids are needed, but our legal mind-set is still in many respects attached to the state-sovereignism of the black-box model and the distinctions of the traditional systematization.

Nonetheless, the conceptual and systematizing frameworks coined in the nation-state context are often enough the only available starting-point for examining what we - temporarily - call legal hybrids. Thus, to revert to the example of the constitutional analysis of the EU, we cannot simply abandon concepts attached to modern nation states; rather, the task is to assign them a meaning suited to examining the transnational polity of the EU and its transnational legal order. They must be detached from their “nation-state logic”, so that they can capture the interaction between the transnational and the national, so typical of the EU and its law (and a major source of hybridity).

However, not only are new conceptual and systematic frameworks needed but the very point of legal conceptualization and systematization must be redefined. Coherence of normative legal material is still, for both scholarly and practical reasons, a pertinent objective. But a total coherence presupposing a gapless conceptual compartmentalization of all legal phenomena is a chimera and as such can no longer constitute a viable regulative ideal for legal scholarship. Instead of comprehensive, total coherence, we have to be content with such *local coherence* which has been the central promise of recent proposals for new fields of law, such as bio or medical law, information or communication law, or – why not? – European regulatory private law.

These new proposals help us to perceive the inevitable *perspectivism* in law. The same healthy and sobering effect is to be expected from what has been called spatial legal hybridity: the existence of rival legal orders or systems within the same social and territorial space. Along with the objective of total coherence, we have to abandon the idea of one and only “correct” way of conceptualising and systematizing law. The new branches of law or legal transnationalization do not necessarily render the traditional systematization completely obsolete. It may still be instrumental for specific purposes, but it has certainly lost its exclusive validity, as has the domestic legal order within the nation-state. Alternative, mutually non-exclusive ways of conceptualising and systematizing legal phenomena and of defining and tackling legal problems exist. This might be called legal pluralism, but it is legal pluralism which rejects neither the normativity of law nor the normative objective of coherence.

Finally, we have to reconsider the role of legal concepts in legal scholarship and practice. Now as before, concepts constitute an integral and indispensable element of our legal *Vorverständnis*. But we should accentuate their *heuristic* function. Concepts are necessary for identifying, defining and organising legal issues. But their mutual relations should be seen in terms of clusters and networks rather than as amounting to conceptual pyramids or trees. Emphasis on the heuristic function also makes clear that concepts as such cannot be expected to provide a basis for normative conclusions or derivation of new legal rules. But perhaps such legal constructivism, along with the ideal of a conceptual pyramid, only exists in the travesty of *Begriffsjurisprudenz*, concocted by “late” Ihering and his intellectual heirs, and in the complementary caricatures of conceptualism drawn by the American and Scandinavian realist soul mates of German *Interessenjurisprudenz* (Tuori 2011, 105 ff.).

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2) Convergence

CONVERGENCE: WHAT, WHY, AND WHY NOT?

*Roger Brownsword**

Introduction

Imagine that it is proposed that there should be a degree of ‘convergence’ (partial, total, specific, general) between two legal orders, A (LOA) and B (LOB). When such a proposal comes ‘out of nowhere’, without any explanatory context, there are many questions to be asked about it. However, even a proposal for convergence between LOA and LOB that has a more explicit context invites a number of questions. What precisely do we mean by ‘convergence’? Why do we think this is a good idea? Are there reasons for resisting convergence? How is convergence to be effectuated, and so on?

In this short paper, I will focus on what we mean by ‘convergence’ and then, and for the most part, on the reasons we have for thinking that convergence might be a good or a bad idea. Here, I will introduce a distinction between Type 1 convergence (broadly speaking convergence for its own sake) and Type 2 convergence, where the underlying reasons point, first, to the credentials of a particular rule and then to convergence. I think that this is potentially an important distinction; but, as with everything else in this paper, I could be wrong. In case my analysis seems to make too much of a presumption in favour of convergence (whatever it might be), I close with a few remarks about the value of self-governance and private ordering.

What Do We Mean by ‘Convergence’?

The idea of ‘convergence’ is open to a variety of interpretations. For example, we might judge that there is ‘convergence’ between LOA and LOB if:

- (i) the same formal rule exists in both LOA and LOB (e.g., in both LOA and LOB, the law is that cars should be driven on the right hand side of the road and that the maximum speed on any highway is 120kmph; or that in the general law of contract there is a ‘reception’ rule for the time at which an acceptance takes effect)
- (ii) as in (i) but also that, in both LOA and LOB, the formally convergent rules are enforced in practice
- (iii) regardless of formal convergence or divergence, in both LOA and LOB, materially similar questions of law are decided in ways that generate convergent outcomes (e.g., in both LOA and LOB, issues concerning fair dealing produce convergent outcomes even though LOA relies on a doctrine of good faith and LOB relies on particular applications of reasonableness)

For the purposes of this paper, let me take the first of these interpretations (purely formal convergence) as the operative one. Although this interpretation allows for divergence *in practice*, it suffices to concentrate the mind on why anyone should propose that the rules in LOA and LOB should be brought into alignment or why we should think that it is a good thing (even only a *prima facie*, other things being equal, good thing) that the rules in LOA and LOB are formally identical.

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However, before we get to the question of ‘Why convergence?’, I want to highlight a critical distinction (between convergence for the sake of convergence and convergence for the sake of some independent reason); and I want to note that, even at the level of formal convergence, there seem to be different degrees of convergence.

A Critical Distinction

Suppose that LOA and LOB share a border and that there is a great deal of road traffic across this border. Whereas, in LOA, the rule is that cars drive on the left, in LOB the rule is that they drive on the right. It is proposed that, in both LOA and LOB, the rule should be the same. The case for convergence, however, might be put in two rather different ways as follows.

One proposal for convergence might state that it does not matter whether the rule provides for driving on the left or the right; the important thing is that, either side of the border, the rule should be the same. What matters is convergence—that is, convergence for the sake of convergence.

A second proposal, however, might agree that the two rules cause some inconvenience to drivers but maintain that the best reason for convergence is that there is evidence that driving on the right is actually safer than driving on the left. In other words, the question is not so much whether there should be the same rule in LOA and LOB (a question of convergence pure and simple), it is whether the rule in LOA or the rule in LOB should be adopted as the better rule relative to what we know about the conditions for road safety.

So, there is a potentially critical distinction between (i) a proposal for convergence that is driven purely by the consideration that it is better to have the same rule in LOA and LOB than it is to have different rules and (ii) a proposal that has independent reasons for supporting a particular rule and then arguing for adoption of that rule in both LOA and LOB (which would lead to formal convergence). Let me call the former ‘Type 1 convergence’ and the latter ‘Type 2 convergence’.

I can see that this distinction is too simple. For example, we might sub-divide Type 1 convergence into cases where, quite literally, any rule will do (so long as it is the same rule in LOA and LOB) and cases where there are a number of candidate rules, any one of which will do. In these various Type 1 cases, there are different degrees of indifference as to the particular rule that is used. Nevertheless, they share the essential Type 1 characteristic, namely that their primary concern is that there should be convergence, that the rule should be the same, not that the rule should be a good one, or the best.

Degrees of Convergence

Let us suppose that formal convergence in its ideal-typical expression requires that, in both LOA and LOB, on a particular legal question, a particular rule applies. In both LOA and LOB, this rule is the only rule that applies; it is mandatory; and it is maximal. For example, in both LOA and LOB, the rule that governs the recovery of consequential losses following a breach of contract is that the claimant may recover damages in relation to the losses that flow directly and naturally from the breach. There is no way round this rule; and there is no way that the formal rules may permit any different level of recovery.

Nevertheless, formal convergence might be a bit less strict, a bit less rigid. Within a scheme for convergence, there might be a degree of optionality. I am not sure how to characterise these limited openings for divergence, but we might perhaps speak about hard, medium, and soft convergence.

Thus:

- Hard (ideal-typical) convergence means that the rule is mandatory and maximal.

- Medium convergence means that the rule is mandatory but minimal (so some optionality is available)
- Soft convergence means that the rule is either optional (as with the development risks defence in European product liability law; or the moral exclusions against patentability in Article 27(2) TRIPS in patent law) or a default.

To return to the example of the rule for the recovery of consequential losses following a breach of contract, we have the following:

- The claimant may recover, always and only, in respect of the losses that flow directly and naturally from the breach (hard convergence: maximal)
- The claimant may always recover in respect of the losses that flow directly and naturally from the breach, however it is for each legal order (LOA and LOB) to decide whether to provide also for the recovery of some indirect losses (medium convergence: minimal harmonisation)
- Unless contrary provision is made in LOA or LOB, the claimant may recover, always and only, in respect of the losses that flow directly and naturally from the breach (soft convergence: default rule).

No doubt, more could be made of the different degrees of convergence but I do not think that it is an absolutely fundamental matter—or, at any rate, I do not think that it is as critical as the Type 1/Type 2 distinction.

Why Convergence?

What reasons might be given for a proposed convergence between some or all rules in LOA and LOB? Here are four classes of reasons that might be offered: (i) political; (ii) economic/efficiency/trade; (iii) health, safety, and environment; and (iv) moral.

The Political Case

Where the context for a discussion about convergence is one of political union between LOA and LOB, there might be competing ideas about how the union is best expressed.

The symbolic significance of sharing the same rules (at any rate, the same rules for the public ordering of the union) will be an important consideration. However, there might still be questions about (i) which rules should be adopted (it is not entirely a matter of convergence for the sake of convergence) and (ii) how much room is to be left for local (and divergent) ordering within the union. (Compare the debate between ‘Hamiltonian federalists’ who argue for convergence as a close binding together [coupled with central control] and ‘Jeffersonians’ who argue for a looser networked society).

We should also note the possible application of cosmopolitan ideals. According to Kwame Anthony Appiah (in his book, *Cosmopolitanism*):

[T]here are two strands that intertwine in the notion of cosmopolitanism. One is the idea that we have obligations to others, obligations that stretch beyond those to whom we are related by the ties of kith and kind, or even the more formal ties of a shared citizenship. The other is that we take seriously the value not just of human life but of particular human lives, which means taking an interest in the practices and beliefs that lend them significance. People are different, the cosmopolitan knows, and there is much to learn from our differences. *Because there are so many human possibilities worth exploring, we neither expect nor desire that every person or every society should converge on a single mode of life.* Whatever our obligations are to others (or theirs to us) they often have the right to go their own way....[T]here will be times when these two ideals—universal concern and respect for legitimate difference—clash.

The italics in the above quotation from Appiah are mine. They suggest that, for cosmopolitans, a hard look should be taken at proposals for convergence if the effect of convergence will be to reduce the permitted and available (different but legitimate) modes of life.

The Economic/Efficiency/Trade Case

Where the context is not one of political union between LOA and LOB, how do we decide whether convergence is rational?

One argument is that the particular (divergent) rules in LOA and LOB have no underpinning rationale other than that there was a need for a rule (like the rule of the road) and that these divergent rules are 'inefficient', in the sense that they impose some unnecessary costs on traders and their customers (or they impair the realisation of some economic benefits). To achieve convergence, there will be some costs; but, let us suppose, the case for convergence factors in these costs.

I am not sure how many cases for convergence can be made out on the premise that what is most needed is that the rule in LOA and LOB should be formally convergent rather than that what matters is having the 'best' or the 'right' rule in LOA and LOB. But, we can be sure that the debates about convergence will become more contested once one side judges that its rule is better than others (and not just because its rule has a certain pedigree or a long history).

There is also a further complication. Even if it is agreed that a particular rule should be adopted for the sake of economic efficiency, it might be opposed on quite different grounds—for example, for reasons relating to matters of human health and safety, or protection of the environment, or for reasons that are of a moral nature. Here, the objection is not to convergence as such; the objection is to economically-driven convergence that presents unacceptable HSE risks or that offends moral principles.

While HSE and moral reasons can operate as objections, they might also be cited as reasons *in favour* of convergence. However, where this is the case, the argument for convergence will be of a Type 2 kind.

The HSE Case

Consider, again, the rules in LOA and LOB that regulate road traffic. Let us suppose that, in LOA, the demand is for very high levels of road safety (the maximum speed is 90kmph) and the background culture is very 'green' (which is reflected in strict laws regulating car emissions and fuel consumption). In LOB, things are completely different. Now, when it is proposed that there should be convergence between these sets of laws in LOA and LOB, there will be a strong resistance in LOA to any relaxation in its safety and environmental standards. For LOA to meet LOB half-way, just is not an option.

Suppose, though, that the economic arguments for convergence are strong. Suppose that, with convergence (on LOB's terms), LOA would increase its trade with LOB so that it would be significantly 'better off'. If citizens in LOA put HSE considerations on a different (higher) plane to economic considerations, the strength of the economic arguments will not make any difference. However, if citizens in LOA regard economic cost/benefits as commensurable with HSE costs/benefits, their willingness to relax their HSE standards for the sake of economically beneficial convergence will depend on how the overall cost/benefit calculation looks.

If, for the sake of the economic benefits, LOA is prepared to give some ground in relation to its pre-convergence HSE standards, the adoption of LOB's standards might not be the only way forward. For example, LOA and LOB might agree upon a scheme of mutual recognition (which produces some version of convergence although I am not sure quite how it fits in with my earlier typology).

The Moral Case

A Type 2 case for convergence might be made out on moral grounds. For example, it might be argued that, in both LOA and LOB, there should be a convergent set of rules that prohibit discrimination on grounds of race, sex, political or religious views, and so on.

If such a scheme of convergence is agreed, at any rate where it is agreed at a relatively high level of generality, there might be scope for a degree of local diversity and divergence (legally protected under margins of difference and margins of appreciation, and the like; as well as by some notions of ‘regulatory cosmopolitanism’). This scenario is one of what I call ‘closed pluralism’ (the baseline values are agreed but they may be articulated in somewhat different ways—for example, even though LOA and LOB have convergent anti-discrimination or equal opportunity laws, they may take different views about the legality of reverse/positive discrimination).

Moral reasons may, of course, feature as reasons against convergence. In a moral community, unless its morality is utilitarian, economic benefits will be ‘trumped’ by arguments that draw on moral rights or duties. Here, even though convergence might be economically beneficial, it is unacceptable if it involves the violation of human rights or the compromising of human dignity.

In conditions of what I call ‘open pluralism’, where LOA subscribes to one kind of morality and LOB to another, there will be little interest in morally driven convergence and plenty of reasons to oppose convergence that offends moral principles. Of course, there might be occasions where moral convergence arises in a spontaneous and happenstance way (‘incompletely theorised agreements’ as Cass Sunstein might put it)—for example, it might be the case that in both LOA and LOB the divergent moralities lead to the prohibition of human reproductive cloning. Market and morals might seem to inhabit different worlds; but, if we understand morals as being about ‘doing the right thing’, there is no reason to exempt the marketplace from such reasoning.

Consider the central question in regulating the consumer marketplace: what do we judge to be a fair balance of rights and responsibilities as between suppliers and purchasers? Why should LOA and LOB have the same rules for consumer transactions? Why convergence? This is not convergence for convergence’s sake; it is not the case that we think that any convergent rule will do. If the case is that convergence (with some level of consumer protection) will serve the interests of efficiency, this might not be enough to convince a moral community that subscribes to ideas of fairness that are not based on utilitarian considerations. If the community puts moral reasons on a higher plane than efficiency reasons, convergence should be resisted unless these moral reasons are satisfied. Possibly, this might mean that only soft convergence will be acceptable.

A Different Thought: How Important is Private Ordering (Self-Governance)?

In some of my more recent writing on contracts and on the use of technologies as regulatory instruments, I have underlined the importance of self-governance and of preserving zones in which there is a real practical opportunity for private ordering. I did not write any of this in opposition to convergence. Nevertheless, it does imply some tension with convergence, or at least with convergence for its own sake. If there is to be convergence, those who value self-governance will think that the softer the convergence the better.

To connect contracts to technological instruments of regulation, as contracts migrate to on-line environments, the infrastructure (which might seem to be just ‘technical’) needs to be interoperable---for the sake of efficiency, there does need to be degree of convergence. However, as Johnson and Post argue, this is a place for private ordering, for networked divergence.

Consider, too, the vexed question of the regulation of business networks (Teubner): self-governance is surely important to recognise and preserve. Each network can order its internal relationships in its own way. External relations raise different questions. Similarly, I would want to allow commercial

contractors to be permitted to provide for their own sectoral regimes of governance and to be able to rely on what they take to be the agreed sectoral groundrules.

Conclusion and Caveat

The conclusion is: convergence is complex!

No doubt, as with many things, convergence has its time and its place. We do well to ask whether early 21st century Europe is such a time and place. What exactly are the drivers (is there a danger of mindless Type 1 convergence)? Why, if at all, and where, should we resist convergence?

My sense (and it is no more than a very general sense) is that, where the trajectory is towards greater standardisation and convergence, much of it ostensibly for the sake of efficiency, we need to resist when our valuations of HSE risks are overridden or when our moral values are at stake.

We should also think about how convergence sits with both cosmopolitan ideals (which favour Type 2 convergence of universal values as well as non-convergence where there is a threat to legitimate local difference) and with the opportunity to act as self-governing individuals and communities.

As for the caveats, I have a few....but mainly that this so-called paper is no more than my first thoughts.

3) Self-Sufficiency

SELF-SUFFICIENCY OF EUROPEAN (REGULATORY) PRIVATE LAW: A DISCUSSION PAPER

*Jan M. Smits**

1. Introduction

The aim of this exploratory paper is to discuss the idea of a ‘self-sufficient European private law.’ As is rightly set out in the writings of Hans Micklitz,¹ and in the project in the context of which this workshop takes place, there is a clear need to address the question of how the large body of European rules with relevance for private actors relates to the traditional national private laws. This paper aims to provoke discussion about the idea of a self-sufficient European private law itself. To this end, a provisional answer is offered to the question whether ‘a self-sufficient European private law’ is indeed a viable concept.

Section 2 sets out the relevant background, largely providing my own understanding of the problems at stake in the present project. This will make readily clear that there is a need to better define some of the concepts used in the discussion, including the ambiguous term ‘(European) private law’ itself. Once we have more clarity on this, we are able to explore three types of interaction between the European and the national private law order (section 3). In my view it is only possible to make progress on whether self-sufficiency is a viable concept if we identify the function of self-sufficiency and subsequently distinguish between different ways in which it can be achieved at the national and the European level (section 4).

2. Framing the Question and Making Assumptions Explicit

My starting point is formed by the claims underlying the present project.² I paraphrase these claims as follows. While traditional national private legal orders are largely guided by autonomy and freedom of contract, continuing European influence has transformed private law into a field that is increasingly characterised by ‘functionalism in competition and regulation.’ The result is a growing tension between the nation state private laws (still different from one country to another, but united in their aim to provide a particular type of ‘justice’: see below) and the ‘market state’ European private law. This tension is mainly due to the fundamentally contradictory aims of national and European private law: while national private laws would aim to realise some national view of justice, European private law reflects a more instrumental view. This could be qualified as a development from social justice to ‘access justice’: the European Union grants ‘access justice to those who are excluded from the market or to those who face difficulties in making use of the market freedoms. European private law rules

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¹ See in particular Hans-W. Micklitz, *The Visible Hand of European Regulatory Private Law*, in: Piet Eeckhout and Takis Tridimas (eds.) *Yearbook of European Law* 28 (2010), 3-60, id., *Social Justice and Access Justice in Private Law*, EUI Working Paper Law 2011/02 and id. & Dennis Patterson, *From the Nation-State to the Market: the Evolution of EU Private Law*, EUI Working Paper Law 2012/09.

² As apparent from the literature mentioned in footnote 1.

have to make sure that the weaker parties have and maintain access to the market – and to the European society in so far as this exists.’³

It seems useful to distinguish two aspects of this important and insightful account. First, it *describes* the emergence of a large set of rules and policies at the European level and indicates that these rules have remained largely separate from traditional private law, prompting a tension that is apparent in a variety of ways.⁴ In fields such as telecom, energy, finance, insurance, transport, health, food, intellectual property, public procurement, non-discrimination and consumer law, a large number of rules with relevance for private actors has emerged. This account fits in with previous work on the rise of the European ‘regulatory state’ in general: since the 1985 Commission White Paper on the completion of the internal market, European policymakers have focused on guaranteeing access of actors to the market in order to further develop it.⁵

Second, the account is *normative* by claiming that it is wrong to keep this large regulatory framework on access justice separate from the traditional national private laws: a fundamental re-orientation of structures and methods of European private law is needed in order to keep our ideas of private law in sync with a 21st century society. I could not agree more,⁶ but it is important to point at two assumptions underlying this claim that can provide the necessary perspective.

The first implicit assumption is a view on what is actually ‘private law.’ If one looks at the way in which this field is usually understood (e.g. taught and written about), it is clear that also at the *national* level, many rules with relevance for private parties are not seen as part of ‘classic’ private law and are not related to the ‘core’ areas of contracts, torts and property. In the fields just mentioned, there are often specific national law rules as well (to a greater or lesser extent curtailed by European law), but they mostly are separately studied. I believe this is wrong, but this does imply the need to better define what the field of ‘private law’ is exactly about and how it should be studied. This is even more urgent in view of the unclear concept of ‘European private law’ itself: there is no common understanding of what this field exactly includes. In the above I formulated it as providing rules with relevance for private actors, but this is of course a rather vague formulation that is in need of further refinement. And all this is not just a matter of definition: the question of what is the ‘true’ (European) private law sets the agenda for how many different rules and policies are to be part of the same system (see below).

The second assumption is that traditional national private law is not primarily about access to the market (or in any event in a different way than European private law). However, also at the national level the main aim of private law is arguably to provide all citizens with the possibility to enter into transactions and to enjoy property on a national market and in a national society. The expression of the Civil Code being the true constitution of a country⁷ is in this respect telling.⁸ Seen from this perspective, it could be argued that the rise of access justice in the European Union is ‘only’ the next logical next step in a development towards Europeanisation of the market. If this is true, there is only a

³ Hans-W. Micklitz, Introduction, in: id. (ed.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham (Elgar) 2011, 3-57, at 37.

⁴ Cf. also Christoph U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union*, Baden-Baden (Nomos) 2010 and Ralf Michaels, *Of Islands and the Ocean: the Two Rationalities of European Private Law*, in: Roger Brownsword, Hans Micklitz, Leone Niglia & Stephen Weatherill (eds.), *The Foundations of European Private Law*, Oxford (Hart Publishing) 2011, 139-158.

⁵ See e.g. Christian Joerges, *The Market Without the State? The ‘Economic’ Constitution of the European Community and the Rebirth of Regulatory Politics*, 1997.

⁶ See in general on the need for a different type of thinking about European private law Jan Smits, *Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?*, in: Roger Brownsword, Hans Micklitz, Leone Niglia and Stephen Weatherill (eds.), *The Foundations of European Private Law*, Oxford 2011 [Hart Publishing], pp. 323-335.

⁷ Cf. Jean Carbonnier, *Droit civil: Introduction*, 20. éd., Paris (PUF) 1991, 123: ‘le Code civil reste la constitution la plus authentique du pays.’

⁸ Put differently: ‘autonomy’ also has a function, namely to allow people to make use of the market, making the development from freedom to functionalism only a gradual one (which does not mean it is less important).

gradual difference between European and national access justice: while at the national level all kinds of mechanisms have developed over time to enable parties to operate on the national market, such mechanisms are now put into place to also allow access to the European market. If this alternative reading of the present situation makes sense, it is of course still urgent to redefine the relationship between the national and the European level (and between the different conceptions of justice operating at these levels), but the challenge may not be to aim for a complete re-orientation of present-day private law. This calls for a clear definition of what is access justice.⁹

With these two caveats in mind, it is possible to frame the main question. It can be defined as how the European and the national level private legal order should interact. Three types of interaction are to be considered.

3. Three Types of Interaction between the European and the National Private Law Order

The question of interaction between different legal orders is of course not new, but it has received new impetus in the last decade as a result of the accelerating pace of European integration. The question is also certainly not restricted to the field of private law, to the contrary: most of the debate on pluralism and multilevel law making takes place in the field of constitutional law.¹⁰ In the context of the present workshop, I distinguish between three ways in which one can deal with the interaction between the national and the European private legal order.

The first possibility is not to consider European regulatory private law as private law, or even as law, at all. This is not as strange as it may seem. If ‘the purpose of private law is to be private law’, as Weinrib has famously claimed,¹¹ there is no need to integrate any regulatory aims in this field. To some extent, this is even the present situation, caused by the compartmentation of sub-disciplines (including different scholars publishing in different journals and being active in different academic circles). It also fits in with the claim that the European Union is moving from integration *through* law to integration *without* law. This perspective is one of denial and for me there is no question that it is therefore the wrong perspective. It is exactly this view that leads to ‘surprises’ caused by the tension between national and European conceptions of justice, as apparent in for example the cases of Viking and Laval¹² and Küçükdeveci.¹³

The second possible way to deal with the interaction between national and European private legal orders is to consider European regulatory private law as law, but to look at it through the national lens. This assumes that the national private law is still the starting point of any meaningful analysis and that the European norms are to be studied as *influencing* national law. The emergence of rules emanating from the European legislature and courts is then considered as a phenomenon that stands next to the ‘normal’ production of norms at the national level. This view prevails in present-day academia.¹⁴ It must however be discarded for being too one-sided: it does not take European private law seriously by not looking at it as a separate field of study. Even if the outcome of such study would be that European

⁹ For Rawls, Justice as Fairness: A Restatement, 2001, social justice seems to be about assuring the ‘protection of equal access to liberties, rights, and opportunities.’

¹⁰ Instead of many others: Neil Walker, The Idea of Constitutional Pluralism, *Modern Law Review* 65 (2002), 338 ff.

¹¹ Ernest J. Weinrib, *The Idea of Private Law*, Harvard UP 1995.

¹² C-438/05; C-341/05.

¹³ C-555/07.

¹⁴ See e.g. Gebauer & Wiedmann (eds.), *Zivilrecht unter europäischem Einfluss*, 2nd ed., Stuttgart (Boorberg) 2010 and Hartkamp, Sieburgh & Keus (eds.), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer (Kluwer), 2007.

private law cannot be seen as a separate field in its own right, the second perspective does not even allow an attempt to consider it in this way.

The third possibility is to look at European private law as an autonomous field. This view of European private law as a ‘self-sufficient’ system implies that the substantive body of European private law norms can be looked at from the ‘European’ perspective. This is, however, not enough. If a truly autonomous European private law does exist (or can be developed), one also needs to establish how this body of law relates to the national private laws, either through hierarchy, coordination or competition. In the following section, an attempt is made to show what such a self-sufficient European private law could look like and how it could relate to national laws.

4. A ‘Self-sufficient’ European Private Law

4.1 What is a ‘Self-Sufficient’ Legal Order?

It makes sense to ask first what we must understand by a ‘self-sufficient’ order of private law and why we would need it. Self-sufficiency in general refers to a state of not requiring any support or interaction for survival, thus reflecting collective or personal autonomy. I see this concept as a gradual one: one side of the spectrum is formed by autarky, meaning that a system or a person is completely independent and does not need to interact with any other system or person to survive. On the other side of the spectrum, self-sufficiency also exists if a system or a person enjoys at least some autonomy in the broader scheme of things. While complete autonomy of a person (meaning: without any interaction with the outside world) seems very difficult in today’s world, complete independence of a societal system (such as law) seems even impossible: legal systems will always interact in some way.

The main reason why we are in need of a sufficiently autonomous law is that it creates a ‘stable practice’: it allows people to rely on a set of norms that is publicly recognised as binding on the collectivity.¹⁵ Elements of this self-sufficiency at the national level consist in my view of common values inherent in the products of national legislatures and courts, a common legal system and a common discussion by way of a shared frame of reference of all legal actors (legislatures, courts, practitioners and academics). This shapes the legal process from the making of law to its enforcement.

4.2 What Shall We Do With European Private Law? Searching for European Self-Sufficiency by Mimicking National Law

Is it possible to find a self-sufficient European private law that consists of the same elements just described for the national level? This is partly suggested in the present project, in which the hypothesis is that a self-sufficient private law could consist of three different layers: ‘(1) the sectorial substance of ERPL, (2) general principles – provisionally termed competitive contract law – and (3) common principles of civil law.’

If we ask what these elements would look like at the European level, some problems may emerge. Systematisation of the sectorial substance of regulatory private law is of course possible, but if all the areas mentioned in section 2 have to be part of this system, its informative value may not be very high.¹⁶ An additional problem is that regulatory law tends to change rather quickly. When it comes to an area such as European consumer law, the development of a system is of course easier to achieve. I

¹⁵ Cf. the summary of a forthcoming book by Mariano Croce, *Self-sufficiency of Law: A Critical-Institutional Theory of Social Order*, (Springer) 2012.

¹⁶ And even less if the system is to consist of not only the six or so fields of regulatory private law, but also of the national materials. If all these materials have to be brought under the same heading, this would require a reformulation of existing national private laws in regulatory (functional) terms.

understand the second element ('competitive contract law') to be about the conditions under which choice by private actors is possible within the European private law system, which is indeed important (see also below). The third element (common principles of civil law) would in my view require a different perspective than the one apparent in the present case law of the Court of Justice, that only seems to repeat the principles already accepted at the national level or laid down in the DCFR.¹⁷ However, to say that a contract has binding force is not very informative. The real challenge is to develop principles on basis of the existing *acquis*, that might actually speak in favour of a strong mitigation of the binding force of consumer contracts.

The general elements needed for self-sufficiency at the level of the member-states may also be difficult to achieve at the European level. Naturally, in a Union of 27 member-states there is much more debate about the common values than within one country, necessarily leading to a type of *minimum* justice. More importantly, a common discussion on basis of a shared frame of reference used by all legal actors is still largely missing. I believe this element to be the most important one of a self-sufficient system because it allows discussion among all relevant actors. In the last twenty years, we have made huge progress towards in particular a European legal science, but we must accept that the other legal actors are not yet sufficiently part of this debate. This makes it difficult to adopt a similar conception of self-sufficiency at the European level as at the national level.

4.3 Self-Sufficiency at the European Level: Ensuring Stable Practices through Private Actors

Must we then find the self-sufficiency of the European private law order in something else than we are used to at the national level? I believe this is indeed the case. My point is that the degree of self-sufficiency of a legal system that is required to make it function is *also* influenced by Europeanisation. We should not transplant our idea of what is a self-sufficient legal system *at the national level* to the European one. In each national private law system, there is some idea of the role that private actors should play within the system¹⁸ and of how the legal system should therefore be designed. But the different European conception of 'access justice' does not only influence the law substantively, it also affects the search for what makes European private law a system. In my view (and despite the differences among them) national private laws have in common that primarily the State institutions provide the 'stable practice' that allows people to rely on a set of norms (see above, section 4.1). This is impossible at the European level for the simple reason that the EU is (for various reasons, among them the already mentioned lack of a common European discussion, a lack of competences and a lack of a highest European civil court deciding upon the facts of the case) not able to provide coherence and legal certainty through law. This means that European private law simply has to give much greater importance to the role of private actors in setting and ensuring their rights: what the European Union cannot provide in the same way as national institutions must be remedied by giving private actors a more important role. This explains not only the conception of the consumer as a 'reasonably well informed and reasonably observant and circumspect'¹⁹ actor, but also the emphasis put on empowerment of consumers, on ADR and on optional legal regimes such as the proposed CESL.²⁰

What this means for the self-sufficiency of European private law is obvious. While national jurisdictions can be self-sufficient through emphasising their own values, principles and coherent system (providing parties with legal certainty and justice), the European Union has to put the responsibility for ensuring these goods in the hands of private actors. They need to undertake action

¹⁷ Cf. Masdar (47/07); Hamilton (412/06); Société thermale d'Eugénie- les- Bains (277/05).

¹⁸ See Hans-W. Micklitz, Introduction, in: id. (ed.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham (Elgar) 2011, 3-57, at 37: while English law reflects a liberal and commercial view of justice, French law adopts the idea of a political and 'just' society and German law 'an authoritarian paternalistic-ideological' view.

¹⁹ See e.g. CoJ EU, C-220/98, [2000] ECR I-117 (Estée Lauder).

²⁰ Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final, claiming (p. 11) it offers 'a self-standing, uniform set of rules' on contract law.

themselves in order to get what they want. This also makes the need to develop common values less urgent: minimum level protection is sufficient. Put differently: self-sufficient actors can replace a self-sufficient legal system.

Also when it comes to the aspect of interaction between the European and national legal orders, an essential (if not *the* essential) element consists of a theory on the choices that private actors should be allowed to make. This is consistent with the view that if we take pluralism of (national and European) sources seriously, this is incompatible with the idea of one coherent system. Hans Kelsen wrote that a system cannot serve two masters at the same time.²¹

5. A Provisional Answer

It was announced in the introduction of this discussion paper that I would provide a provisional answer to the question whether a self-sufficient European private law is a viable concept. It was shown that the answer depends on a number of variables. Apart from the exact definition of what is (European) private law and what is access justice, it has become clear that it is vital from which perspective one looks at the interaction between the European and the national private law order. If one adopts the perspective of a self-sufficient European private law, it is important to ask why one would need such self-sufficiency. The answer is found in the ‘stable practice’ it provides: it allows people to rely on a set of norms that is publicly recognised as binding on the collectivity. While national jurisdictions can be self-sufficient through emphasising their own values, principles and a coherent system through the State institutions, the European Union has to put the responsibility for ensuring these goods to a greater extent in the hands of private actors.

²¹ Hans Kelsen, *Reine Rechtslehre*, reprint 2000) 330: ‘Niemand kann zweien Herren dienen.’

INTRUSION OF PUBLIC LAW INTO CONTRACT LAW: THE CASE OF NETWORK SECTORS

Annetje Ottow*

1. Introduction

1.1 Main Claims of Prof. Micklitz

In his EUI Working paper (2008/14), ‘The visible hand of European regulatory Private law’ Prof Micklitz makes the following observations:

- (i) his major argument is sectors such as energy and telecom have established their own separate legal order distinct from general administrative or civil law;
- (ii) European governance has yielded new processes of law-making, new regulatory instruments and new enforcement mechanisms, and is going to change the substance of the (private) law itself;
- (iii) law enforcement is moving away from courts to public bodies that seek soft solutions (new enforcement mechanisms);
- (iv) new network law develops: this new law sets aside the contractual (private) law dimension and focuses instead on the public law side i.e. regulatory devices meant to open up markets and to establish a competitive structure, as well as on the availability of an appropriate decentralized enforcement structure;
- (v) the focus is no longer on traditional contract (private) law, but contract law is not more than a device to serve the overall purpose of liberalization of markets, the so called “regulatory role of contract law”.

The question is whether these observations are factually and theoretically correct. In this paper some examples will be given from the energy and telecoms areas, inspired by the Dutch practice. The focus will be on regulatory instruments, the influence of public law in private law and some enforcement issues. This paper mainly deals with the influence of sector regulation on commercial contracts related to infrastructure access (so called whole sale contracts), but some attention is also given to the influence on consumer contract law.

1.2 Main Objectives of Infrastructure Regulation

For network industries, such as telecom and energy, over the last 10-15 years regulation has been developed on the basis of European Directives, implemented in the national regulatory regimes. In these generations of directives basically two main objectives have been laid down:

- (i) the liberalization of these markets: introducing, obtaining and maintaining competition;
- (ii) protecting the consumer/end users of services: guaranteeing basic services (universal services), setting minimum standards for those services and consumer protection against unfair contractual conditions.

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To obtain these objectives, broad regulatory powers have been given to *national, independent authorities* (“NRA’s”). They have received many regulatory instruments to impose obligations on undertakings, intervening in the contractual relationships with commercial users of infrastructure (networks) and contracts with end users for (telecom and energy) services. The main objective is to ensure that no abuse of power takes place by the owner of the networks (which is considered as an essential facility). For that purpose the (European) legislator has chosen for a *public regulatory framework*.

2. Influence of Regulatory Public Law on Commercial Infrastructure Contracts

2.1 Powers to Impose Terms and Conditions

Around these objectives the directives provide many rules for access to infrastructure and connecting different networks (interconnection), the so called whole sale provisions: competitors can have under certain conditions access to the infrastructure (telecom, electricity, gas or rail infrastructure). Powers are given to the NRA’s to impose access and set terms and conditions for this access. Mainly, these powers can be divided in two categories:

- (i) the NRA takes in its own right a decision in which it imposes tariffs or other terms and conditions for certain types of access services;
- (ii) it can resolve a dispute between undertakings and solve the matter as a “mediator”/“arbitrator”.

In all these cases the NRA imposes certain terms and conditions applicable to the whole sale contract. On the basis of public law (regulation) the NRA regulates certain parts of the contractual relationship between the owner of the infrastructure and the user of the network. These conditions are in many cases related to pricing issues: the access has to be calculated on the basis of cost orientation principles. But also other terms and conditions (such as very detailed regulation on service level agreements, time frames, access to facilities, technical requirements, etc...) form part of the regulatory whole sale rules.

Looking at the regulation for these network sectors, with an origin in European public law, sectors such as energy and telecom have established their own separate legal order distinct from general administrative or civil law. Those regimes have a complex set of rules, which deviate more and more from general rules and are difficult to incorporate fully in the national general systems of public and private law.² This has also led to the choice for public enforcement by NRA’s and specialized (economic) courts, which review the decision of NRA’s in complex economic cases.

2.2 Relationship between Public and Private Law

This regulatory work requires complex cost calculation models and specific (sector) expertise. This forms an important consideration for choice of the public law enforcement in these cases: this expertise is developed by independent public authorities, the NRA’s (and within the framework of the European networks of these NRA’s) in order to harmonize these terms and conditions within the EU and create a level playing field. This implies, the exclusionary powers to set these rules and conditions on the basis of this regulatory framework, excluding contractual law. But is this always accepted according to the applicable national law? This forms an important question. What is the relationship

² A.T. Ottow, Supervising telecommunications, The influence of European and Dutch administrative procedural law, (*‘Telecommunicatietoezicht. De invloed van het Europese en Nederlandse bestuursprocesrecht’*) (thesis), The Hague: Sdu Uitgevers, 2006 and S.A.C.M. Lavrijssen & A.T. Ottow, The legality of independent regulatory authorities, in: L. Besselink, F. Pennings & S. Prechal (ed.), *The eclipse of the legality principle in the European Union*, Alphen aan den Rijn: Kluwer Law International, 2011, p. 73-96.

between public and contract law? Or to phrase it *in a Micklitz way*: is contract law not more than a device to serve the overall purpose of liberalization of markets? Is there only the so called *regulatory role of contract law*? As the public rules must be incorporated in a contractual relationship, both – public and civil – regimes are relevant. A strict borderline cannot always be drawn. In practice, the (Dutch) courts do not always answer this question in the same way. Some courts state clearly that public law must prevail, others find this less clear.

For example electricity case: CBB (highest Dutch administrative court in economic cases) February 1, 2012, case AWB 09/1105 and 09/1112, Liander vs.NMa.

In this case the administrative court explicitly states that the establishment of the network tariff the infrastructure provider can charge is exclusively regulated by public rules on the basis of the applicable electricity act (the Wet tarievencode elektriciteit). The cost based principle must be interpreted on the basis of the objectives of this act, mainly to avoid abuse of the natural monopoly of the owner of the network. See also CBb 25 June 2009 (LJN BJ2637).

TV cable case: Civil court of appeal Amsterdam, UPC vs. Council of Hilversum, October 19, 2010, LJN BO1-50.

One of the questions in this case is whether the Council of Hilversum has the legal authority to fix prices in a contract with the local TV cable operator (UPC), where at the same time the NRA (OPTA) has the (assumed)³ power to set these tariffs (when certain conditions are met). One of the for this paper relevant question is whether the Council of Hilversum can forbid the TV cable operator to increase its tariffs, referring to the applicable contract, when at the same time these tariffs are being regulated on the basis of the *ex ante* rules of the Communications Directives, where the NRA is given the explicit power to set those tariffs. This question is now referred to the European Court of Justice in a preliminary procedure.

KPN case: decision of OPTA in 2006, where an infringement of tariff regulation was established on the basis of the Dutch telecommunications Act

OPTA established that KPN had given illegal tariff reductions to customers, to the detriment of competitors. Special in this case was that OPTA did not only impose a administrative penalty on KPN, but in addition it obliges KPN to pay a substantial amount to its competitors a compensation for the damages they suffered. As a result of this decision, these undertakings did not have to initiate civil procedures for damages against KPN, but was the dispute solved within the context of the administrative sanction procedure.

In my opinion, there are good reasons to give the NRA the exclusionary power to set those infrastructure tariffs on the basis of the applicable regulatory framework and exclude contractual freedom in this respect. The regulatory frameworks provide for a complex set of rules which require an economic analysis of the markets concerned and the position of parties on these markets. Moreover, special procedural rules are put in place (consultation of market parties and the intervention by the European Commission⁴) to ensure harmonized and balanced decisions by NRA's. The application of contract law would circumvent these procedural safeguards, as set by the European legislator. In fact, this whole framework can be considered as a separate legal order distinct from general administrative or civil law (claim Micklitz).

³ Complication in this case is that this power of OPTA is disputed. I leave this element of the dispute aside.

⁴ A.T. Ottow, Europeanization of the Supervision of Competitive Markets, *European Public Law* 2012, Volume 18, issue 1, p. 191-221.

2.3 *Dispute resolution*

Looking back one can observe that in the first year of liberalization many of the whole sale rules were established in the context of *disputes*: the regulatory framework of the first generation directives was not yet as developed and through conflicts the regulatory rules were built on a case by case basis. In later years, the frameworks became more sophisticated, as a result of which the NRA's imposed obligations mostly on the basis of standard decisions and models. This explains why (especially in the telecom sector) dispute resolution was – in the first years of liberalization - a popular (new) regulatory instrument to regulate whole sale contracts, in later years these disputes were seldom used. However, from a legal academic perspective and for the purpose of this paper, it were mainly these disputes which caused the most interesting and complex questions, as this instrument involved a mixture of public and private law elements, which led to new legal questions.

The problems pointed out in this paper actually converged in OPTA's power to resolve disputes. The character of this power of the independent regulatory authority does not correlate well with the traditional regulatory supervision of an administrative body. Dispute resolution is characterised by its contradictory nature, the dispute being between two private parties. This configuration does not relate to a traditional dispute between a private individual/undertaking and the government, in which the individual needs to be protected from overly authoritative action taken by the government. This procedure does not correlate to the administrative model taken into account in the Dutch General Act on Administrative Law. In the Dutch Telecommunications Act and in the actual practice of OPTA, however, an attempt has been made to fit this legal concept into the general system of administrative (procedural) law, thus paying too little attention to the contradictory character of dispute resolution and the resulting specific role of the regulatory authority. This led to many complex legal questions.

In a dispute, the NRA (in this case for The Netherlands) OPTA does not function in its role as an administrative body in the traditional way, rather as a sort of arbiter or arbitrator. OPTA's conflict management role received too little recognition from both legislation and OPTA itself, with the result that too much emphasis is placed on clamping down on the powers of the regulatory authority and not on its instrumental and guiding role as an arbitrator. As a result, the administrative and adjudicative tasks of the administrative body have converged, which does not do justice to the specific characteristics of this procedure and the position of the parties involved in the dispute.⁵

In previous papers⁶ I have analysed these complications in details. In the current paper I will select two topics to illustrate the previous observations.

Case 1

A major concern was the evaluation of interconnection disputes. The Dutch telecommunications Act mentioned that the "reasonable" tariffs could be asked. The main question was how to establish *reasonable* tariffs. Was this a public law concept or was it possible to take into account the contractual relationship between the parties? OPTA was of the opinion that this was a public standard, which required implementation on the basis of the regulatory framework of the EU Directives. However, the administrative court of Rotterdam was of the opinion that the powers of OPTA on the basis of the Telecommunications Act was limited by the contractual relationship and the applicable rules on the basis of contract law.⁷

⁵ Ottow 2006.

⁶ A.T. Ottow, 'Effective Access and Procedure in telecommunications Disputes in Europe. National Report Netherlands.', In: M. Andenas & S. Zleptnig, *Telecommunications Dispute resolution: procedure and effectiveness*, London: British Institute of International and Comparative Law, 2004 and A.T. Ottow, 'Dispute resolution under the new European framework' in: E.J. Dommering & N.A.N.M. van Eijk, *The Round Table Expert Group on Telecommunications Law. Conference Papers*, Amsterdam: Institute for Information Law (IViR), University of Amsterdam, 2005.

⁷ Administrative court of Rotterdam, January 31, 2003, *Mediaforum* 2003-4, Jur. Nr. 21., p. 139-141.

Case 2

In interconnection disputes, relating to tariffs, problems can exist in relation to the refund of money already paid to the other party (mostly the incumbent) once the correct tariffs has been established by the NRA. The European directives do not regulate this issue. One of the main problems is the fact that this is mainly a contractual issue, while the decision of the NRA is mostly seen as a decision of administrative law. The NRA lacks in many cases the power to force the party concerned to pay the amount due. In The Netherlands this problem has been a major obstacle for newcomers on the market. Due to the legal system they are forced to litigate before OPTA and the administrative appeal courts and only after a final judgment is given, they can start civil litigation before the civil courts to collect their money.⁸

OPTA's position as arbiter has also repercussions in the established appeal procedure. Because of the civil law character of disputes, I have questioned whether the option of legal protection against rulings of OPTA through administrative law is an obvious one.⁹ The appeal procedure should take place between the two parties involved in a dispute, OPTA being involved only as an expert. In the traditional, administrative law appeal procedure, the appeal of a party affected by the dispute decision is made against the administrative body. However, the dispute is in reality a conflict between two private companies, the administrative body being involved only as a third party. The applicable appeal procedure should be geared to this, which requires a modification of the current applicable rules for administrative appeals. In the French legal system, appeal against dispute resolution rulings of the French telecommunications regulator ARCEP is open at one actual instance only – at the especially designated civil appeals court (*Cour d'Appel de Paris, première chambre*). For such an appeal, the procedural rules of civil law are applicable. The appeal procedure takes place between the two parties involved in the dispute, with the regulatory authority functioning only as an expert. The civil court is able to examine the dispute resolution ruling to full extent, taking into account the civil law aspects of the dispute.

Also in other dispute cases this mixture of civil and public law elements lead to problems. Dispute resolution is (in The Netherlands) also used for dispute relating to installment, replacement, transfer and removal of infrastructure (cables). In case of a dispute between the land owner and the cable operator, this dispute can be brought before the NRA, OPTA. OPTA has the power to calculate the damages the cable operator has to pay to the owner of the land. This is not an exclusive power of OPTA, as the land owner can also chose to bring the dispute before the civil court. As a result of this option, parallel procedures are taken place, where the case is not only decided by the civil courts, but also by OPTA. The Dutch Supreme Court has accepted this situation by deciding that the civil courts have the legal competence to decide in these cases.¹⁰ For this reason OPTA has decided recently to refer litigating parties to the civil courts and stop dispute resolution in these matters.

3. Influence of Regulation on Consumer Contracts

A separate part of the sector regulation concerns the rules relating to consumers and consumer contracts. The sector regulation contains special rules to ensure that services are delivered with a specific (minimum) quality and that the service contracts do not contain unfair clauses. In most cases, these rules contain *mandatory* rules and must be considered as a *lex specialis* to general contract law. These rules are related to for example transparency (providing (tariff)information), duration of the contract, termination of contracts, invoices, number portability, service of call centers etc...

⁸ Administrative Court of Rotterdam in first instance, 29 November 2001, BabyXL vs. KPN Telecom.

⁹ Ottow 2006, p. 136-180.

¹⁰ Hoge raad, December 16, 2012, Staat vs. KPN et others, LJN: BT6685.

But the rules can go even further. In the Dutch Electricity Act for example, a specific provision is made that the NRA (in this case the Dutch Competition Authority) formulates a *model consumer contract* for certain services, the energy companies must offer to consumers. Specific terms and conditions, including the type of services and tariffs, are established by the NRA for this model contract. This consumer protection law is not based on European law, but was included on the special request of the Dutch parliament and is a *novum* in sector specific regulation. In this case the NRA had to develop a model contract, using public regulation and general contract law, resulting in a “public law model contract”. This model was developed by the NRA in consultation with consumer organizations and energy companies. Energy companies are now obliged— on the basis of a decision of the NRA – to offer this model contract to consumers. Other type of contracts can still be used, but it is a signal to consumers that this model contract is “safe”. It is expected that energy companies will adapt other contract according to this model. This mandatory model is limiting the contractual freedom of energy companies in an extensive way, setting general contract law aside.

Enforcement of the contractual regulatory provisions takes place by the NRAs on the basis of administrative law instruments (such as administrative sanctions), which causes a strange mix of public law enforcement for contractual issues.¹¹ In addition (at least in The Netherlands) a separate dispute resolution procedure for consumers has been introduced. This is a low threshold and low cost procedure, where a special committee (“de Geschillencommissie”)¹² solves disputes between consumers and operators. De Geschillencommissie is a non-profit private organization, not falling within the judiciary. According to the sector regulation operators must offer this dispute resolution procedure in their contracts. In many disputes in these sectors consumers make use of this procedure. Public enforcement by the NRA on the basis of the sector regulation only takes place in important cases with a public interest aspect.

For network sectors a *new trend* can be envisaged. The interest of the consumer and its protection becomes more and more important and the sector regulation is shifting from pure market regulation towards more consumer oriented regulation. Consumer protection will play a key role in the further development of sector specific regulation (but probably also in general competition law) as the public has become more skeptical towards full liberalization of markets (and competition) and draws attention to the (perceived) adverse effects for consumers.

4. Some Preliminary Conclusions

Whether all the above mentioned claims of Prof. Micklitz can be substantiated by the law and practice in the different Member States will need further study (e.g. on the aspect of enforcement¹³). This paper is a first *tour d’ horizon* written mainly on the basis of experience in The Netherlands. However, some preliminary observations can be made:

- The two systems are interrelated, but exist in parallel, using each other’s legal norms,
- Public regulation dictates which terms and conditions must be incorporated in contracts;

¹¹ See e.g. CBb September 30, 2009, SD&P vs. OPTA, LJN: BJ9068, where the administrative court had to decide whether OPTA had the power to amend a certain contractual provision. In that case the CBb decided that OPTA was lacking the legal mandate to do so.

¹² The Geschillencommissie is used in many sectors as a dispute resolution committee. See for an evaluation of the functioning of this committee: A. Klapwijk & M. ter Voort, *Evaluatie De geschillencommissie* 2009, WODC, 2009, deel 278.

¹³ Currently at the Europa Institute, Utrecht University, a Phd study takes place on ‘The alternative enforcement of competition law’. See also: A.T. Ottow, *Mastering the market? Exploring new forms of market supervision* (‘De markt meester? De zoektocht naar nieuwe vormen van toezicht’), inaugural lecture 18 September 2008, The Hague: Boom Juridische Uitgevers, 2009.

- Public regulation is incorporating contract law as a regulatory tool (the regulatory function of contract law);
- Consumer protection rules in sector specific regulation override general contract law (*lex specialis*);
- Public enforcement takes over civil litigation for contractual issues.

It is clear that through sector specific regulation for network industries borders between public and private law are blurred. Within the context of public regulation provisions and decisions of regulators interfere directly with the contractual relationship of parties. Professor Micklitz has rightly pointed to this development, a development which has been a silent process for many years. A new legal order has been created for the liberalisation of markets. New mechanisms have been developed, such as dispute resolution by NRA's and the instrument of model contracts in public regulation. This leads to new legal questions. In my opinion, the discussion should not focus on the question which system should prevail (public or private law), but how a legal system can be built which serves the needs of markets *and* consumers. General public and private law can no longer be studied and analysed in an isolated manner. A new common legal system is created¹⁴, which is a *fact of life* legal scholars will have to live with!

¹⁴ Ottow 2006.

4) Conflict and Resistance

BEHIND JUDICIAL RESISTANCE TO EUROPEAN PRIVATE LAW

*Guido Comparato**

Introduction

According to its usual understanding in law, the expression conflict of laws refers to a situation in which the provisions of two or more legal orders may be applicable to a given concrete case. Such a contrast between legal orders is traditionally solved by specific rules, termed indeed 'conflict of law rules', which provide for the criteria to follow in order to solve the coordination problems naturally arising in a context of factual legal pluralism. While private international law rules have been partially harmonised in the European Union, in that particular context nonetheless, a particular case of conflict still concerns the relation between national and supranational rules. The settlement of that contrast has kept and is still keeping busy highest national courts and the Court of Justice for the European Union for several years already, resulting in a conflict which has assumed such dimensions to be emphatically defined in political science as an institutional 'cold war'.¹ Provisionally, this has been settled in the sense that, as specified by the European Court, community law should prevail over national rules unless, as specified by various national constitutional courts,² the former one infringes fundamental rights which are guaranteed by the latter. In that solution, the tension which opposes European and national actors is self-evident and reveals the existence of further political and value considerations underlying conflict of law rules.

Despite of the existence of such more or less clear statutory or judge-made criteria to solve conflict of laws, in a more general sense conflicts can indeed arise also at a deeper level. The application of a transnational or supranational rule in a domestic legal order can be problematic for several reasons, since legal rules may be characterised by particular economic, social or institutional backgrounds which could be impossible to transpose into another context. Not just a conflict of laws might arise but rather a conflict of values or rationalities of different legal orders. This problem is well-known and largely discussed in comparative law and more recently in the debate as to the possibility or impossibility of legal transplants in Europe. In the European context jurists are indeed confronted with a high number of such transplants every day so that resistance to the application of the foreign or supranational rule may be the likely result of these different values or rationalities.

The likelihood of such a conflict has also often been considered as a sufficient reason why processes of legal harmonisation or even unification at a supra-national level are doomed to failure and there is little alternative to national law: while black-letter law can be unified and standardised at the supranational level, this does not happen with the judiciary rule. While these divergences and therefore the difficulty of harmonisation increases with the number of legal actors involved and possibly geographic dimensions, these dynamics are present also at the national level and can involve one jurisdiction only. It is then important to make clear that conflicts of values, which the current academic fascination for European Union law has led to discuss mainly in a trans-national scenario, can very easily also arise even within the same legal order, when new rules establish themselves over previous

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¹ K. Goldmann, *Transforming the European Nation-State. Dynamics of Internationalization* (London: Sage, 2001) at 89.

² In particular German Constitutional Court, *Solange II* [1986] BVerfGE 73, 339.

ones elaborated under different political and social circumstances. Such an internal value conflict appears clearly also only considering black-letter rules, especially when new rules are elaborated through a democratic process by a political majority which is expression of a different social and economic ideology than the one of the parliamentary majority which drafted the previous rules. When this conflict concerns rules whose political and ideological connotation is manifest also to public opinion, such as may often be the case with labour law rules, resistance can even assume a social dimension.³ Something analogous, although clearly less apparent, happens in the courts also in cases of less politically divisive legal rules.

That having been said, the main difference between the internal conflicts of this kind and those opposing national and European rules rather lies in the institutional framework and in the existence of different mechanisms to ensure uniformity within a jurisdiction. In order to ensure predictability and uniformity of the legal system and possibly reduce the resistance of lower courts, national legal orders in particular have developed and still rely on a system which can be termed *nomophilachia*, consisting in conferring only one specific judicial body the authority to provide for the only and exact interpretation of law. This mechanism, that may occasionally be reinforced by the explicit recognition of a *stare decisis* principle but that can also operate just thanks to the informal authority of the highest courts' decisions, does not however rule out the possibility of a value conflict between the rule as drafted by the legislator and as interpreted by the highest court.

While these dynamics are common to all legal orders despite of the myth-principle of the internal coherence of legal systems,⁴ the likelihood of this kind of conflict when we consider not only the national but also the supranational European legal system arises considerably. This is due to two institutional reasons: on the one hand, the matter of competences determines that the rules elaborated at the European level are likely to be inspired by economic considerations which can be at odds with those of some national order. Given the 'omnipotence' of national legislators, national rules may indeed be aimed at the achievement of further objectives than just economic ones. This contrast may concern not only an opposition of European and national legislations, but even more importantly of European and national case-law.⁵ On the other hand, the described function of *nomophilachia* established at the national level is less strongly developed at the European level, leaving freeway for divergences and national judicial resistance.

Let us then consider the cases in which these two aspects are combined, that is to say in which the *nomophiliachia* function of the European court is compromised as a possible consequence of a conflict of values between national and European private law. To this aim the next part delves into the institutional dynamics of the interaction between national and European courts and the following part will look into the private law dimension, putting emphasis on the employment of the *acte clair* doctrine in matters concerning the regulation of financial services.

The Dialogue between European and National Courts

If one considers the many and frequent infringements proceedings against member states for delayed or inexact implementation of European law, the resistance offered by national judiciaries may appear as less noteworthy than that given by national parliaments. National judges, quite to the contrary, 'have often used the leverage of EC law to denounce or even make up for the shortcomings of their own national systems. By complying with Brussels rule even beyond the mandates of their own States'

³ R. Sefton-Green, 'Cultural Diversity and the Idea of a European Civil Code', in M.W. Hesselink, *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) 84.

⁴ See R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *The American Journal of Comparative Law* 1-34, 343-401.

⁵ C. Salvi, 'Diritto civile e principi costituzionali europei e italiani: il problema' in C. Salvi (ed) *Diritto civile e principi costituzionali europei e italiani* (Torino: Giappichelli, 2012).

legislators, courts have experienced a veritable institutional empowerment'.⁶ In this sense, national judges have often behaved like real European Union judges. Several other times, nonetheless, it is exactly the national judiciary that has offered more resistance to European law. Resistance at this level can take different forms – often not easily detectable – such as rejection and avoidance;⁷ but more subtly and frequently judges could be led, intentionally or just unwittingly, to an interpretation of community law in light of the principles of their particular national system, something which jeopardises the uniformity of supranational law and has already been described in the literature on transnational private law as homeward bias.⁸ To this purpose, the apparent neutrality of formalism has often become a suitable means of resistance.⁹

Several doctrines have been elaborated at the European level in order to cope with this situation. In particular, the Court of Justice of the European Union has made clear that since Community law binds not only legislators but also judges, these latter are required to interpret domestic law in conformity with the provisions of the treaties and also 'in the light of the wording and the purpose of the directive(s)', even when these have not been implemented yet.¹⁰ But while the principle that national law has to be interpreted in light of Community law has been imposed by the Court of Justice, the procedures to enforce this interpretative rule remain less clearly delineated. The institutional mechanism that has been foreseen in the treaties to reduce resistance and which is quite innovative for an international organisation, allows or even obliges national judges to refer to the European Court for a preliminary ruling when they are in doubt about the exact meaning of a European disposition, demanding national courts of final appeal to do so. Owing to this mechanism, the European Court can exercise a (limited) function of *nomophilachia* which is typical of national highest courts and should prevent divergent interpretations within the European legal system. That mechanism is therefore necessary to ensure the effective unity of a legal system, both at the national and at the European level.

Nevertheless, while the European Union has proven to have efficient instruments – first and foremost the infringement proceeding – to combat and limit national legislative resistance, the same does not hold true with regard to judicial resistance. The introduction at the European level of a mechanism that has proved to be successful at the national level seems to be still insufficient to ensure judicial uniformity. This is due to several reasons. In the first place, it is not even clear what the legal consequences would be in cases where national judges fail to request the intervention of the European Court when they are expected to,¹¹ since although it would be theoretically possible to see an infringement of articles 258 and 259 TFEU, such proceedings would lead to delicate constitutional issues of independency of the judiciary¹² and, politically, would compromise the cooperation between European and domestic courts in an era in which the European Court seems to be particularly interested in a constitutional dialogue with the member states rather than in imposing politically

⁶ D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3-32, 25.

⁷ L. Niglia, 'The Non-Europeanisation of Private Law' (2001) 4 *European Review of Private Law* 575-599, at 580 ff. According to this author, the reluctance of national courts is such that Europeanisation of private law appears as a normative discourse of legal scholarship rather than reality, at 598-599.

⁸ See F. Ferrari, 'Homeward Trend: What, Why and Why Not', in A. Janssen and O. Meyer, *CISG Methodology* (Munich: Sellier, 2009) 171 ff..

⁹ D. Caruso, 'The Missing View of the Cathedral', 29.

¹⁰ ECJ *Marleasing* (C-106/89)

¹¹ K. Langenbuecher, 'Europarechtliche Methodenlehre', in K. Langenbuecher (ed), *Europarechtliche Bezüge des Privatrechts* (Baden-Baden: Nomos, 2008) 10.

¹² In *Commission vs Italy*, the ECJ has nonetheless stated that even the conduct of constitutionally independent institutions may result in an infringement of EU law, see B. Hofstötter, *Non-Compliance of National Courts. Remedies in European Community Law and Beyond* (The Hague: Asser, 2005) 183-188.

contentious decisions upon them.¹³ For these reasons, in the end, infringement proceedings are very unlikely to be brought against a member state for the decision of a national court not to refer to the CJEU.¹⁴ In this scenario, the risk arises again that European law is interpreted from the perspective of the national order so that a ‘parallel-version’ of European law can jeopardise legal unity once again.¹⁵ Nevertheless, this often appears as the main concern for European institutions and scholars, this is not only a problem of ensuring legal unity, but more substantively of effectiveness of the legal rule: if supranational rules are interpreted in a way which conforms with national law, deliberately or as the result of the mentioned homeward bias tendency, the innovative character of the former is denied, and the policy aims of that intervention are likely to go disappointed. In the second place, consequently, national judges may be reluctant to refer to the Court of Justice for a preliminary ruling, especially when their national training suggests to them that the legal issue at stake is already clear and does not need for an intervention by the European Court. Particular ideological considerations may nonetheless also lie behind this choice to refer.

The value dimension of the lack of dialogue between national and supranational courts may be concisely touched upon by means of a look at the constitutional dimension. As a general trend, it appears that constitutional courts are particularly reluctant to refer to the European Court. This path has been followed in particular by the German *Bundesverfassungsgericht* and for a long time by the Italian *Corte Costituzionale*,¹⁶ the two institutions that most developed limits to the supremacy of European law. In particular in the case of the Italian Constitutional Court, the ‘rebelliousness’¹⁷ to refer to the European court was formally justified on the basis of the argument that the Constitutional Court is not a ‘court’ or a ‘tribunal’ in the sense in which the European treaties speak of,¹⁸ so that also in this case, a ‘strict formalism’ has been the way chosen to maintain the separation of European and domestic law. The Italian court changed approach for the first time in 2008,¹⁹ with a judgment which was hailed as the beginning of a new dialogue between the Italian and the European Court.²⁰ This general trend of resistance among national constitutional courts can be understood if one considers the subtle distrust that is based on institutional reasons in the first place. As a result of the peculiar function they perform, constitutional courts can hardly accept a higher authority which could occasionally imply the powerlessness of the courts when faced with unconstitutional European provisions, that is, in other terms, the priority of the four economic freedoms over established internal

¹³ See L.F.M. Besselink, ‘National and constitutional identity before and after Lisbon’ (2010) 6 *Utrecht Law Review* 36-49; A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (Oxford: Oxford University Press, 2009) 112 ff.

¹⁴ F.C. Mayer, ‘The European Constitution and the Courts. Adjudicating European constitutional law in a multilevel system’, *Jean Monnet Working Paper* 9/03, 4.

¹⁵ F.C. Mayer, ‘The European Constitution and the Courts’ 18.

¹⁶ From the annual reports of the Court of Justice of the European Union it results that the Belgian *Cour constitutionnelle* referred 71 times in the period 1952-2008, the Austrian *Verfassungsgericht* 4 times and the Italian *Corte Costituzionale* only 1 time. The German *Bundesverfassungsgericht*, the French *Court Constitutionnel*, the Spanish *Tribunal Constitucional* and the Portuguese *Tribunal Constitucional* never referred.

¹⁷ M. Panebianco, ‘La recente giurisprudenza comunitaria della Corte costituzionale’, in *Studi in Onore di Modestino Acone*, Vol. I (Napoli: Jovene, 2010) 153.

¹⁸ Italian *Corte Costituzionale*, Ordinanza 536/1995.

¹⁹ See F. Fontanelli and G. Martinico, ‘Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice’ (2010) 16 *European Law Journal* 345-364; E. Happacher, ‘Der italienische Verfassungsgerichtshof und das Vorabentscheidungsverfahren gemäß Art. 234 EGV: neue Entwicklungen’ (2009) 22 *Jahrbuch für Italienisches Recht* 149-162.

²⁰ F. Teresi, ‘Finalmente inizia il dialogo tra la Corte costituzionale e la Corte europea [Nota a C. Cost. 15 aprile 2008, n. 102; ord. C. Cost. 15 aprile 2008, n. 103]’ (2008) 17 *Nuove Autonomie* 129-133.

constitutional principles.²¹ The way in which the potential unconstitutionality of a European provision has to be dealt with by a domestic constitutional court represents a highly intricate legal and even political question, which already led to the afore-mentioned ‘cold war’ between the European and the domestic highest courts. Particular political and historical contingencies may reinforce those tendencies and distrust. Let us consider another country whose *Tribunal Constitucional* has shown strong reluctance to refer to the CJEU: in the case of Portugal, the accession to the European Communities raised several problems of compatibility with the democratic principles, since the Constitution of 1976 – which laid the fundamentals of an economic system potentially in conflict with the European market idea²² – did not expressly contain clauses of attribution of competences to the European Communities. If such absence were understandable in constitutions drafted before the creation of the European Communities, exemplified by the Italian and German basic laws, the silence on this aspect of the Portuguese Constitution was more telling. While authors could ‘save’ the democratic legitimacy of accession to the EC on the basis of an extensive interpretation of the clause of adaption to general international law – similar to what had been done in Italy – the problem of the prevalence of the decisions of the European Court of Justice on the domestic courts remained more difficult to solve²³ and can have reasonably led to some resistance at least in the lower courts, taking into account that, unlike in other European countries, there was no constitutional court that could authoritatively shed light on the complicated issue until constitutional reform took place in 1982. A new reform of the constitutional text in 2004 – adopted in (confident) view of the entry into force of the European Constitution – was eventually necessary to affirm the principle of supremacy of EU law as well as the limitation represented by the theory that Italians call *controlimiti*.²⁴

How to Escape EU Law

As it is known, according to the treaties national judges may halt proceedings and refer to the Court of Justice of the European Union for a preliminary ruling when they have a doubt as to the correct interpretation of European law, while in the case of judges against whose decision there is no legal remedy, there is no space left for discretion and that option converts into an obligation. The CJEU itself has nonetheless clarified that there are important exceptions to the strictness of that rule, elaborating two doctrines usually referred to with the French expressions (given the fact that they have been elaborated mainly in France to demarcate the competences of civil and administrative tribunals) *acte éclairé* and *acte clair*. Pursuant to the *acte éclairé* doctrine, national tribunals are relieved from the obligation to refer when the European Court has already delivered its interpretation on a materially identical question. By means of this doctrine, elaborated already in the case *Da Costa*²⁵ of 1963, a feeble system of authority of precedents was introduced in European law so that, in this sense, the *acte éclairé* doctrine was instrumental to the establishment of a *nomophiliachia* system for European law. In contrast to this, the second and more controversial exception was later developed in the *CILFIT* case²⁶ of 1982 and refers to the situation in which the meaning of a rule is so obvious that a reference to the CJEU would be superfluous. This idea was not new, as this had already been proposed in the

²¹ On the sometimes difficult conciliability of internal constitutional principles and market freedoms, and the role of constitutional courts, see C. Salvi (ed) *Diritto civile e principi costituzionali europei e italiani* (Torino: Giappichelli 2012).

²² P. de Pitta e Cunha, ‘A regulação constitucional da organização económica e a adesão à C.E.E.’, in J. Miranda (ed), *Estudos sobre a Constituição*, Vol. 3 (Lisboa: Livraria Petrony, 1979) 439 ff.

²³ M. Rebelo de Sousa, ‘A adesão de Portugal à C.E.E. e a Constituição de 1976’, in J. Miranda (ed), *Estudos sobre a Constituição*, Vol. 3 (Lisboa: Livraria Petrony, 1979) 457 ff.

²⁴ J. Mota de Campos and J.L. Mota de Campos, *Manual de Direito Europeu. O sistema institucional, a ordem jurídica e o ordenamento económico da União Europeia* (Coimbra: Wolters Kluwer Portugal, 2010) 407-408.

²⁵ Joined cases 28-30/62 *Da Costa* [1963].

²⁶ Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982].

opinion of the Advocate General in the *Da Costa* case and later accepted by certain national courts.²⁷ As later framed by the CJEU, the *acte clair* doctrine requires national judges to be convinced that the matter is equally obvious to the courts of the other Member State and to the Court of Justice, also including a comparison between the different language versions of EU law and in any case provided that the interpretation has to be in light of the objectives of Community law. The doctrine, in other terms, appears as the Community revival of the old principle *in claris non fit interpretatio*. Exactly like that Latin expression, the *acte clair* doctrine has controversial and problematic aspects. Indeed, the institution which has to establish whether an act is sufficiently clear, comparing different linguistic versions too, is the national judge, while as already said the legal consequences under EU law for a refusal of referring a question remain unclear. Under these circumstances, national courts have developed quite different approaches, ranging from those which are more inclined to refer to those who are more ‘relaxed’ in assessing whether a matter is sufficiently clear. In general, national courts of last instance seem to adopt a more relaxed interpretation of the strict conditions established in *CILFIT*.²⁸ The autonomy and potential unaccountability that it offers to the national courts, makes the *acte clair* a possibly ideal instrument of resistance to European law.

At the same time, the employment of the *acte clair* doctrine or even a low number of reference to the Court of Justice of the European Union cannot be considered to be *per se* a mark of resistance to European law. While in past years a high number of references was considered to be a ‘good’ sign, as it would show that national courts are aware of European law and are open to accept that domestic rules should be interpreted coherently with supranational rules, in later years a growing number of scholars have highlighted that this may not necessarily be the case. In this sense, it has been suggested that the need to refer to the CJEU was essential during the first phase of existence of the European Communities, in which that supranational legal order was still particularly weak, the knowledge of it was not widespread among national judges and there was therefore still a concrete risk of ineffectiveness of European rules, while it would be almost physiological for a sound legal order that the number of references diminish at some point.²⁹ In this perspective, the insistence of the ‘CJEU on accepting references undermines the role of national courts as a network of EU courts’ and appears as a form of ‘supremacist supervision’ inspired by certain distrust in the capabilities and willingness of national judges to apply European rules.³⁰ Indeed, the reference mechanism is mainly intended to ensure the uniformity of Community law in different jurisdictions by avoiding that national courts offer different interpretations of supranational black-letter rules; nonetheless, in the recent years legal literature seems to have assumed a more favourable post-modern approach towards legal diversification, admitting that uniformity of Community law is not necessarily the most important value to be pursued, often on the basis of the idea that legal diversification may be the expression of a value and cultural diversification which is worth being maintained.³¹ By the same token and despite of the low attitude of certain tribunals, the lack of references to the European Court may be not indicative of the real Euro-friendly or Euro-sceptic tendency of national judges.³² While these observations can

²⁷ *Bulmer v. Bollinger* [1974] EWCA Civ 14.

²⁸ N. Fenger and M.P. Broberg, ‘Finding Light in the Darkness: On the Actual Application of the *acte clair* Doctrine’ (2011) 30 *Yearbook of European Law* 180-212, 211.

²⁹ J.H.H. Weiler, ‘The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC’, in H.G. Schermers et al. (ed.) *Article 177 EEC: Experiences and Problems* (Amsterdam: Asser, 1987) 366-378.

³⁰ T. de la Mare and C. Donnelly, ‘Preliminary Rulings and EU Legal Integration: Evolution and Stasis’, in P. Craig and G. De Búrca (ed.) *The Evolution of EU Law* (Oxford: University Press, 2011) 363-406, 391.

³¹ On legal diversification and cultural pluralism, C. van Dam, ‘Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law’ (2009) 20 *King’s Law Journal* 281-308.

³² M.P. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford: University Press, 2010) 57; C. Kilpatrick, ‘Community or Community of Courts in European Integration? Sex Equality Dialogues between UK Courts and the ECJ’ (1998) 4 *European Law Journal* 121-147.

certainly be shared, the idea of a harmonious and well working judicial dialogue between European and national courts seems, at present, not necessarily correct. An empirical study (by means of questionnaires and interviews) on the attitude of national judges in Germany and the Netherlands towards European law highlighted for instances that the conditions under which a preliminary ruling has to be requested are not entirely clear to numerous judges, in particular when and how such a reference must be requested is unclear to most of them,³³ and slightly less than half knew what they were supposed to do with an answer from the European Court.³⁴ This was linked more to the lack of adequate training obtained during law school years³⁵ on European law rather than a Eurosceptic political attitude.³⁶ On the other hand, it cannot be denied that the *CILFIT* doctrine has been employed already several times by national courts in order to challenge the supremacy of EU law; a commentator has pointed out in the case of Denmark that the *acte clair* argumentation may be used to 'shield politically important Danish statutes from a potentially destructive Union-judicial scrutiny'.³⁷

For these reasons, while the decision to refer to the interpretative authority of the Court of Justice of the European Union cannot be directly considered to be determined by some kind of resistant political attitude, it is necessary to verify the practical significance of that resistance, as this may be determined, especially in the case of the highest courts, by an opposition to certain principles and values. The question of referring to the European Court is therefore not just a procedural matter, but it is a substantive one. All this considered, instead of focusing on the general legal mechanism of reference as it is outlined in the treaties, it is necessary to look into concrete legal cases to observe the value dimension behind this particularly nuanced form of resistance.

Cases-studies from the United Kingdom

Among the national courts that have explicitly resorted to the *acte clair* doctrine, a particular case is the English Supreme Court, formerly the House of Lords. While its general attitude towards the preliminary reference procedure has changed through the years apparently moving from an initial particularly reluctant orientation to a gradually more open position,³⁸ recently it has shown a conservative approach to the interpretation of European legal concepts in the English system and, in addition, a lack of willingness to refer to the Court of Justice for a preliminary ruling.

Such a tendency may be provisionally interpreted in different ways. In the first sense, it could be considered as an expression of some kind of 'Euro-sceptic' attitude which is said to be widespread in England and would consequently be mirrored in the way in which European law is considered by English jurists and in which manner the Supreme Court interacts with the Court of Justice of the European Union. Indeed, the European Court has been the focus of fierce and occasionally nationalistically oriented criticisms in non-legal literature, where it has been pointed out that this institution goes too far in its interpretation of European law creating *de facto* new law without any democratic legitimacy and imposing it on national institutions.³⁹ At the same time, the impact of

³³ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges. Knowledge, Experience and Attitudes of Lower Court Judges in Germany and the Netherlands* (The Hague: Eleven International Publishing, 2011) 53, 54.

³⁴ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, 54.

³⁵ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, 58.

³⁶ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, 65-80.

³⁷ H. Rasmussen, 'Constitutional Laxity and High International Economic Performance: Is There a Nexus?', in J.L. Campbell, J.A. Hall, O.K. Pedersen (ed.), *National Identity and the Varieties of Capitalism. The Danish Experience* (Copenhagen: DJØF Publishing, 2006) 199-244, 208.

³⁸ P.P. Craig, 'Report on the United Kingdom', in A.-M. Slaughter, A.S. Sweet, J.H.H. Weiler (ed) *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (Oxford: Hart, 1998) 205-206.

³⁹ See C. Booker and R. North, *The Castle of Lies. Why Britain Must Get Out of Europe*, (London: Duckworth, 1996) 195.

European law and its consequences for national sovereignty had been famously denounced in the English system by distinguished judges in the past.⁴⁰ Nevertheless, such simplistic political interpretation may easily mislead and the link between judicial behaviour and attitude towards European integration of the country as a whole, although not necessarily irrelevant, remains questionable and likely less significant than other factors.⁴¹ The House of Lords is indeed also one of the institutions that, in its judgments concerning European law has shown a particular deep understanding of European law, often analysing in detail the characteristics of that legal system or referring to the *travaux préparatoires* of EU law. For these reason, it is necessary to look behind the particular instance of resistance to highlight the interests at stake in each case.

Looking for the implication of resistance strategies for the development of European private law, a few important and famous decisions of that court can be mentioned here, while specific focus will lie on only one of these, which has the clearest consequences. These cases are not even 'clear' in the sense that they unequivocally lead to an easy conclusion as to resistance to European law and the relation between national and supranational law, since that relation is anything but obvious. The cases are rather evidence of the complex dynamics between national and European law and of contrasting tendencies, values and regulatory strategies in legal orders. Not by coincidence, the cases have already resulted in an extensive debate in the literature – not exclusively from the United Kingdom – inasmuch as they deal with core areas of banking and contract law and also have a particularly strong economic and social impact. What characterises these cases is not only the lack of willingness to refer to the Court of Justice of the European Union, but also their particular economic relevance, as they mostly deal with the financial sector. It may be suggested that the two evident features of those cases are interconnected, that is, that the lack of willingness to refer to the Court of Justice has been an instrument for the Court to maintain an exclusive authority to judge on economically and politically important matters.

Limiting ourselves to contract law, this tendency may emerge already from the First National Bank case of 2001, a famous case with pivotal implications for English and European contract law. On 25 October 2001 the House of Lords⁴² had to find whether a term included in the standard loan contracts of the First National Bank fell within the scope of the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR)⁴³ which implemented the Unfair Terms Directive and, if so, whether that term had to be deemed unfair. The disputed term established more specifically that 'If the repayment instalment is not paid in full by that date, [the Bank] will be entitled to demand payment of the balance on the Customer's account and interest then outstanding together with all reasonable legal and other costs charges and expenses claimed or incurred by [the Bank] in trying to obtain the repayment of the unpaid instalment of such balance and interest. Interest on the amount which becomes payable shall be charged [...] at the rate in paragraph D overleaf (subject to variation) until repayment after as well as before any judgment (such obligation to be independent of and not to merge with the judgement)'. The Director General of Fair Trading, in representation of the interests of consumers, alleged that the term was unfair and that the First Bank should therefore discontinue making use of it in its standard contracts. This view was supported by the Court of Appeal which, in quite consumer-friendly terms, considered that 'The bank, with its strong bargaining position as against the relatively weak position of the consumer, has not adequately considered the consumer's interests in this respect. In our view the

⁴⁰ *Bulmer vs Bollinger* [1974] EWCA Civ 14.

⁴¹ W. Mattli and A.-M. Slaughter 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' 268-271, who speak of the necessity to 'move beyond a unitary conception of the state' and, focusing specifically on English case law on supremacy of EU law, P.P. Craig, 'Report on the United Kingdom' 209-212, both articles in A.-M. Slaughter, A.S. Sweet, J.H.H. Weiler (ed) *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (Oxford: Hart, 1998).

⁴² House of Lords, *Director General of Fair Trading v First National Bank plc* [2001].

⁴³ SI 1999/2083.

relevant term in that respect does create unfair surprise and so does not satisfy the test of good faith'. The decision of the House of Lords went in the opposite direction.

The pronouncement of the court was grounded on a particular interpretation of the notion of good faith. The case indeed gave the highest UK Court the opportunity to address the controversial issue of good faith, a concept of allegedly civil law tradition that had been previously openly rejected by common law courts, later introduced in English legislation under the duty to implement the Unfair Term directive which stated that a terms that, 'contrary to the requirement of good faith, [...] causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' is unfair and therefore does not bind the consumer. It is with regard to the introduction of good faith in common law that the famous expression 'legal irritants' was developed.⁴⁴ Despite the often alleged extraneousness of the concept to British law,⁴⁵ in interpreting that provision the House of Lords rejected the view that good faith is something foreign to the English legal tradition as long as one gives a particular interpretation of it: 'the requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps'. The House of Lords concludes affirming that, given this particular reading, good faith 'is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice'. In the national legal system, the requirement of good faith has therefore ended up being interpreted in a restrictive way by the House of Lords,⁴⁶ which made it basically coincide with legal concepts coherent with the English legal tradition and coloured it with a clearly commercial connotation – as a good standard of commercial morality. This reading could be considered as expression of a certain homeward trend. Despite the nebulosity of that concept – quite inherent to such a general and vague notion such as 'good faith' and that led legal literature to draw a considerable number of doctrines from that notion on the continent – and its relative novelty in the English context, the Court stated that the interpretation given was somehow obvious, which allowed it to resort to the doctrine of the *acte clair* in order to avoid a reference for preliminary ruling to the Court of Justice. Their Lordships recognised that 'if the meaning of the test were doubtful, or vulnerable to the possibility of differing interpretations in differing member states, it might be desirable or necessary to seek a ruling from the European Court of Justice on its interpretation. But the language used in expressing the test, so far as applicable in this case, is in my opinion clear and not reasonably capable of differing interpretations'.⁴⁷ As it has been noted by the finest private law literature, this choice is already 'surely surprising given the disagreement between the members of the House of Lords, and the implied disagreement with the lower courts'.⁴⁸ Indeed, literature on the *acte clair* doctrine has discussed the situation in which there is a disagreement between national courts as to the interpretation of a provision as particularly problematic, concluding that such a disagreement does not automatically imply that there is a lack of clarity on the issue and therefore the Court of last instance is obliged to refer the question to the European Court, since it would be possible to affirm that the internal disagreement was determined by the incapacity of a court of assessing the correct

⁴⁴ G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 *Modern Law Review* 11.

⁴⁵ The literature on good faith in English and European private law is vast, generally the novelty of the concept as introduced by the Unfair Terms directive has been emphasised, while comparative and historical analysis have rather insisted that the concept is not foreign at all to the English legal system. Amongst many see, G. Alpa, 'A Glance at Unfair Terms in Italy and England', in G. Alpa, *Markets and Comparative Law* (London: British Institute of International and Comparative Law, 2010) 150 ff; H. Collins, 'Good Faith in European Contract Law' (1994) 14 *Oxford Legal Studies* 229; G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 *Modern Law Review* 11; R. Zimmermann... ; M.W. Hesselink ...

⁴⁶ House of Lords, *Director General of Fair Trading v First National Bank plc* [2001].

⁴⁷ House of Lords, *Director General of Fair Trading v First National Bank plc* [2001] at 17 (Lord Bingham).

⁴⁸ H. Collins, 'The 'Common Frame of Reference' for EC Contract Law: A Common Lawyer's Perspective', in M. Meli and M.R. Maugeri (ed), *L'armonizzazione del diritto privato europeo. Il piano d'azione 2003* (Milano: Giuffrè, 2004) 116.

interpretation of something which remains nonetheless objectively obvious. The price to be paid in this case is of course the necessity to very little diplomatically affirm that the lower judge was totally wrong about the interpretation of such a clear legal rule.

Nevertheless, the *CILFIT* criteria elaborated by the Court of Justice – more interested in the issue of uniformity of EU law among different jurisdiction rather than of etiquette between internal judges – require the interpretation to be obvious rather than to internal judges, to all judges in different member states. Not even this was the case, since, as recognised by the House of Lords, ‘the member states have no common concept of fairness or good faith, and the directive does not purport to state the law of any single member state’.⁴⁹ The mentioned ‘relaxed’ approach followed by the highest national courts in understanding the *CILFIT* criteria is thus manifest in this decision. The result of this interpretation was that the House of Lords could autonomously conclude that the contract term at stake was not covered by the exception concerning ‘the adequacy of the price or remuneration, as against the good or services sold or supplied’ which would have excluded the fairness assessment, but that in concrete the term in itself could not be deemed unfair so that the Bank could continue including it in its standard contracts.

In Particular: The Bank Charges Case and Its Aftermaths

Standard terms of Banks in England were again the focus of an important judgment of the Supreme Court of the United Kingdom in 2009, which has also had a strong media coverage given the relevance of the issue at stake for the economic interests of a high number of consumers involved, whose expectations were bitterly disappointed by the decision of the Court. The case revolved around the fairness of the unauthorised overdraft fees that banks use to charge on customers after performing a payment request for which there is no sufficient coverage in the customer’s account.

This particular set of terms had come under the lens of the Office of Fair Trading which started, in accordance with seven important banks and one building society, a test case to verify whether these could be assessed for fairness under the provisions of the UTCCR. The OFT had indeed found out in specific studies that, despite some positive features and high level of beneficial competition, the personal account market in the United Kingdom was mostly non-transparent and therefore ‘not working well’ for the consumer. In particular, consumers would have only a limited capacity to control the services for which they pay and more seriously ‘low levels of transparency on fees that make up a substantial proportion of the effective payment that consumers make for current account services’ and ‘complexity in the way that these fees, particularly insufficient funds charges, are implemented that makes it hard for consumers to predict when they will be incurred’.⁵⁰ This circumstance gives rise to a problematic situation not only for individual consumers but even for the well-functioning of the market since, lacking basic information, consumers cannot act rationally on the market jeopardising the competitiveness of the system. Ensuring transparency of standard terms is therefore also an instrument to foster competition. What can appear to be mainly a problem of efficiency of the market has nonetheless also a quite important social dimension as well, as just in 2006 twenty three per cent of accounts incurred at least one insufficient funds charge, while the incurrence into a charge once was associated with a high probability of incurring in a new charge later.⁵¹ Overdraft charges are at least statistically strongly linked to phenomena of financial and social exclusion, a concern that had long been addressed in the United Kingdom⁵² and increasingly more at the European level, and which called for policies intended to include a higher number of people in the

⁴⁹ House of Lords, *Director General of Fair Trading v First National Bank plc* [2001] at 17 (Lord Bingham).

⁵⁰ OFT, *Personal current accounts in the UK. An OFT market study* (July 2008) 109.

⁵¹ OFT, *Personal current accounts in the UK*, 66-67.

⁵² HM Treasury, *Access to financial services. The Report of Policy Action Team 14* (1999).

financial market under better economic conditions. On the other hand, this lack of transparency seemed beneficial for the providers of financial services, since insufficient funds charges provides for 2.6bn of banks' revenue on personal current accounts, which means – together with net credit interest income – 85 per cent of the total revenue on personal current accounts.⁵³ While overdraft consumers are charged with these prices, banks rather adopt a 'free-if-in-credit' policy for accounts not going into overdraft. In oversimplified terms, this basically means that the 'poor' paradoxically finances the bank account of the 'rich' – although the free-if-in-credit policy is also financed through low interest rates on deposits. As Lord Mance put it, this is a sort of 'reverse Robin Hood exercise'.⁵⁴ In this context, in which lack of transparency appears to be detrimental to consumer and competition but beneficial for the financial services providers, it is unlikely that the problem can be solved without some form of outside regulatory intervention. The study identified the need to promote transparency, possibly according the principles of 'better regulation', rather than strong regulatory interventions: transparency, accountability, proportionality, consistency and targeted intervention': some forms of 'light touch regulatory intervention' seems necessary in that sector.⁵⁵

While the studies of the OFT showed how important and wide the economic and social implications of the issue were, the question of law discussed by the Supreme Court was narrower, as it only concerned the legitimacy of the OFT to assess the fairness of unauthorised overdraft fees. More specifically, the jurisdiction of the OFT depended on whether those charges had to be considered penalties – so that the standard terms allowing these practices could be deemed unfair in case they determine a significant imbalance in the parties' rights and obligations to the detriment of the consumer – or whether, as sustained by the Banks, overdraft fees are rather a component of the remuneration for the bank services and that, therefore, they pertain to the core economic bargain that cannot be subjected to the fairness assessment. Since permission to appeal on that particular ground was denied by the Court of Appeal, the question as to whether the terms were drafted in plain and intelligible language was not considered by the Supreme Court, so that it was common ground that the relevant terms at stake were in plain and intelligible language indeed. Correctly implementing the European directive of 1993, Reg 6(2) of the UTCCR indeed states that 'In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate (a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange'. Overturning the decision of the Court of Appeal, the Supreme Court found that the overdraft charges were to be considered to form part of the price or remuneration for the 'package of services' offered by the banks and therefore covered by the exclusion from the fairness assessment.⁵⁶ In the metaphor of Lord Walker, 'If for instance a consumer orders a variety of goods from a mail-order catalogue – say clothing, blinds, kitchen utensils and toys – there is no possible basis on which the court can decide that some items are more essential to the contract than others'.⁵⁷ The way in which the Court formed such a decision has nonetheless been matter of criticisms that in this place can be addressed in particular from the European private law perspective.

Core of the decision of the court was not the fairness of the charges, but rather the question whether these can be considered a price or remuneration. This appears to be a complicated problem, as to which unequivocal answers are difficult and different solutions are imaginable, as these terms may be considered 'unreasonable charges for consumer default', embracing clauses 'imposing liabilities for breach that exceed the real losses' or 'in response to consumer actions that are not technically breaches, imposing (via primary obligations) charges and costs that are not reasonably expected in the

⁵³ OFT, *Personal current accounts in the UK*, 3.

⁵⁴ *Bank Charges* [2009] UKSC 6, at 2 (Lord Walker).

⁵⁵ OFT, *Personal current accounts in the UK*, 111.

⁵⁶ *Bank Charges* [2009] UKSC 6, at 47 (Lord Walker).

⁵⁷ *Bank Charges* [2009] UKSC 6, at 39 (Lord Walker).

circumstances'.⁵⁸ Again the Office of Fair Trading had traditionally considered this kind of clauses as unfair.⁵⁹ And indeed the question whether these form part of the price or remuneration had been solved differently by different judges and jurisdictions.⁶⁰ The point was already discussed in the aforementioned First National Bank case. On that occasion, the Supreme Court – at that time the House of Lords – opted for a narrow understanding of the notion of remuneration so that it could exclude that the terms at stake were part of the economic core bargain and subject them to the test of fairness, which, in the concrete case resulted in the fairness of the terms. A similar interpretation had been sustained in the Bank Charges case by the Court of Appeal. The Supreme Court overturned this latter decision, adopting an approach which already appears as partially innovative compared to the one taken in the First National Bank case. This solution has been criticised in the literature, in particular by Whittaker, for being inconsistent also with the different approach followed by the Court of Justice of the European Union in a contextual judgment, *Caja de Madrid*,⁶¹ concerning the legitimacy of the lack of transposition in Spanish law of the exclusion of core economic terms from the fairness assessment.

Considering the different ways in which 'price or remuneration' can be construed and therefore the possibility of divergent interpretations of such a pivotal provision of the directive, a reference to the CJEU for solving the interpretative question as to whether those clauses had to be considered to fall within the scope of the exclusion could have led to a different conclusion. The Supreme Court nonetheless avoided referring the question to the CJEU, again ignoring the disagreement with the lower courts, which, usually, should be indicative of a lack of clarity of a matter. Curiously, in this case the disagreement was not limited to a difference between the Supreme and the lowest courts – which can already put higher Courts in quite an uncomfortable situation inasmuch as they have to consider that lower judges are unable to understand correctly something which is obvious⁶² – but it even was an internal disagreement. Actually, the disagreement did not involve the interpretation of the regulation at stake, as to which there was unanimity among the justices, but rather concerned whether that provision was an *acte clair* or not. From this perspective, the decision not to refer is quite surprising, considering that Lord Phillips stated: 'I do not find the resolution of the narrow issue before the court to be *acte clair*. I agree, however, that it would not be appropriate to refer the issue to the European Court'.⁶³ Evidently, that decision not to refer was based on considerations other than the clarity of the rule: one of this appears to be the alleged 'non relevance' of the question,⁶⁴ the other concerns the intention to avoid delays in the activities of the Court.

Having decided that the issue did not have to be addressed by the European Court, the Supreme Court resorted to a mainly empirical economic argument to assess whether the relevant terms had to be considered to form part of the price or remuneration for the banks' services. Unanimously, their Lordships held that the charges for unauthorised overdrafts 'are a monetary consideration for the package of banking services' which constitute 'an important part of the bank's charging structure,

⁵⁸ C. Willet, *Fairness in Consumer Contracts. The Case of Unfair Terms* (Hampshire: Ashgate, 2007) 291.

⁵⁹ OFT, *Unfair contract terms guidance. Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (2001) 5.8; C. Willet, *Fairness in Consumer Contracts*, 292.

⁶⁰ For a comparison with the German system, see H. Kötz, 'Shranken der Inhaltskontrolle bei den Allgemeinen Geschäftsbedingungen der Banken. Entscheidung der britischen Supreme Court vom 25. November 2009' (2012) 332.

⁶¹ ECJ, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios* (2010) ECR I-04785.

⁶² 'It may seem paradoxical for a court of last resort to conclude that a point is clear when it is differing from the carefully-considered judgments of the very experienced judges who have ruled on it in lower courts. But sometimes a court of last resort does conclude, without any disrespect, that the lower courts were clearly wrong, and in my respectful opinion this is such a case', *Bank Charges* [2009] UKSC 6, at 1 (Lord Walker).

⁶³ *Bank Charges* [2009] UKSC 6, at 91 (Lord Phillips).

⁶⁴ *Bank Charges* [2009] UKSC 6, at 117 (Lord Mance).

amounting to over 30% of their revenue stream from all personal current account customers'.⁶⁵ Moreover, if banks 'did not receive relevant charges they would not be able profitably to provide current account services to their customers in credit without making a charge to augment the value of the use of their funds'.⁶⁶ In this light, Lord Walker clarifies: 'I do not see how [the Court of Appeal] could have come to the conclusion that charges amounting to over 30 per cent of the revenue stream were "not part of the core or essential bargain"'.⁶⁷ The Court therefore employed an economic consideration, implying that intruding on the autonomy of determining a core issue may lead to higher costs for other parties involved, because of the free-if-in-credit mechanism adopted by the Banks. From this perspective, intruding on the autonomy of the parties may alter this economic mechanism, producing externalities and imposing costs on other subjects. The Supreme Court was also well aware of the link between overdraft fees and financing of the particular banking system followed in the United Kingdom, which mostly adopts a free-if-in-credit approach different from the one followed for instance in France.⁶⁸ As Whittaker has critically pointed out, 'rather than an objective approach to the determination of the price', the arguments employed by the Supreme Court 'adopt the viewpoint of the supplier of the goods or services',⁶⁹ failing to see that 'the customer makes no firm commitment to pay [the relevant charges] at all on concluding the contract'.⁷⁰

It was on the contrary exactly from the standpoint of the consumer that the issue had been looked at by the Court of Appeal, which referred to the 'typical' (i.e. average) consumer to understand whether the terms were part of the essential bargain between the parties.⁷¹ Even more interestingly in particular in a *jus commune* perspective is that exactly the same perspective of the 'average customer' is adopted in other jurisdictions such as Germany as a criterion to distinguish primary from secondary obligations and consequently decide whether a contract term may be tested by courts.⁷² The reason for this solution is that the typical consumer has in mind mostly the primary obligations while he pays less attention to the secondary ones, regardless of the fact that these are drafted in a plain and intelligible language. Indeed, already the study of the OFT had highlighted that 'The bulk of consumers pay little or no attention to the key elements of either insufficient funds charges or the interest they earn on credit balances. Only five per cent of consumers surveyed considered overdraft fees – arranged and unarranged – important when choosing a [personal current account]',⁷³ and many were not even aware of the existence of certain fees.⁷⁴ This interpretation was eventually rejected by the Supreme Court: identifying the price or remuneration 'is a matter of objective interpretation by the court'.⁷⁵

Nonetheless, while the conclusions of the Supreme Court have been criticised from different perspectives, there is one specific point as to which their Lordships were incontrovertibly right: 'this decision is not the end of the matter'.⁷⁶ Outside the courtroom, government-supported banks Northern Rock, HBOS and RBS were soon asked to review their overdraft charges terms in order to make them fairer to consumers, but even before the decision of the Supreme Court was rendered, the Office of

⁶⁵ *Bank Charges* [2009] UKSC 6, at 47 (Lord Walker).

⁶⁶ *Bank Charges* [2009] UKSC 6, at 88 (Lord Phillips).

⁶⁷ *Bank Charges* [2009] UKSC 6, at 47 (Lord Walker).

⁶⁸ *Bank Charges* [2009] UKSC 6, at 1 (Lord Walker).

⁶⁹ S. Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74 *The Modern Law Review* 106-122, 116.

⁷⁰ S. Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges', 117.

⁷¹ S. Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges', 112.

⁷² H. Kötz, 'Shranken der Inhaltskontrolle bei den Allgemeinen Geschäftsbedingungen der Banken. Entscheidung der britischen Supreme Court vom 25. November 2009' (2012) 343.

⁷³ OFT, *Personal current accounts in the UK*, 4.

⁷⁴ OFT, *Personal current accounts in the UK*, 5.

⁷⁵ *Bank Charges* [2009] UKSC 6, at 113 (Lord Mance).

⁷⁶ *Bank Charges* [2009] UKSC 6, at 62 (Lord Walker).

Fair Trading had already started negotiations with the industry to introduce changes in standard contracts and in October 2009 announced that banks had agreed to make costs related to personal current account more transparent. Since the decision of the Supreme Court, particular attention has then been paid to unarranged overdrafts. The OFT and the industry agreed to introduce changes to the contract terms in particular in matters relating to ‘the development of minimum standards to cover how consumers are offered the ability to opt out of unarranged overdraft facilities’.⁷⁷ At the same time, ‘On clarity and predictability, the OFT expects some PCA providers to introduce new products that provide consumers with greater clarity and predictability around unarranged overdraft charges, including in some cases a shift away from charges based on transactions towards other forms of charging.’⁷⁸ In the expectations of the OFT, these changes will produce benefits not only for a competitive market but also for consumers, who will be likely to pay less charges and have less difficulties in opting out of unarranged overdraft facilities. These results can be achieved through ‘co-regulation’ rather than strong legislative intervention: ‘Given the significant developments underway, the OFT considers that a market-based approach with banks competing to find the best way of addressing the needs of their customers is likely to be preferable to a regulatory ‘one size fits all’ approach. As a result, the OFT is not recommending legislative change at the present time’.⁷⁹ One year later, the minimum standards for personal current account providers covering how they offer customers the ability to opt out of unarranged overdraft facilities as well as best practices on how to deal with customers in difficult economic situations who incurred unarranged overdraft charges were finalised and introduced in the new Lending Code of 2011.⁸⁰ At the same time the OFT could confirm its prevision on a decrease in the average cost of unpaid item charge.⁸¹

In this sense, while the judiciary maintained a conservative position which resulted in a defence of parties’ autonomy, regulation (in a broad sense) is intervening nonetheless through different national channel, more specifically authorities such as the Office of Fair Trading.

Conclusion

Can the fact that the Supreme Court of the United Kingdom chooses not to refer to the ECJ / CJEU in such important and unclear legal issues be interpreted as a resistant and likely Eurosceptic attitude of that Court? Actually, it is impossible to speak of resistance in the sense of a simple avoidance of the application of European (secondary) legislation such as the one that could occasionally emerge at the judiciary level in particular in the first years of activity of the European Communities. The cases considered directly concerned the application of national legislation with regard to the implementation of European law, which moreover had been correctly transposed in the British legal system by the legislator (this could even be considered as a problematic element, given the lack of coordination with the UCTA regulation dating back to 1974). The justices of the Supreme Court are certainly well aware of the reference procedure and even addressed this issue explicitly in their decisions, discussing, as in the Bank Charges case, whether a reference to the European Court was necessitated. What is more, in order to legitimate their interpretation the justices of the Court resorted to the *travaux préparatoires* of European directives, considering not only the history of the drafting of black-letter rules but also inquiring the purposes of those interventions and even engaged in a comparison with other language versions (that, however, in the Bank Charges case ‘cast little light on the interpretation of the English text’⁸²). These are complicated and time-consuming activities that surely not many national judges are

⁷⁷ OFT 1216 (March 2010), 4.

⁷⁸ OFT 1216 (March 2010), 9.

⁷⁹ OFT 1216 (March 2010), 54.

⁸⁰ OFT 1319 (March 2011), 4-5.

⁸¹ OFT 1319 (March 2011), 5.

⁸² Bank Charges [2009] UKSC 6, at 5 (Lord Walker).

inclined or even able to perform and in light of which the stereotypical association English-Eurosceptic, translated in the legal field, appears as an unsophisticated simplification. What emerges from the cases is rather that, as demonstrated in the literature on Community law as a general trend of a high number of national courts, the English supreme judges too applied a particularly ‘relaxed’ understanding of the conditions under which a question has to be referred – continuously ignoring the disagreement with the lower judges and even internal to the Court – together with a certain homeward biased interpretation of supranational legal categories which could have deprived European private law of some of its regulatory strength.

Considering for instance the First National Bank case, the interpretation given of the standard of good faith appears as a conservative one which on the one hand challenged the trite assumption of this notion being irreconcilable with the English legal tradition but which on the other hand may have impaired some of the innovativeness of the concept, since ‘[b]y defining good faith as a requirement for the trader to take into account the interests of the consumer, the Directive poses a challenge to purely self-interested rationality which so often provides the values which guide the common law of contract’.⁸³ Within the space of autonomy so obtained, the Court gave mainly conservative interpretations in light of the English common law shielding parties’ autonomy, and notably that of the banking sector.

As the Bank Charges case shows, the ‘price’ appears to be the aspect of market transactions as to which contract law mostly remains anchored to a traditional autonomy perspective,⁸⁴ and in which regulatory interventions encounter more trouble intruding. This holds true also at the European level, since also the Unfair Terms directive left the control on the economic bargain of the contract untouched as a compromise between consumer protection and freedom of contract. The reason for that choice, as expressed in the comments to the Acquis principles is two-folded: on the one hand a judicial control on the adequacy of price would presuppose the existence of criteria to determine a *iustum pretium*, on the other hand and more fundamentally, that control would be ‘incompatible with the needs of a market economy’.⁸⁵ In this context, it can be misleading to establish a simple link between consumer protection and European law on the one hand and freedom of contract and national law on the other hand, all the more considering that some member states have extended judiciary control also to price and remuneration (this was the situation that led to the *Caja de Madrid* case in front of the CJEU) and that the first legislative attempts to regulate standard terms originated in national context, and specifically in the English one. The situation is undoubtedly more nuanced. Nonetheless, when it came to the interpretation of economically complicated border-line cases, the interpretations offered by the UK Supreme Court favoured an approach meant to shield parties autonomy. The Supreme Court moreover showed not to take in particular consideration reasoning based on the behaviour of a typical consumer – a category which is now gaining momentum in European private law discourse – who is often not be fully aware of certain contract terms, rather favouring a classical view of the consumer as a rational economic actor, perfectly able to identify the core terms of a contract. This can be seen as coherent with the circumstance that the common law has shown a ‘traditional resistance to test the fairness of contracts’ from which the combined formal-substantive fairness test of the unfair terms directive marks a departure.⁸⁶ The regulatory technique of the European directive therefore infringes on the traditional approach of English law, including the provisions of the UCTA which,

⁸³ H. Collins, ‘Good Faith in European Contract Law’, 254.

⁸⁴ H. Collins, *The Law of Contract. Fourth edition* (London: LexisNexis, 2003) 9.

⁸⁵ Research Group on the Existing EC Private Law, *Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Munich: Sellier, 2007) 241.

⁸⁶ H. Collins, ‘Good Faith in European Contract Law’, 253.

intended as part of a broader welfarist project with a specific political colour,⁸⁷ was mostly limited to exemption clauses.

The judiciary result of the case appears nonetheless to be mostly due to the choices taken by the English legislator, which the Supreme Court has just interpreted in a strict way. It indeed appears as a new instance of formalism as a means of resistance as described in the literature. The English legislator could have adopted a broader approach meant to provide higher consumer protection, such as the Spanish and several other legislators did and as it emerged to be legitimated according to the *Caja de Madrid* decision. This option was nonetheless not taken by the English legislator. That this was a deliberate economic-political choice is clearly highlighted, analysing the political background of the English legislation, by Lord Walker: Ministers and Parliament ‘decided, in an era of so-called “light-touch” regulation, to transpose the Directive as it stood rather than to confer the higher degree of consumer protection afforded by the national laws of some other member states.’⁸⁸ The ideological dimension inherent to the matter was even clearer in the observation of Lady Hale: ‘As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice. [...] Fortunately, however, that is for Parliament and not for this Court’.⁸⁹

At the same time, behind the denial of reference to the European Court lies a further consideration: parties before the judge are certainly more interested in their case solved as soon as possible rather than in the uniformity of interpretations throughout Europe and be therefore quite hostile vis-à-vis the preliminary reference mechanisms. There is even some empirical evidence that, at least before the lower courts, just presenting the mere hypothesis of referring to the CJEU has a stimulus function for the litigants, who are more persuaded to rapidly find a conciliation.⁹⁰ In this sense, the avoidance of the reference has also been determined by the intention of the Supreme Court to avoid delays in the definition of the case. The point was explicitly admitted by Lord Walker in the *Bank Charges* case: ‘Neither side showed any enthusiasm for a reference, because of the further delay that would be occasioned in a very large number of claims at present stayed. The Court is entitled to take the likely delay into account, although not as an overriding consideration, in deciding whether to make a reference’.⁹¹ In the end, the Court decided not to make that reference considering that ‘[t]here is a strong public interest in resolving the matter without further delay’.⁹² Such necessity may be adverted more strongly by the UK Supreme Court, which, as a court of last resort, is already used to receive very few cases per year compared with analogous institutions in other European countries, before which a higher number of cases – often with consequent higher delays in the judiciary activity – are heard. The need for considering the economic costs and the possible delays determined by a reference were even explicitly mentioned by Lord Denning as further criteria to be considered before asking a preliminary ruling.⁹³ Those considerations – that were nonetheless mainly developed by the judge of a lower court, who as such has a larger margin of appreciation to determine whether a reference should be made – were later dismissed by the English courts as these took a less reluctant approach to EU law and recognised that it not up to the national judge determining issues of Community law⁹⁴ but seem to have now re-appeared in the considered more recent case-law of the Supreme Court. It is however

⁸⁷ On the political and economic background of the English law of standard terms, L. Niglia, *The Transformation of Contract in Europe* (The Hague: Kluwer Law International, 2003) 85-88.

⁸⁸ *Bank Charges* [2009] UKSC 6, at 52 (Lord Walker).

⁸⁹ *Bank Charges* [2009] UKSC 6, at 93 (Lady Hale).

⁹⁰ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*.

⁹¹ *Bank Charges* [2009] UKSC 6, at 48 (Lord Walker).

⁹² *Bank Charges* [2009] UKSC 6, at 50 (Lord Walker).

⁹³ *Bulmer v. Bollinger* [1974] EWCA Civ 14.

⁹⁴ P.P. Craig, ‘Report on the United Kingdom’, 205-206, referring to *Commissioners of Customs and Excise v. Samex* [1983] Queen’s Bench Division 3 CMLR 194.

doubtful that this approach is compatible with the *raison d'être* of the preliminary reference procedure, which is to ensure effectiveness and uniform interpretation of European law. While discretion is left to lower judge, who may also be free to consider also the preferences of the parties as pointed out by Lord Denning, such autonomy does not seem to exist for the courts of last instance: referring to the CJEU in case of interpretative doubt is a duty for national judge and not a further method of appeal to the benefit of the parties of the procedure. This reveals an underlying contrast between the rationalities underlying the two judiciary systems, one more focused on the celerity of problem-solving and the other about the uniformity and effectiveness of law. In this light, it is likely that in particular situations, this difference may lead to some kind of resistant behaviour.

In particular, while the necessity for trials to be solved rapidly may be felt as particularly important by any national court (as to this aspect, Lord Denning referred to analogous considerations by a German court),⁹⁵ this is of pivotal importance for the interests of business contract parties, and, consequently particularly important also for a well-functioning judicial system which aims to maintain a competitive, and actually the leading, position in Europe as the jurisdiction of choice for businesses transactions.⁹⁶ Both in the literature and in the perception of economic actors, there is quite a strong opinion that the English common law system has a strong 'business-friendly' connotation, so that, with the necessary modifications, English law still appears as the law 'designated for a nation of shopkeepers' comparative lawyers spoke of some years ago.⁹⁷ Rather than to some kind of specific trait of the Englishmen, this is mostly due to economic specialisation and the particular institutional conformation of the court system of the country, which makes access to the Supreme Court accessible basically only to businesses and for particularly economically important issues.⁹⁸ While the considered decisions of the Supreme Court contribute to continue seeing the English system under that particular viewpoint, the view that the whole English legal system remains basically the realm of freedom of contract would therefore be deceptive. Quite to the contrary, in particular the aftermath of the decision by the Supreme Court in the *Bank Charges* case has shown that the market is being regulated not by traditional legislative instruments, but through co-regulation practices promoted by administrative authorities.

⁹⁵ *Bulmer v. Bollinger* [1974] EWCA Civ 14, at 9(2)1 (Lord Denning).

⁹⁶ This exigency is felt as being so important that Section 2 (3) (e) of the Financial Services and Markets Act 2000 (FSMA) requires the Financial Services Authority to have regard to 'the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom'.

⁹⁷ O. Kahn-Freund, C. Lévy and B. Rudden, *A Source-book on French Law* (Oxford: Clarendon, 1979) 318.

⁹⁸ H Kötz, 'The Jurisdiction of Choice: England and Wales or Germany?' (2010) 6 *European Review of Private Law* 1243-1257, at 1251-1252.

CONFLICT AND RESISTANCE – THE NATIONAL PRIVATE LAW RESPONSE

*Horatia Muir Watt**

I have been asked to assemble some introductory ideas to start the discussion on the “conflict and resistance” generated in national private law systems by the rise of European (regulatory) private law. At the outset, it must be said that this question covers a great deal of ground, much of which is already far too well-trodden to be of much interest here. Perhaps the most promising angle would therefore be to focus debate on the various shifts which seem to be taking place currently within the various sites of national resistance to European private law.

I.

It may be useful to consider, first, the political economy of national resistance. Clearly, there are both ostensible and hidden reasons behind the resistance in Member states’ legal systems. Complex and often invisible alliances may link different stakeholders in counterintuitive ways. For instance, according to the national sovereignty/European unity divide, hostility towards European Union private regulatory law may go hand in hand with rejection of European human rights law and the pursuit of cultural diversity. On the other hand, it may, on the contrary, federate ideological opposition along the neoliberal/redistributive divide, where champions of national tradition and pursuers of social justice through human rights may find themselves allied against the claims of the market-based ideology which is generally perceived to be promoted by the European Union and its Court.

Thus, political resistance may exist either because European law is supranational, and thus a threat either to sovereignty or local culture, or because it is regulatory, heralding a contested model of private law. It may vary therefore, according to whether the system is linked to a strong or weak economy, in which the regulatory turn in the law is perceived to play (for better or worse) a significant causal role. Conflicts may again be more or less likely according to whether European private law is seen as a salutary factor of progressive change from an oppressive political regime, or on the contrary as destructive of national tradition or indeed as a downgrading of domestic standards. Embracing European private law may be perceived as empowering by smaller state actors and threatening by the more influential. And of course, each national Member state comprises highly heterogeneous groups, which may seize on European private law as a means of contestation of an established order, or on the contrary resist its impact on vested power structures such as the local notariat or the bar.

Less obviously, analogous factors may be at play within the academic world which participates in the articulation of the very idea of a European private law. In academic circles, being seen as a player on the European law scene may be a way of asserting influence within the domestic or wider international context. Since standardization projects bring the windfall of European Union funding, there is an obvious academic race to “join in” the various unification programs. As the trajectory of the European civil code project over the past ten years shows, such participation has often involved changing an intellectual stance according to the policy choices of the powers that be. The rest of the academic community looks on bemused at the conflicts which surface from under the draft common frame of reference, or the creation of the European law Institute. However, the band-wagon syndrome is so obvious that in many circles, pursuing prestige through European funding also means running the risk of being outcast to the “foreign and exotic” department, and gives an unfortunate academic name to exercises in European private law teaching and research.

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Economic lobbies may stand to gain, or not, from legal standardization. This factor is of course at the heart of the familiar debate over the Commission's private law unification projects. Powerful interest groups may be wary of losing the economic benefit of national legal idiosyncracies which accommodate forum shopping or compartmentalize markets. But they may on the contrary profit considerably not only from the economies of scale which the disappearance of conflicts of laws is supposed to bring, but also from the rise of economic freedoms at the expense of national regimes of social justice. On the other hand of course, less powerful or at least less organized consumer groups may either fight for higher protection through European private law or reject it in turn either as eroding more generous domestic standards, or as serving as a Trojan horse for an information-based model of contract law, with insufficient regard to substantive consumer welfare.

II.

This analysis might then make it easier to identify the processes and focuses of resistance. What sorts of arguments are opposed to European regulatory private law and what are the types of conflicts upon which they crystalize? The sites of resistance have traditionally been found in culture, politics, methodology/epistemology and economics. But as the complex political economy of resistance suggests, arguments drawn from these areas are all highly intertwined, but at the same time may combine or conflict in unexpected ways.

Thus, among cultural concerns, language has been a focal point for resistance. Since legal unity can hardly come with linguistic diversity (the argument goes), much opposition has been expressed in terms of defense of national languages, big and small. English having gained ground meanwhile in the outside commercial world, resistance tends now to be essentially academic, leading the weaker among the non-native English-speakers to engage in a losing battle over the linguistic justice of law review publications. The price to be paid within the European Union for linguistic diversity is a highly costly translation of all official documents - of which private regulatory law is but a (albeit substantial) part - in all the recognized languages. The dominance of English in practice does however seem to be linked to the appearance of a new regulatory language within the law, in which the very term "regulatory" or "regulation" is the subject of some confusion.

But of course, the cultural debate was framed from an early stage in terms of methodological and epistemological opposition between civilian and common law traditions, codes and non-code, the latter being staged as a minoritarian stance within a largely civilian Europe - curiously mirroring the reverse picture outside, where linguistic and cultural majorities have largely tended to coincide. This is of course a standard debate in comparative law and there is no need here to recall its terms. It suffices here to point out that this debate does not seem to capture the contemporary regulatory technology of European law, whose hand, both visible and invisible, obviously comes in many forms other than codes or case-law. Open method of coordination, internal market clause, mutual recognition, minimal or maximal harmonization through directives, soft law, self-regulation, proportionality analysis, use of indicators ... all engage novel methods of law-making which, beyond methodological issues, rather provide food for political thought.

In turn however, the civilian tradition has largely come to stand for an ideological model of social justice and redistribution, as opposed to a perceived common law-driven, English-speaking, neo-liberal model of private contract law supported by the economic freedoms, and perhaps paradoxically (given its lack of popularity in such circles), by an activist Court, more versed in competition law than in concerns of collective equality. But the terms of the economic debate, like the alliances it inspires, are again more complex than meets the eye, since the case for diversity in national legal systems is made both by partisans of regulatory competition whose stance tends to be neo-liberal, and by those concerned with the status of cultural minorities, who are usually, if not necessarily, located at the other end of the political spectrum. Moreover, within the camp for European private law and even among the supporters of its current regulatory turn, models may vary along a spectrum ranging from the

“competitive” within Hans Micklitz’ reading, to the centralized or distributional, passing through the informational, all of which also have various anthropological foundations, or connect to diverse claims in social theory.

III.

Within all these sites of resistance, various interesting shifts are becoming visible. It seems to me that these shifts reflect contemporary global governance debates, or new trends in critical de-compartmentalized legal analysis, which were kept at bay for a surprisingly long time during the formation years of the internal market. European private law has now therefore to come to terms with the situation of Europe itself within a wider world, and with the rise of other European or supranational legal sources, whether conflicting or confluent, which can impact considerably upon the field of private law. Attention can then be drawn to the fragile equilibrium on which it is built. Crises – whether the sovereign debt crisis or climate change - may also be working beneficially to enlarge its horizon in some respects.

Thus, among the methodological issues in adjudication, the deduction/induction debate linked to the common law/civil law divide seems to be more or less exhausted (which does not mean it is solved), and has to a large extent been superseded by conflicting views on the emergence of proportionality in private law reasoning. Here, however, while national-traditionalists may oppose the impact of public law methods in private law, those in favor of the horizontal effect of human rights in private litigation may prefer the flexible appearance of judicial balancing, perceived as more open to the equities of each case. Yet proportionality can also be preferred by those who hold the view that the pursuit of economic freedoms should prevail over the national interest in maintaining dissuasive levels of social protection. Moreover, the rising influence of distributional analysis in private law leads to awareness that wider concerns in the field of labor law, family law or immigration can provide the invisible background for the functioning of private law rules, so that much that goes into the balancing weighs in unseen.

Remarkably, too, the various public and private actors with stakes in these various debates are changing swiftly. Horizontal effect oblige, clashes between the two European Courts over private law issues are appearing increasingly, in virtual or real form. Thus although the recent Ullens case before the European Court of Human Rights concerns the field of criminal law, the procedural conflict it revealed between national *res judicata* and primacy of European Union law, could of course easily arise in the field of private law. Similarly, the equally recent Sneersone conflict, in which the procedural expediency pursued by Regulation Brussels II bis clashed with fundamental rights before the same Court, could well play out in a field other than family law, such as in contract cases involving jurisdictional immunities. The Germany v. Italy case before the CIJ illustrates the type of conflict which might arise in the context of tort litigation.

There may well be also a shift taking place in the focus of public and academic awareness and concern from the protection of the European consumer to the third world farmer. The law of the internal market grew up with little concern for third states either as players, or as the location of private economic actors, or indeed as the geographical origin of diverse categories of economic or ecological migrants and refugees from war and violence. European regulatory private law is concerned by these limitations to the extent that it operates functionally and geographically to ensure the smooth working of the European consumer market at the end of the agricultural and industrial production chain, which typically originates in developing countries. At least one benefit of the current world crises, financial and ecological, may be to create public awareness of poverty, famine, and destruction of natural resources beyond the frontiers of Europe but in the service of its consumers. Similar consciousness-raising could usefully draw attention to the highly significant global governance implications of European laws of contract, tort, property and the conflict of laws, and their articulation with WTO law and fundamental rights.

Finally, although private law is not the most obvious point of impact of the sovereign debt crisis, there are in fact many points on which weaknesses in the private law regime for debt and default may have contributed to worsen its consequences. But beyond these aspects of the substantive law of complex obligations or contractual structures, the much decried role of rating agencies may not only lead to improving modes of public accountability and private liability, but to giving specific attention to the use and abuse of private benchmarking as a market substitute for public law-making. Academic awareness of private trans- or post-national rule-making is already developing fast in Europe in various fora. But in a similar vein, the epistemology and the politics of the use of indicators by public lawmakers, including the European legislator, needs to be addressed. The shift in focus suggested here concerns the means through which is constructed the knowledge on which policy and legislation are built and monitored.

Section III: APPLICATIONS AND EXAMPLES

1) Remedies

RESHAPING THE BOUNDARIES OF THE ENFORCEMENT OF EUROPEAN SOCIAL REGULATION: UNITAS IN DIVERSITATE – THE CONSTRUCTION OF A HYBRID RELATIONSHIP

Betül Kas*

Introduction

The aim of this paper is to investigate the interplay between the European and the national level when it comes to shaping remedies within the area of European social regulation as for instance consumer law, anti-discrimination law, unfair commercial practices and aspects of the regulated markets. The European enforcement structure is based on the concept of '*executive federalism*', meaning that the substantive rules adopted by the European level are applied and enforced by the national courts and the national public authorities.¹ Under the principle of procedural autonomy, national procedures and remedies are then applicable before the national enforcers for the enforcement of European rights. However, the principle of procedural autonomy seems to have lost its relevance as the European Union is exerting more and more influence on the national enforcement structures by borrowing its competence in enforcement matters from the respective subject-related substantive area at stake.² The growing European influence on the national enforcement structures, whether resulting from subject-related secondary Union law, the case-law of the Court of Justice of the European Union or the role of the European Commission in a network of national authorities, raises the need for a new conceptualization of the interplay between the European and the national level in enforcement matters.

The hypothesized conceptualization of the relationship between the European and the national level is that of "hybridization", meaning that the national level is required to shape its remedies according to a European minimum standard. Hybridity means that the legal character of the respective remedy is neither European nor national but bears elements of both legal orders. Hybridization processes are hypothetically able to achieve *unitas in diversitate* in the sense that the different national legal systems are not homogenised but each national legal order determines individually how it shapes its remedies in compliance with the European standard. In order to determine the processes that give shape to remedies in the area of European social regulation and to examine whether the concept of "hybridization" has an explanatory ability to define current trends, the research will be carried out by way of case-studies.³

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¹ H.W. Micklitz, "The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-made European Law on Remedies," in *The ECJ and the Autonomy of the Member States*, ed. B. de Witte and H.W. Micklitz (Cambridge, Antwerp, Portland: Intersentia, 2011), 367.

² E. Storskrubb, "Civil Justice - A Newcomer and an Unstoppable Wave?," in *The Evolution of EU Law*, ed. P. Craig and G. de Burca (Oxford: Oxford University Press, 2011).

³ It has to be pointed out that in the selection of cases, there is currently a bias for the judiciary (i.e. the case-law of the Court of Justice of the European Union) which is due to the (at the current state of research) opaque operations of the networks of national administrative authorities and particularly the extent of influence the European Commission is exerting over the national authorities via those networks and the degree of autonomy left to the national authorities. Moreover, gaining

The paper will start by providing a sketch of the European enforcement structure and thereby set the scene for the rest of the paper by distinguishing three forms of enforcement: “judicial”, “administrative” and “extra-judicial” enforcement. The paper will illustrate the patterns of the hybridisation processes by example of three case studies, namely the *Putz/Weber*⁴, *Janecek*⁵ and *Alassini*⁶ case, each linked to the three forms of enforcement. Following, the paper will develop a constitutional perspective and draw on integration theories to conceptualize the relationship between the national and the European level in shaping hybrid remedies. Particularly, it will be claimed that current legal integration theories as based on hierarchical thinking or perceiving the European and the national level on equal footing fail to grasp the complex interplay between both levels.

Part I: Setting the Scene - The European Enforcement Structure

This part intends to give a broad overview of the institutional and remedial dimension of the enforcement of European law in general and in the area of social regulation in particular. The focus will be on the extent of influence exerted by the European level on the national enforcement structures. Looking at the central enforcement instruments under the Treaty, it becomes clear that the European level has no structure at its disposal to ensure the effective enforcement of European social regulation independently from the national level but depends in that regard on the national courts and national administrative authorities. While constitutional barriers exist to the development of a European enforcement policy, resting on the principle of subsidiarity⁷ and even more on the principle of procedural autonomy⁸, those did not hinder the European level to heavily intervene into the national enforcement structures. It will be shown that the increasing European influence on the institutional organisation of the national enforcement structures as well as on national remedies and procedures sheds doubt on the continued relevance of the principle of procedural autonomy and raises the need for a new conceptualisation of the interplay between the European and the national level in enforcement matters.

The Institutional Perspective of the European Enforcement Structure

The Limitations of the Central Enforcement Instruments under the Treaty

In principle, European law can be enforced by administrative or judicial mechanisms as well as centrally or decentrally. While central administrative enforcement takes place via the infringement

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access to case-studies regarding the enforcement actions taken by the national authorities is more difficult than obtaining access to court decisions.

⁴ Joined Cases C-65/09, *Gebr. Weber GmbH v Jürgen Wittmer* and C-87/09, *Ingrid Putz v Medianess Electronics GmbH* [2011] ECR 00000.

⁵ C-237/07, *Janecek v. Freistaat Bayern* [2008] ECR I-6221.

⁶ C-317-320/08, *Rosalba Alassini et al. v. Telecom Italia* [2010] ECR I-02213.

⁷ The principle of subsidiarity was introduced into EU legislation by Article 5 (3) TEU, providing: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

⁸ The classic statement of the procedural autonomy of the Member States can be found in the *Rewe* and *Comet* case: “[...] in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [...] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.” Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5; Case C- 45/76, *Comet* [1976] ECR 2043, para. 13.

procedure before the European Commission set out in Articles 258 TFEU⁹, central judicial enforcement can be initiated before the Court of Justice of the European Union via the annulment procedure provided for in Article 263 TFEU. Although the centralised enforcement of European law was the primary method of enforcement foreseen by the Treaty of Rome, the protection offered by both instruments is limited. The annulment procedure allows challenging only the legality of European acts but not the conduct of the Member States or private parties. Moreover, the restrictive standing requirements of “*direct and individual concern*” pose many obstacles for private parties. Also the standing conditions for NGOs under the annulment procedure are a subject of controversy. The changes under the Treaty of Lisbon loosened the standing requirements in only very limited circumstances: Under the new regime, private parties need to show *only* “direct concern” when a regulatory act which does not entail implementing measures is at stake.¹⁰ Even though it has to be noted that there is a tendency of the Commission to use the infringement procedure to ensure the enforcement of European law, in principle, the infringement procedure aims to ensure the proper implementation of European law and not its application.¹¹ Furthermore, the Commission’s limited resources and its large discretion in setting its priorities need to be stressed.¹² Also the powers of the European Ombudsman as established by the Maastricht Treaty in 1992 are limited: His role is restricted to investigate complaints of private parties about maladministration in the institutions and bodies of the European Union and he attempts to find an amicable resolution of the dispute between the parties.¹³ As the centralised enforcement instruments are subject to many restrictions and limitations, a decentralisation of the judicial and administrative enforcement structures took place, leading to a situation in which the responsibility to enforce European law is currently shared among various actors.

Decentralised Judicial Enforcement: National Courts with a European Mission

The Court of Justice has over time construed a system of decentralised judicial enforcement based on the doctrines of *direct effect* and *supremacy*. In *van Gend and Loos* the Court of Justice created the principle of direct effect, according to which European law provisions are capable of conferring rights on individuals which the national courts are bound to recognise and enforce, provided the respective European provision is sufficiently clear, precise and unconditional.¹⁴ In *Costa v Enel* the Court of Justice established the principle of supremacy pointing out that the European provisions take precedence over all conflicting national law, whatever its rank in the national hierarchy of sources.¹⁵

⁹ For reasons of completeness, the Article 259 TFEU procedure has to be mentioned, which allows a Member State to initiate the infringement procedure against another Member State. However, this mechanism is considered to be a “dead letter” in legal scholarship. For political reasons, it is well known that Member States are very reluctant to use this procedure. See: S. Weatherill, “Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective,” in *The Future of European Remedies*, ed. T. Novitz et al. (Oxford and Portland, Oregon: Hart Publisher, 2000).

¹⁰ M. Eliantonio and B. Kas, “Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?,” *Journal of Politics and Law* 3, no. 2 (2010).

¹¹ Micklitz has shown that in some policy areas where the Commission has formally no enforcement power, the Commission is using the infringement procedure not only to make sure that European law is properly implemented but that the respective European rules have been properly applied, meaning enforced. An example for this is the area of European environmental law. For further details see: H.W. Micklitz, “Administrative Enforcement of Private Law,” in *The Foundations of European Private Law*, ed. R. Brownsword et al. (Oxford: Hart Publishing, 2011).

¹² M. Dougan, *National Remedies before the Court of Justice : Issues of Harmonisation and Differentiation* (Oxford; Portland, Or. : Hart Publishing, 2004). 1-2; M. Eliantonio, *Europeanisation of Administrative Justice* (Groningen: Europa Law Publishing, 2009). 3-11.

¹³ See: Article 288 TFEU.

¹⁴ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁵ Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

The implications of the principle of supremacy were clarified in the *Simmenthal* judgement, in which the Court of Justice held that “every national court, must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers upon individuals and must accordingly set aside any provisions of national law which may conflict with it, whether prior or subsequent to the Community rule.”¹⁶ Moreover, in *Marleasing*, the Court of Justice made clear that national courts are obliged to interpret national law, as far as possible, in the light of European law.¹⁷ Article 4 (3) TEU, the principle of loyal cooperation, was regarded by the Court of Justice as the principal legal basis for the duties of national courts under European law. Consequently, the Court of Justice imposed on national courts a European mission and thereby turned them into “European” courts.¹⁸

In the decentralised judicial structure, the preliminary ruling procedure as provided for in Article 267 TFEU constitutes a unique method of co-operation between the national courts and the Court of Justice. It allows the national courts to seek assistance from the Court of Justice with regard to the interpretation and application of European law. The preliminary ruling procedure aims to ensure that European law is applied uniformly. In order for the preliminary ruling procedure to function, the national court and the Court of Justice need to mutually communicate. As pointed out by *Micklitz*, this could be difficult for the following reason: The national court needs an interpretation by the Court of Justice of a European provision in order to solve a specific national dispute. On the other hand, the Court of Justice is aware that it will give a judgement, which is valid for the whole European Union.¹⁹

Decentralised Administrative Enforcement: Setting up of National Public Authorities

Looking at secondary Union law in the area of social regulation, the choice between judicial and administrative enforcement has been primarily left to the Member States in accordance with the principle of procedural autonomy.²⁰ However, a trend is emerging, which requires the Member States to set up national authorities responsible for the implementation and enforcement of European law. These initiatives are rather patchy as they depend on the substantive area at stake. This development can be observed for instance in the areas of the regulated markets, particularly in the context of the liberalization and privatization of former state monopolies, as for instance in the areas of financial services, electricity, gas, telecommunication, postal services and transport. Even though the Member States have autonomy of organization and procedure, European influence is intensifying. While these public authorities focus their activities currently on ensuring the workability of the respective market, secondary Union law is pressuring the Member States to include the protection of customers into their main activities.²¹ A further example can be found in the area of consumer protection as the Consumer

¹⁶ Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para. 21.

¹⁷ Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1991] 1 ECR 4135, para. 8.

¹⁸ S. Prechal, “National Courts in EU Judicial Structures,” *Yearbook of European Law* 25(2006).

¹⁹ H.W. Micklitz, *The Politics of Judicial Co-operation in the EU - Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press, 2005). 41.

²⁰ F. Cafaggi, “The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective.,” *Loyola Consumer Law Review* 21(2009): 502. For instance, in the area of consumer protection, Article 2 of Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests left the choice between judicial enforcement, administrative enforcement or both to the Member States. A further example can be provided by Article 7 of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, requiring Member States that judicial and/or administrative procedures are available for the enforcement of the obligations under the directive.

²¹ Directive 2004/39/EC of 21 April 2004 on markets in financial instruments; Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity; Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas; Directive 2009/136/EC of 25 November 2009 on universal service and users' rights relating to electronic communications networks and services. See also: Micklitz, “Administrative Enforcement of Private Law.”

Protection Cooperation Regulation 2006/2004 requires the Member States to establish national authorities, which are responsible for the enforcement of consumer law in trans-border litigation and are entitled to issue actions for injunctions.²²

The question arises as to what extent the European level can exert influence on the enforcement actions to be taken by the national authorities. A design seems to appear, which links the national authorities, as well as the Commission, in an enforcement network. Networks of national regulators may enhance cooperation with regard to enforcement through for example information sharing and coordination of national procedures. The national authorities often fulfil a double role: They are part of both the national administration and the European administration, meaning that they co-operate with the agencies of other Member States as well as the European Commission. Consequently, the crucial factors in understanding the functioning of these networks are the relationships between the national authorities, as well as the relationship with the European Commission. The extent of influence the European Commission is exerting over the national authorities via those networks and the degree of autonomy left to the national agencies needs to be determined. In considering this, attention has to be paid not only to the formal but also the informal dynamics and practices outside the legislative framework. It seems that no hierarchical structure is created but that the networks aim to stimulate a co-operative relationship.²³ Consequently, hybrid forms are emerging whereby responsibilities are shared to differing degrees between the European Commission, European agencies and the national authorities.²⁴

Extra-judicial Enforcement: Promoting ADR Mechanisms

The European Union is showing a growing interest in alternative dispute resolution (ADR) mechanisms. ADR is promoted by the Commission as a less costly and less time-consuming alternative to court proceedings, which is able to improve access to justice for consumers. A 2009 study of the European Commission as well as a more recent study conducted by the CMS Research Programme for Civil Justice headed by Professor Hodges revealed that Consumer ADR is widespread among the Member States.²⁵ The national ADR models provide for different architectures and many variations as to their extent of independence and transparency can be found. On the European level, there are two non-binding Recommendations 98/257/EC and 2001/310/EC, which set out minimum requirements for ADR bodies, and two networks, the European Consumer Centre Network (ECC-Net) and the Financial Services Complaint Network (Fin-Net), which help consumers to access the appropriate ADR body in case of cross-border disputes.

Also secondary Union law in the regulated markets emphasizes the importance of ADR mechanisms. In the telecom sector²⁶, energy sector²⁷, Consumer Credit Directive²⁸ and Payment Services

²² Article 3 Regulation 2006/2004/EC of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

²³ M. Groenleer, "Regulatory Governance in the European Union: The Role of Committees, Agencies and Networks," in *Handbook on the Politics of Regulation*, ed. D. Levi-Faur (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2011), 548.

²⁴ Y. Svetiev, "W(h)ither Private Law in the Face of the Regulatory Deluge," in this working paper.

²⁵ C. Hodges et al., *Consumer ADR in Europe* (Nomos, 2012). 390-91. This study claims that the 2009 study of the European Commission, showing that there exist more than 750 consumer ADR schemes in Europe, to be based on a miscalculation and that one can find around 100 ADR schemes in Europe. (For the Commission study, see: Civic Consulting Study, "Study on the Use of Alternative Dispute Resolution in the European Union" commissioned by DG Sanco (2009), available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf (last visited: 12.05.2012).

²⁶ Directive 2009/136/EC of 25 November 2009 on universal service and users' rights relating to electronic communications networks and services.

Directive²⁹ Member States are *required* to set up adequate and effective ADR bodies for consumer disputes. Next to the requirements to adopt ADR systems, we find measures *encouraging* Member States to provide for ADR bodies like in the Directives for Postal Services³⁰ and Markets in Financial Instruments³¹. The sector-related Directives do not prescribe any detailed requirements as to the organization of the ADR bodies or the procedure followed by them. The Member States can decide whether they attribute the competence for dispute resolution to the national regulatory authorities or to another public or private entity.

Most recently, on the 29th of November 2011, the European Commission presented a proposal for a Directive on alternative dispute resolution for consumer disputes requiring that Member States ensure that all disputes between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to an ADR body. Of major concern in the discussions of legal scholars and practitioners are the quality requirements provided for in the Commission proposal, which aim to ensure that the consumer is adequately protected during the ADR proceedings. Concerns are raised to not impose a too high burden on companies by adopting too strict quality requirements. Particularly the principle of legality, requiring that the consumer is not deprived of the protection afforded by mandatory legal provisions, is a subject of controversy as it was not included into the Commission proposal.³²

The deeper implications of the promotion of ADR mechanisms for the legal protection of European rights need to be considered. As put by Edwards, “*we must determine whether ADR will result in an abandonment of our constitutional system in which ‘the rule of law’ is created and principally enforced by legitimate branches of government.*”³³ It needs to be determined whether and under which conditions ADR constitutes an adequate mechanism to provide for the legal protection of European rights.

The Remedial Perspective of the European Enforcement Structure

The institutional decentralisation of the enforcement structure raises the question about which remedies and procedures are applicable before the national enforcers of European law. The principle of procedural autonomy provides that in the absence of European rules on this matter, the national legal systems lay down the detailed procedural rules for the enforcement of European law.³⁴ The doctrine of procedural autonomy also extends to remedies. According to the national *remedial* autonomy, in the absence of European rules on this subject, European law does not intend to create new remedies other than those already laid down by national law.³⁵

(Contd.) _____

²⁷ Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity; Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas.

²⁸ Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers.

²⁹ Directive 2007/64/EC of 13 November 2007 on payment services in the internal market.

³⁰ Directive 2008/6/EC of 20 February 2008 with regard to the full accomplishment of the internal market of Community postal services.

³¹ Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.

³² Possible reasons for not including the principle of legality in the Commission proposal can be found in Svetiev, “W(h)ither Private Law in the Face of the Regulatory Deluge.”

³³ H.T. Edwards, “Alternative Dispute Resolution: Panacea or Anathema?,” *Harvard Law Review* 99(1986): 671.

³⁴ Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.

³⁵ C-158/80, *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805, para. 44; C-432/05, *Unibet* [2007] ECR 2271, para. 40. It has to be pointed out that the term “*remedial autonomy*” is not used by the Court of Justice but it is also referring to “*procedural autonomy*” in the context of remedies. See: V. Trstenjak and E. Beysen, “European Consumer Protection Law: Curia semper dabit remedium?,” *Common Market Law Review* 48(2011).

However, national procedures and remedies may not be able to fulfill the policy objectives of the European legislation at stake and may not fit to the particularities of the European legal order. As national procedural and remedial rules may hinder the effective and uniform application of European law, a growing influence is exerted by secondary Union law as in the areas of consumer protection and anti-discrimination law.³⁶ Also in the areas of the regulated markets, minimum requirements can be found requiring that Member States make sure that national remedies are effective, proportionate and deterrent.³⁷ However, the European legislative influence on national remedies remains either patchy, depending on the substantive area at stake or rather vague, leaving a wide discretion to the Member States.

Despite the subject-related influence via secondary Union law, the Court of Justice has a major role in influencing national remedies for the enforcement of European law. The Court of Justice intervened into the remedial and procedural dimensions of the national enforcement systems already in 1976 by imposing two cumulative requirements on the national systems, namely the principles of equivalence and effectiveness. According to the principle of equivalence, the same conditions need to apply to claims based on European law brought before the national courts than in respect of similar actions based on purely national law. The principle of effectiveness requires that national remedies and procedural rules must not render the exercise of European rights virtually impossible or excessively difficult in practice.³⁸ However, even though those principles are constantly reoccurring in the case-law of the Court of Justice, their definite meaning and relationship to each other remains unclear. Moreover, both principles are considered to be *minimum* standards as they set an outer limit to the national autonomy and take a *negative* role by *excluding* excessive restrictions or discrimination against claims based on European law.³⁹

Legal scholars are pleading for the development of a *positive* theory of legal protection.⁴⁰ As argued by W. Van Gerven, *adequate* and *not minimum* legal protection is needed.⁴¹ The principle of *effective* judicial protection is recognised as a general principle of European law, influencing all stages of the judicial enforcement process.⁴² Indeed, Article 19 (1) TEU provides that “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*” As the Court of Justice is increasingly emphasizing the fundamental right to legal protection as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, it might be argued that a new understanding of the principle of effective legal protection as requiring not only *effective* but *adequate* remedies is evolving.⁴³ However, the definite meaning of what constitutes an *adequate* remedy (i.e. what is adequate enough?) and whether it has to be understood as a substantive or procedural concept remains unclear.

Indeed, in the case-law of the Court of Justice, a series of cases can be found in which the Court of Justice has intervened into the national legal systems more strongly than might be expected regarding

³⁶ N. Reich, "Effective Private Law Remedies in Discrimination Cases," in *Non-Discrimination in European Private Law*, ed. Schulze (Mohr-Siebeck 2011); N. Reich, "Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht," *Schriftenreihe der Juristischen Studiengesellschaft Hannover (Nomos)* 51(2012).

³⁷ A. Ottow and K. de Weers, "Towards a European Enforcement Toolkit?," *Working Paper of The Europe Institute Utrecht* (01/2011).

³⁸ Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

³⁹ M. Bobek, "Why there is no Principle of 'Procedural Autonomy' of the Member States," in *The European Court of Justice and the Autonomy of the Member States*, ed. H.W. Micklitz and B. de Witte (Cambridge, Antwerp, Portland: Intersentia, 2012); Reich, "Effective Private Law Remedies in Discrimination Cases."

⁴⁰ Reich, "Effective Private Law Remedies in Discrimination Cases."; Micklitz, "The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-made European Law on Remedies," 395.

⁴¹ W. van Gerven, "Of rights, remedies and procedures," *Common Market Law Review* 37(2000): 529.

⁴² Case C-125/01, *Peter Pflücke v. Bundesanstalt für Arbeit* [2003] ECR I-9375. See also: Eliantonio, *Europeanisation of Administrative Justice*: 10-11.

⁴³ Reich, "Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht."

a strict application of the principle of procedural autonomy. The Court does not seem to be reluctant to require the creation of new remedies or the shaping of existing national remedies if it considers it necessary in order to ensure the legal protection of rights derived from European law. However, despite some spectacular landmark decisions as for instance *Francovich*⁴⁴ and *Factortame*⁴⁵ in which the Court of Justice introduced the remedies of state liability and interim relief respectively, the influence of the Court of Justice will be “gradual and contain ups and downs, with activist and receptive phases.”⁴⁶

Linking “Judicial”, “Administrative” and “Extra-judicial” Enforcement

Examining the effectiveness of an enforcement structure in the area of social regulation necessitates not only looking at the three forms of enforcement independently from each other, but requires determining also the interrelationships between the different mechanisms. This is particularly relevant in case of disputes having a collective dimension. Social conflicts often involve diffuse interests, meaning that the individual losses of the victims are small while the aggregate gains for the tortfeasor are high. The costs for the individual person might be too high to have an incentive to initiate court proceedings. Those problems can be addressed by collective judicial enforcement, administrative enforcement or a combination of both. While the Member States become more and more active in establishing collective judicial enforcement mechanisms, it has been shown that in particular sector-related areas, the European Union is pushing the Member States to set up national public authorities. Consequently, in the areas in which we observe the establishment of national public authorities, the interface with collective judicial enforcement needs to be rebalanced.⁴⁷ In addition, extra-judicial enforcement enters the picture and questions arise as to whether collective conflicts are suitable to be dealt with by alternative dispute settlement mechanisms.

Moreover, the relationship between individual and collective enforcement needs to be clarified. Collective enforcement via the courts or administration is often not conceptually linked to individual litigation. Under the *res judicata* doctrine, the collective and the individual procedure have to be kept separate. However, ensuring effective legal protection might require to link collective and individual proceedings: It needs to be clarified whether a collective action before a court can bind another court in individual proceedings and whether an action of a public authority may bind a national court.⁴⁸ Consequently, individual judicial enforcement has to be aligned with administrative and collective judicial enforcement.

Finally, it has to be stressed that the interrelationships between the different forms of enforcement are rendered even more complex in case of cross-border disputes, raising the need for the establishment of horizontal co-ordination and co-operation techniques amongst the different enforcers in the Member States.

Conclusion

It has been shown that the European enforcement structure is based on the concept of ‘*executive federalism*’, meaning that the rules adopted by the European level are applied and enforced by the

⁴⁴ Joined Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357.

⁴⁵ Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

⁴⁶ Micklitz, "The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-made European Law on Remedies."

⁴⁷ H.W. Micklitz, "The Visible Hand of European Regulatory Private Law," *EUI Working Paper Law* (2008/14): 36; F. Cafaggi and H.W. Micklitz, *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement* (Antwerp, Oxford, Portland: Intersentia, 2009).

⁴⁸ H.W. Micklitz, "Reforming European Unfair Terms Legislation in Consumer Contracts," *European Review of Contract Law* 6, no. 4 (2010): 350-59.

Member States, whether in form of the national courts or the national public authorities.⁴⁹ As a consequence, under the principle of procedural autonomy, national procedures and remedies are applicable for the enforcement of European rights. The principle of procedural autonomy can be seen as a source of policy diversity, allowing the Member States to follow their own national conceptions about the organisation and functioning of the administration of justice, according to their local legal culture and varied societal goals.⁵⁰ However, in light of the European influence on the mode of enforcement chosen as well as on particular remedies and procedures, it becomes clear that the principle of procedural autonomy is fading away and that it is unable to capture the relationship between the European and the national level in enforcement matters. While the influence exerted by secondary Union law depends on the substantive area at stake and is therefore subject to subject-related fragmentation, the role of the Court of Justice seems to be that of filling the gaps left by secondary Union law.⁵¹ The aim of this research is to determine whether it is possible to discern European minimum standards or common principles on enforcement matters by way of a horizontal analysis of the dispersed rules contained in secondary Union law as well as the case-law of the Court of Justice and to finally provide a new conceptualization of the interplay between the European and the national level.

Part II: Three Examples of the Interplay between the European and the National Level in Shaping Remedies

The *Putz-Weber*⁵², *Janecek*⁵³ and *Alassini*⁵⁴ cases are used as case-studies to determine the interplay between the national and the European level when it comes to shaping remedies for the enforcement of European law. The three cases chosen are of a different nature and concern different fields of the area of social regulation. In the *Putz/Weber* case, the Court of Justice strengthened the remedies available to the consumer-buyer against the seller under the Consumer Sales Directive. Consequently, the case dealt with individual judicial remedies available in the horizontal relation between private parties. In the *Janecek* case, the Court of Justice guaranteed the existence of an administrative remedy, which makes it possible for private parties to take enforcement actions to ensure compliance of the Member States with European environmental law. Contrary to *Putz/Weber*, the *Janecek* case involved the vertical relation between private parties and the state and is furthermore illustrative for the difficulties that arise if diffuse interests are at stake. The reasoning adopted in this case could be transferred to other legal areas, as financial services.⁵⁵ Regarding extra-judicial enforcement, in the *Alassini* case, the Court of Justice clarified which requirements have to be met in order for out-of-court settlement procedures in consumer disputes to comply with the principle of effective legal protection.

⁴⁹ Micklitz, "The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-made European Law on Remedies," 367.

⁵⁰ M. Dougan, "The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts," in *The Evolution of EU Law*, ed. P. Craig and G. de Burca (Oxford: Oxford University Press, 2011).

⁵¹ Micklitz, "The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-made European Law on Remedies," 367.

⁵² Joined Cases C-65/09, *Gebr. Weber GmbH v Jürgen Wittmer* and C-87/09, *Ingrid Putz v Medianess Electronics GmbH* [2011] ECR 00000.

⁵³ C-237/07, *Janecek v. Freistaat Bayern* [2008] ECR I-6221.

⁵⁴ C-317-320/08, *Rosalba Alassini et al. v. Telecom Italia* [2010] ECR I-02213.

⁵⁵ Micklitz, "The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-made European Law on Remedies," 380.

The Putz/Weber Case – Strengthening Individual Remedies under European Consumer Law

The joined cases C-65/09 *Gebr. Weber*⁵⁶ and C-87/09 *Putz*⁵⁷ dealt with the interpretation of Article 3 of the Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Article 3 of the Consumer Sales Directive establishes a liability system in case the seller had delivered non-conforming goods to the buyer. According to Article 3 (3), the consumer is entitled to repair or replacement of the defective goods free of charge, unless this is impossible or disproportionate. Article 3 (5) allows the consumer to require a price reduction or to rescind the contract if the consumer is not entitled either to repair or to replacement.

Both cases deal with the same situation: After a consumer bought goods from a seller and properly installed them, it turned out that the goods have been in non-conformity with the contract. The German courts were required to determine the exact scope of the seller's obligation to cure the defect and particularly, whether the seller has to bear the costs of removing the defective goods and installing replacement goods. In German private law, this issue has been one of the most controversial and extensively discussed topics. In a previous decision in 2008, the German Federal Civil Court held that the seller is not obliged to bear the costs of installing replacement goods, if installation was not part of the contractual obligations.⁵⁸ While the Federal Civil Court had a clear view that the seller does not need to bear the installation costs, a reference for a preliminary ruling to the Court of Justice of the European Union was made in the *Weber* case as to whether the seller is obliged to bear the costs for removing the non-conforming goods.⁵⁹ However, the first instance court in the *Putz* case openly questioned the reasoning of the Federal Civil Court and expressed its doubts that an interpretation of Directive 1999/44/EC in the light of European law would not require the seller to bear the costs for the installation of the new goods. Consequently, it decided to submit the question whether the seller has to bear also the costs for installation to the Court of Justice via the preliminary ruling procedure.⁶⁰

The Ruling of the Court of Justice

Contrary to the opinion of Advocate-General Mazak, the Court of Justice came to the conclusion that the seller has to bear the costs for the removal of the defective goods and for the installation of the new goods. By relying on the *Quelle*⁶¹ judgment, the Court of Justice firstly refers to the purpose of the "free of charge" aspect of the obligation of the seller to bring the goods into conformity with the contract: "The 'free of charge' requirement [...] is intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection."⁶² The Court of Justice held that if the consumer cannot require the seller to pay for the removal of the already installed goods and for installing replacement goods, that replacement would

⁵⁶ Mr Wittmer bought polished floor tiles from Weber which he had laid in his house. Subsequently, Mr Wittmer noticed shading on the surface of the tiles. An expert concluded that the marks could not be removed, so that the only remedy possible was complete replacement of the tiles.

⁵⁷ Ms Putz concluded a contract for the sale of a dishwasher with Medianess Electronics which delivered the machine to the door of her house. After Ms Putz had the dishwasher installed, a defect, which was not attributable to the installation, became apparent. Since removal of the defect was impossible, Ms Putz requested delivery of a dishwasher free from defects as well as the removal of the defective machine and installation of the new one.

⁵⁸ BGH, decision of 15 July 2008, NJW, 2837 (*Parkettstübe-Entscheidung*).

⁵⁹ BGH, decision of 14 January 2009, BeckRS 2009, 05318.

⁶⁰ Amtsgericht Schorndorf, decision of 25. February 2009, BeckRS 2009, 88603. A. Johnston and H. Unberath, "Case comment on Joined Cases C-65/09 *Weber* & C-87/09 *Putz*," *Common Market Law Review* 49(2012): 795-97; J. Glöckner, "Von Greeman v. Yuba zu Gebr. Weber und Putz - der EuGH geht den nächsten Schritt auf dem Wege der Ökonomisierung des Europäischen Verbraucherprivatrechts," *Europäisches Wirtschafts- und Steuerrecht* 9(2011): 361.

⁶¹ Case C-404/06, *Quelle* [2008] ECR I-2685.

⁶² Joined Cases C-65/09 *Gebr. Weber GmbH v Jürgen Wittmer* and C-87/09 *Ingrid Putz v Medianess Electronics GmbH* [2011] ECR 00000, para. 46.

impose an additional financial burden on the consumer.⁶³ Consequently, if the consumer needs to bear those costs, the replacement would not have been “*free of charge*”.⁶⁴ Moreover, the consumer would not have been subject to this burden if the seller had correctly performed his contractual obligations. Consequently, the seller must bear the consequences of the non-conforming performance.⁶⁵

The Court of Justice further points out that the seller’s financial interests are protected by the two year time-limitation for the buyer to bring a claim against the seller in Article 5 (1) of the Consumer Sales Directive, by the seller’s right to refuse replacement if it is a disproportionate remedy in that it imposes unreasonable costs as well as by the seller’s right of redress against persons in the same contractual chain.⁶⁶ According to the Court of Justice, it is of no relevance whether the seller was originally obliged to install the goods delivered under the contract, since the obligations of the seller arising from Article 3 of the Consumer Sales Directive are considered to be independent of the contractual obligations and may in some cases exceed those provided by the contract.⁶⁷

The Court of Justice dealt then with the question if the seller could refuse the remedy of replacement because the costs of removing the defective goods and installing replacement goods are disproportionate with regard to the value of the conforming goods. According to Article 3 (3) of the Consumer Sales Directive, the consumer has a right to repair or replacement of the non-conforming goods. The seller may refuse a remedy if it is disproportionate, meaning that the remedy demands costs from the seller that are unreasonable in comparison with the alternative remedy. The question arises whether the seller may refuse replacement on the ground that it will require unreasonable costs from him even though the remedy of repair is unavailable because of impossibility. The Court of Justice pointed out that the seller may refuse one of these remedies only if it is disproportionate in relation to the other remedy, which means that the right to refuse is limited to cases of relative lack of proportionality.⁶⁸ Consequently, it is ensured that there is always one of the remedies, either repair or replacement, available to the buyer. The Court of Justice finds support for its view in recital 11 of the Consumer Sales Directive, stating that “*in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy.*”⁶⁹ The result is that “*if only one of the two remedies is possible, the seller may therefore not refuse the only remedy which allows the goods to be brought into conformity with the contract.*”⁷⁰ Consequently, on the basis of Article 3 (3) of the Consumer Sales Directive, Member States are prohibited to adopt legislation, which allows the seller to refuse the only possible remedy because of an absolute lack of proportionality.⁷¹

However, the Court of Justice allows the national courts to limit the consumer’s right to reimbursement of the costs for removing the defective goods and installing the new goods to a certain amount.⁷² The Court of Justice gives further guidelines to the national court by requiring that the national court should bear in mind “*first, the value the goods would have if there were no lack of conformity and the significance of the lack of conformity, and secondly, the Directive’s purpose of ensuring a high level of protection for consumers.*”⁷³ The reduction may not render the consumer’s

⁶³ Ibid., para. 47.

⁶⁴ Ibid., paras. 48-49.

⁶⁵ Ibid., para 56.

⁶⁶ Ibid., para 58.

⁶⁷ Ibid., para 59.

⁶⁸ Ibid., para 68

⁶⁹ Ibid., para 69.

⁷⁰ Ibid., para 71.

⁷¹ Ibid., para 73.

⁷² Ibid., para 74.

⁷³ Ibid., para 76.

right to reimbursement effectively devoid of any substance. In case the national court decides for a reduction of the reimbursement, the consumer has to be able to choose instead for an appropriate price reduction or termination of the contract as provided by Article 3 (5) of the Consumer Sales Directive.⁷⁴ The new limitation to the amount of reimbursement was established by the Court of Justice without legal basis and was justified on policy reasons, namely to ensure a fair balance of interests.

The Interplay of the European and National Level

In the *Putz/Weber* judgment, the Court of Justice interfered strongly with German private law in order to ensure the *effet utile* of the Consumer Sales Directive.⁷⁵ Under German law, the buyer has only limited possibilities to be compensated for the loss of expenses caused by the installation of the non-conforming goods provided that the fault requirement could be met. The Court of Justice turned the fault-based claim for compensation under German law into a claim encompassing the costs for de-installation and new installation irrespective of the fault of the seller. The Court of Justice did not base its argumentation on the traditions of the Member States but instead interpreted the Consumer Sales Directive autonomously by focusing on the wording (“*free of charge*”), systematics and function (“*high level of protection for consumers*”) of the Consumer Sales Directive and embraces thereby a teleological interpretation.⁷⁶ The implementation of the scope of the consumer’s right to reimbursement of the cost of removal and installation was implemented by the German Federal Civil Court in its follow-up decision within the existing framework of the Civil Code without major problems. § 439 German Civil Code (*Bürgerliches Gesetzbuch*) provides that the buyer may require the repair of the defect or the delivery of the goods free from defects. The Federal Civil Court stretched the wording “delivery of goods free from defect” to include the de-installation and new installation.⁷⁷

The more difficult part concerned the refusal of the Court of Justice to grant the seller the defence of absolute disproportionality. § 439 (3) German Civil Code clearly provides that the seller may refuse repair *and* replacement if the cost of remedying the defect as such is disproportionate to the value of performance to the buyer. As it is the case under the CISG and English law, German law allows for the defence of absolute disproportionality.⁷⁸ Moreover, as the Court of Justice did not provide any legal basis for limiting the amount of reimbursement, it was even more difficult for the German courts to accommodate the judgment in the existing statutory framework. Since it was not possible for the German Federal Civil Court to interpret § 439 (3) in conformity with the Directive, it restricted the applicability of this provision for consumer sale contracts. The German Federal Civil Court held that in case of consumer sales contracts, the seller’s defense of absolute disproportionality is restricted to the seller’s right to refer the buyer to an appropriate amount regarding the reimbursement of the costs for de-installation of the defective goods and the new installation of the replacement goods. Moreover, it has to be noted that the German Federal Civil Court requested the adjustment of the relevant provisions by the German legislator. This is particularly of great relevance as Germany has reformed its law of obligations and included the Consumer Sales Directive into general contract law to avoid having separate legal regimes for non-consumer and consumer contracts. However, it remains to be seen how the German legislator will react.⁷⁹

⁷⁴ Ibid., para. 77.

⁷⁵ Reich, “Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht.”

⁷⁶ Glöckner, “Von Greeman v. Yuba zu Gebr. Weber und Putz - der EuGH geht den nächsten Schritt auf dem Wege der Ökonomisierung des Europäischen Verbraucherprivatrechts,” 365.

⁷⁷ BGH, decision of the 21 December 2011, VIII ZR 70/08.

⁷⁸ Unberath, “Case comment on Joined Cases C-65/09 Weber & C-87/09 Putz,” 804.

⁷⁹ Ibid.

If we look at the final complete remedy, the *hybrid* nature becomes apparent as it is shaped by European and national influence. Despite this strong interference into German law beyond what might be expected regarding the principle of procedural/remedial autonomy, the Court of Justice opened the possibility for the national courts to set an appropriate limit for the consumer's right to reimbursement. As a result, the Court of Justice shows that it accepts that the different Member States and probably also the different courts within the same Member States depending on the facts of the case will reach varying conclusions.

The Janecek case - Introducing a Representative Action into German Law

The *Janecek*⁸⁰ case dealt with the question whether on the basis of Article 7 (3) of the Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management an individual can require the national competent authorities to draw up an action plan where there is a risk that the emission standard as set by European law is exceeded.⁸¹ Article 7 (3) of Directive 96/62/EC provides that “*Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence.*”

The proceedings before the German courts revolved around the question whether Mr Janecek has a subjective right to require the national authorities to set up an action plan under Article 7 (3) of Directive 96/62/EC and its German implementation. According to the legal standing rules under the German Administrative Process, individuals are only entitled to bring an action before an administrative court if they can assert the impairment of an individual subjective right by an act of the state.⁸² In case an individual is affected by an administrative act, which is not addressed to him, he can rely on the protective norm theory (*Schutznormtheorie*). According to the *Schutznormtheorie*, a subjective right is existent if the legal norm on which the claimant relies serves to protect his individual/personal interest. The most important criterion to qualify as a *Schutznorm* is the possibility to delimit a specifically protected group of persons that can be distinguished from the general public.⁸³ Consequently, all actions which are aimed at the objective legality control of administrative decisions are foreign to the German Administrative Process - not only popular actions but also representative actions and actions of interested parties are excluded.

The case reached the German Federal Administrative Court, which held that while the competent national authorities failed to comply with their obligation to set up action plans, this failure to act does not violate the subjective rights of Mr Janecek. The action plans intend to protect the general interest

⁸⁰ C-237/07, *Janecek v. Freistaat Bayern* [2008] ECR I-6221. Mr Janecek lives on the Landeshuter Allee on Munich's central ring road. Measurements of an air quality measuring, located 900 m from his home, have shown that the limit value fixed for emissions of particular matter PM 10 was exceeded much more than 35 times per year, even though this is the maximum number of instances permitted under the Federal Law on combatting pollution. Although an air quality action plan exists in respect of the city of Munich, Janecek brought an action before the Administrative Court (*Verwaltungsgericht*) in Munich for an order requiring the Freistaat Bayern to draw up an air quality action plan in the Landeshuter Allee district in order to determine the short-term measures to be taken to ensure compliance with the maximum permitted number of exceeding the limit.

⁸¹ Even though the case revolved around the obligation of the national authorities to set up action plans under Article 7 (3) Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, it needs to be noted that this Directive cannot be seen isolated. The emission limits which have to be complied with according to Directive 96/62/EC, result from further directives as adopted under Article 4 of Directive 96/62/EC. In that regard, Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, requires that the limit value fixed for emissions of particular matter PM 10 is not exceeded more than 35 per year.

⁸² § 42 (2) German Administrative Court Procedures Code (*Verwaltungsgerichtsordnung*).

⁸³ W.R. Schenke, *Verwaltungsprozeßrecht*, 7th ed. (Heidelberg: C.F. Müller Verlag, 2000). 143-45; J. Brandt, *Handbuch Verwaltungsverfahren und Verwaltungsprozess*, 3rd ed. (Heidelberg: C.F. Müller, 2009). 401. C.D. Classen, *Die Europäisierung der Verwaltungsgerichtsbarkeit* (Tübingen: J.C.B. Mohr Siebeck, 1996). 40.

and not the subjective rights of third parties.⁸⁴ However, even though the Federal Administrative Court had a clear view on the issue, it referred the case to the European Court of Justice via the preliminary ruling procedure as there have been diverging views and approaches among the lower instance courts as well as among legal scholars as to whether third parties are entitled to ask for action plans.

The Ruling of the Court of Justice

The German Federal Administrative Court asked for clarification regarding the question whether on the basis of Article 7 (3) Directive 96/62/EC an individual can require the national authorities to draw up an action plan where there is a risk that the limit values or alert threshold may be exceeded. According to the Court of Justice, the Directive placed Member States under a clear obligation to draw up action plans in the case of a risk that the emission standard may be exceeded. Relying on its previous case-law on direct effect, it held that individuals are entitled to rely on the provisions of a Directive against public bodies if they are unconditional and sufficiently precise. Moreover, the national courts are obliged to interpret national law as far as possible in conformity with the purpose of the relevant Directive. If this is not possible, the incompatible national provisions need to be disapplied.⁸⁵

The Court of Justice confirmed that it would be incompatible with the binding effect of directives to exclude the possibility of concerned persons to rely on that directive. Consequently, the Court held that “*natural or legal persons directly concerned by a risk that the limit value or alert threshold may be exceeded must be in a position to require that the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.*”⁸⁶ It was irrelevant that other courses of actions might be available under national law.

Regarding the content of the action plan, the Federal Administrative Court asked whether the national authorities are obliged to lay down *short-term* measures to ensure that the limit value is attained, or whether they could confine themselves to measures ensuring a reduction in instances of the limit value being exceeded or limits on their duration making a gradual improvement possible. By relying on the wording of Article 7 (3), the Court of Justice held that “*the Member States are not obliged to take measures to ensure that those limit values or alert threshold are **never** exceeded*”⁸⁷ (emphasis added). Taking into account all material circumstances and opposing interests, the Member States need to take measures, which reduce the risk of a standard being exceeded and the duration of such an occurrence to a *minimum*.⁸⁸ However, the discretion of the Member States is not unlimited as the measures need to be *adequate* to achieve the objective to reduce the risk of the standard being exceeded, taking into account that a balance between that objective and the various public and private interests needs to be maintained.⁸⁹

The Interplay of the European and National Level

The proceedings before the German courts illustrate that there are still uncertainties regarding the direct effect of Directives. Direct effect of Article 7 (3) of the Directive was denied since the administrative authorities enjoy a wide discretion to decide which specific measures to take under the action plan. However, the Court of Justice of the European Union clarified that the wording of Article

⁸⁴ BVerwG, order for reference of the 29 March 2007, NVwZ 2007, 695, at pp. 696-698.

⁸⁵ C-237/07, *Janecek v. Freistaat Bayern* [2008] ECR I-6221, paras. 34-36.

⁸⁶ Ibid., para. 39.

⁸⁷ Ibid., para. 44.

⁸⁸ Ibid., para. 45.

⁸⁹ Ibid., para.46.

7 (3) is clear and unconditional: “*Member States shall draw up action plans.*” By establishing the direct effect of Article 7 (3) of the Directive, the Court of Justice established an administrative remedy allowing an individual to bring an action to require the competent national authorities to set up an action plan. Consequently, by strengthening the role of the individual, the Court of Justice opened up another route of controlling Member State compliance with European air quality measures as otherwise only the Commission would be able to take an enforcement action by bringing a case before the Court of Justice of the European Union.⁹⁰

Establishing the direct effect of Article 7 (3) raises the question about *who* has legal standing before the national courts in order to use that newly created administrative remedy. Generally, under the *Rewe/Comet* line of case-law the conditions for legal standing before the national courts would be left to the procedural autonomy of the Member States, being subject to the principles of effectiveness and equivalence. However, the Court of Justice did not follow this approach and interfered strongly with the German legal standing conditions and *Schutznormtheorie*. As stated in para. 39, “*the natural or legal persons directly concerned by a risk that the limit values or alter values might be exceeded*” can rely on Article 7 (3) of Directive 96/62/EC. It becomes clear that a strict application of the German *Schutznormtheorie* conflicts with the European standard of legal protection. The Court of Justice established that under European law individually enforceable rights may stand for a broader interest than the individual/personal interest as required by German doctrine. Consequently, the Court of Justice requires an “upgrading” of the German legal standing conditions in order to ensure the effective legal protection of European rights. This means that the German *Schutznormtheorie* needs to be stretched and broadened in case European rights are at stake to be in compliance with European law.

However, while the Court of Justice interfered strongly with the long-standing German *Schutznormtheorie* in order to ensure the legal protection of European rights, in the second part of its judgment the Court left considerable discretion to the Member States regarding the substantive content of the action plan: The Member States have a wide discretion to determine the *adequate* measures to achieve the objective of compliance with the emission standards. The Member States need to take measures, which reduce the risk of a standard being exceeded and the duration of such an occurrence to a *minimum* and consequently, do not need to guarantee that the standard is *never* exceeded. It is up to the Member States to strike a balance between that objective and the various public and private interests at stake. Consequently, the Court established a European-national remedy in the sense that it is shaped both by European and national input. The legal character of the final *complete* remedy is neither European nor national but bears elements of both legal orders and is therefore considered to be a *hybrid*.

The discretion left to the national level has been criticized by German scholars, who consider that the Court of Justice should have established an action to require an action plan, which safeguards the actual compliance with the emission standard. The judgment does not provide at which point in time the Member States need to guarantee the actual compliance with the emission standards and allows for a gradual improvement without any time-limit.⁹¹ Consequently, a higher level of legal protection could have been achieved by providing for the substantive content of the administrative remedy to require the establishment of an action plan.

Nevertheless, the Court of Justice is engaging into a balancing act: By challenging the German legal standing requirements, the Court of Justice seeks to ensure the availability of a remedy to enforce a

⁹⁰ Comparing the EU and US air quality control approach, it seems that in the US, the federal level has stronger enforcement powers over state agencies as there are for instance fewer hurdles to impose sanctions in case of non-compliance with their duties. Moreover, in that regard, enforcement powers in the US are vested in a specifically set up federal agency, namely the Environmental Protection Agency, while in the EU, this power is currently left to the Commission, faced with the general problem of a lack of resources. For a comparison of the EU and US air quality control, see: http://ec.europa.eu/environment/archives/cafe/activities/pdf/case_study2.pdf (last visited: 12.07.2012).

⁹¹ K. Faßbender, "Neues zum Anspruch des Bürgers auf Einhaltung des europäischen Umweltrechts," *EuR* (2009).

right derived from European law. However, by leaving a space to be filled up by the Member States, the Court of Justice allows for national diversity and contextualization to the circumstances of the case.

The Alassini Case - Shaping National ADR Procedures according to European Principles

The preliminary ruling procedure in the *Alassini*⁹² case concerned the transposition of Article 34 (1) of the Universal Service Directive 2002/22/EC into Italian law. Article 34 (1) requires Member States to ensure that “transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive.” Italy decided to confer the responsibility for out-of-court procedures for the settlement of disputes between telecom providers and end-users to the *Autorità per le garanzie nelle comunicazioni* (Communications Regulatory Authority).⁹³ However, the dispute settlement rules as adopted by the Communications Regulatory Authority provide that “no court proceedings could be brought until the mandatory attempt to settle the dispute has been undertaken.”⁹⁴

The essential question the Court of Justice dealt with was whether Article 34 of the Universal Service Directive and the principle of effective judicial protection preclude a national rule which makes legal actions involving claims arising in connection with the Universal Services Directive conditional on a prior attempt to settle the dispute out of court, without which proceedings in that regard may not be brought before the courts.⁹⁵

The Ruling of the Court of Justice

The Court of Justice held that since neither the criteria set out in Article 34 (1) nor Recommendation 98/257/EC as referred to in recital 47 of the Universal Service Directive deal with the question about the mandatory nature of the out-of-court procedures, Member States are not limited in making out-of-court procedures for the settlement of disputes mandatory, if it does not affect the effectiveness of the Universal Services Directive.⁹⁶ In that regard, the Court of Justice stressed the importance of out-of-court procedures in the European Union by holding that the mandatory nature of the out-of-court settlement procedure would even strengthen the effectiveness of the Universal Services Directive.⁹⁷ Following, the Court of Justice points to the principle of procedural autonomy⁹⁸ and examined the compatibility of the Italian provision with the principles of equivalence, effectiveness and effective legal protection. Importantly, it contextualizes the right to effective legal protection in a wider EU fundamental rights framework by referring to Articles 6 and 13 of the ECHR and Article 47 of the Charter of Fundamental Rights of the EU.⁹⁹ While the Court of Justice accepts that a mandatory settlement procedure constitutes an additional step for access to the courts, it points out that fundamental rights may be restricted provided that the restrictions further objectives of general interest and comply with the principle of proportionality.¹⁰⁰ In this regard, the Court of Justice accepted the argument of the Italian Government that the quicker and less expensive handling of

⁹² The case dealt with Mrs Alassini, who submitted a claim to court against an Italian telephone company without making use of the mandatory mediation procedure as provided by the Italian telecom authority, modelled according to the criteria set out in Art. 34 of the Universal Service Directive.

⁹³ C-317-320/08 *Rosalba Alassini et al. v. Telecom Italia* [2010] ECR I-02213, paras. 13-14.

⁹⁴ *Ibid.*, para. 16.

⁹⁵ *Ibid.*, para. 37.

⁹⁶ *Ibid.*, paras. 41-44.

⁹⁷ *Ibid.*, para. 45.

⁹⁸ *Ibid.*, para. 47.

⁹⁹ *Ibid.*, para. 61.

¹⁰⁰ *Ibid.*, para. 63.

telecommunication disputes and the lightening of the burden of the court system constitute legitimate objectives of general interest. Moreover, it found that a mandatory settlement procedure is proportionate considering that a merely *optional* procedure would not be as efficient to achieve those objectives.¹⁰¹

However, the Court of Justice developed a list of mandatory criteria for out-of-court settlement procedures out of Recommendation 98/257/EC. Indeed, the Court pointed to the indirect binding legal effects of Recommendation 98/237/EC and held that “*the national courts are bound to take recommendations into consideration in order to decide disputes brought before them, in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law.*”¹⁰²

Consequently, in order for mandatory settlement procedures to comply with the principle of effective legal protection, the following criteria have to be met:

- The outcome of the procedure is not binding on the parties and consequently, does not affect their right to bring legal proceedings.¹⁰³
- The settlement procedure does not result in a substantial delay for the purpose of bringing legal proceedings.¹⁰⁴
- The period for the time-barring of claims is suspended for the duration of the settlement procedure.¹⁰⁵
- The settlement procedure should not entail significant costs.¹⁰⁶
- It must be ensured that the settlement procedure may be accessed not only by electronic means.¹⁰⁷
- The settlement procedure must allow for interim measures in exceptional cases where the urgency of the situation so requires.¹⁰⁸

The Interplay of the European and National Level

The *Alassini* judgment is an important precedent for all national ADR procedures established under European law. The case established the quasi-binding legal effect of Recommendation 98/257/EC and six specific criteria for mandatory ADR procedures. The six criteria set out by the Court of Justice in *Alassini* appear to be very strict rules leaving less space for the Member State level to play a role when compared to the general principles of Recommendation 98/257/EC. As pointed out by Alexy, European rules and principles have a different effect on the national level: Whereas rules demand a complete fulfilment, principles allow fulfilment to different degrees depending on a balancing of diverging interests and thus allow for flexible solutions.¹⁰⁹ However, it needs to be stressed that while some of the six “rules” are narrower as requiring the non-bindingness of the settlement outcome, others allow for some margin of appreciation since the Member States may determine for instance what constitutes a “substantial” delay to bring courts proceedings, what constitutes “significant” costs

¹⁰¹ Ibid., paras. 64-65.

¹⁰² Ibid., para. 40.

¹⁰³ Ibid., para. 54.

¹⁰⁴ Ibid., para. 55.

¹⁰⁵ Ibid., para. 56.

¹⁰⁶ Ibid., para. 57.

¹⁰⁷ Ibid., para. 58.

¹⁰⁸ Ibid., para. 59.

¹⁰⁹ R. Alexy, *Theorie der Grundrechte* (Suhrkamp).Chapter 3.

of the settlement procedure and what circumstances are sufficiently “exceptional” to allow for interim measures.

It is necessary to consider a broader picture to determine the interplay between the European and the national level with regard to the shaping of ADR mechanisms. While the Member States need to comply with Recommendation 98/257/EC, the principles set out therein leave a wide discretion to the Member States, including that they can still freely decide to which body they confer the dispute resolution responsibilities and particularly important, whether the participation in the procedure should be mandatory or voluntary. However, when the Member States decide to render the procedure mandatory, the principle of effective legal protection as fleshed out by Article 47 of the Charter of Fundamental Rights requires them to comply with the six “rules” as set out by the Court of Justice in *Alassini*.

Consequently, when it comes to shaping ADR mechanisms, the *hybrid* nature can be recognised again: The European level shapes the national ADR mechanisms by requiring compliance with general principles as set out in Recommendation 98/257/EC as well as by stricter rules as set out in the *Alassini* judgment but still leaves considerable freedom for intervention by the Member States.

Conclusion

The three case-studies are illustrative for the interplay between the European and the national level when shaping remedies. The approach in *Putz/Weber* and *Janecek* is very similar. To ensure the availability of an effective/adequate remedy where a European right granted to an individual is at stake, the Court of Justice of the European Union needed to intervene strongly into the German legal system. The Court of Justice thereby adopted a functional approach, aiming to ensure the *effet utile* of the respective substantive area at stake, being European environmental law in *Janecek* and European consumer protection law in *Putz/Weber* – it shapes or upgrades the national legal system according to the needs of the European legal order. As a result, the Court of Justice adopts an approach beyond the strict adherence to the national procedural autonomy and beyond the minimum approach in its *Rewe/Comet* case-law.

However, the Court of Justice left considerable space for the Member States to fill out the substantive content of the remedy and consequently allows for a contextualization to the specific circumstances at stake. Regarding the substantive content of the remedy, the Court of Justice equipped the national courts with “guidelines”, appearing to be minimum standards. Leaving space for national intervention means that the Court of Justice accepts legal divergences. It does not intend to homogenize the legal systems, but to have each of the national legal systems determine itself how it will balance the diverging interests at stake.

While the approach in *Janecek* and *Putz/Weber* is similar, hybridity has a different nature in the *Alassini* case. In *Alassini*, hybridity results from European principles or rules, which have to be filled out by the national level. However, the result is similar since the national levels can individually decide how to fulfill the European standard. Consequently, in all three cases, the final complete remedy is of a hybrid nature as it is constituted by elements of the European and the national legal orders.

Part III: A Constitutional Perspective on the Nature of *Hybrid* Remedies

The question that I want to address in this part is how the complex interplay between the European and the national level when shaping remedies could be conceptualized. Claims by legal scholars have been raised that the term national “*procedural autonomy*” is misleading and should be replaced by “*procedural competence*”. Legal doctrine is also in a state of flux regarding the question whether the

supremacy of European law is sound when it comes to enforcement matters.¹¹⁰ Proposals have been made to understand the interplay of both levels as being governed by a new branch of the principle of supremacy, called “*structural*” or “*procedural*” supremacy¹¹¹ to show that the national courts are required to do more than simply *disapplying* national law, they need to *shape* or *upgrade* national law according to the European standard.¹¹²

The developments regarding the European enforcement structure can be linked to the discussions about the constitutional framework of the European Union. The fundamental question is how European norms are integrated into the national legal systems? Generally, we can distinguish two different basic constellations of the relationship between the European and the national level: one being based on hierarchical thinking and the other on co-operation between both levels. Moreover, a third constellation, which sees the relationship between both levels as being governed by a diagonal dimension, will be introduced.

Hierarchical Structures

The relation between two legal systems could be characterised by a hierarchy of norms, meaning that one legal system would have priority over the other. Conflicting norms of the lower legal system would be replaced by the superior legal system. Firstly, in this regard, the concepts of monism and dualism can be distinguished. Under the approach of monism, foreign rules are directly incorporated into the domestic legal order by satisfying the validity criteria laid down by the foreign legal system from which the rules originate. The incorporation of the foreign rules as well as the place of those rules within the hierarchy of norms is an internal decision of the domestic legal system. Under the approach of dualism, a foreign norm is only able to enter the domestic legal system by a domestic act of incorporation. Consequently, “*the effect produced by this norm within the national system shall depend exclusively on how it has been transformed and on the state’s sovereign to discard any acts within its national legal order that are incompatible with the norm.*”¹¹³ Under these approaches, both legal systems are considered to be separate and autonomous. It protects the principle of autonomy and the integrity of each legal system. Consequently, each legal order is seen as self-referential, meaning that only those foreign rules have a normative value that are recognised by that legal order.¹¹⁴

Secondly, there could be a federal organization between both levels based on a hierarchical multi-level structure and characterised by autonomy and interdependence. Under a federal approach, it would be not necessary to separate both legal systems from each other since both would form together a comprehensive legal order. However, federalism requires the attribution and delimitation of competences between both legal orders and requires the creation of a clear hierarchy of legal norms granting primacy to one of the legal systems.¹¹⁵

¹¹⁰ B. de Witte, “Direct effect, Primacy and the Nature of the Legal Order,” in *The Evolution of EU Law*, ed. P. Craig and G. de Burca (Oxford: Oxford University Press, 2011), 343; S. Weatherill, *Law and Integration in the European Union* (Oxford: Oxford University Press, 1995), 116; J. Delicostopoulos, “Towards European Procedural Primacy in National Legal Systems,” *European Law Journal* 9(2003); C.N. Kakouris, “Do the Member States possess Judicial Procedural Autonomy,” *Common Market Law Review* 34(1997); Bobek, “Why there is no Principle of “Procedural Autonomy” of the Member States.”

¹¹¹ Witte, “Direct effect, Primacy and the Nature of the Legal Order,” 343.

¹¹² N. Reich, “Horizontal liability in EC law: Hybridization of remedies for the compensation of breaches of EC rights,” *Common Market Law Review* 44(2007).

¹¹³ L. Azoulay, “The Force and Forms of European Legal Integration,” *EUI Working Paper Law* (2011/06): 2.

¹¹⁴ W. van Gerven, “Private Law in a Federal Perspective,” in *The Foundations of European Private Law*, ed. R. Brownsword et al. (Oxford: Hart Publishing, 2011), 339.

¹¹⁵ Ibid., 338; Azoulay, “The Force and Forms of European Legal Integration,” 9.

Co-operative Structures

The theory of legal pluralism claims that “*there is no exclusive relationship between one territory and one legal order, but that on the same territory several [autonomous] legal orders do co-exist.*”¹¹⁶ Both levels are considered to be on an equal footing. There is no hierarchy established between them, but both legal orders are co-existing and co-operating. Legal pluralism accepts that legal orders “*may communicate, dialogue and enter into contact with each other.*”¹¹⁷ Nevertheless, the administration and courts of the different legal orders are considered to be separate from each other - they can decide how they address the norms originating from the other legal system independently.¹¹⁸ From a European perspective, according to Azoulai, legal pluralism means that the primacy of EU law would lose its relevance and that “*it is superseded by a method of reconciliation based on the ‘reasonable’ character of the assessments made by the various parties.*”¹¹⁹ This could lead to fragmentation and individuation if there are no common supra-legal values as reference norms.

A Multi-level Structure

The conflict of laws approach as promoted by Joerges and Schmid is based on the multi-level governance structure of the EU. While the national as well as the European level are seen as autonomous levels, their relationship is characterised by reciprocal dependence. The multi-level structure of the EU gives rise to various conflict-constellations about which legal norms apply to a given case, termed as “*vertical*”, “*horizontal*”, and “*diagonal*” conflicts. Vertical conflicts arise between legal orders at different territorial levels, as between the European and the national level. Horizontal conflicts are considered to occur from the differences among the national legal systems and represent “*the traditional PIL setting*”. Diagonal conflicts arise “*if regimes at two different levels that apply to a different aspect of a given case make contradictory demands.*”¹²⁰ Joerges and Schmid see diagonal conflicts as “*a structural characteristic of the European multi-level system.*” In those kinds of conflicts, the European and the national level need to co-ordinate since the individual levels cannot address a specific problem alone. As a result, European law is seen as conflicts law and the rule of primacy is used to prevent conflicts of norms “*by creating an area for EU norms that national law declines to occupy.*”¹²¹ As pointed out by Azoulai, “*there is not strictly speaking any merger of legal systems*” but merely a “*cohabitation within each individual legal order of rules of different origin.*”

Conclusion

A “black-box model”¹²², in the sense that the national legal orders as well as the European legal order are treated as self-contained and self-sufficient normative wholes, cannot grasp the interplay between the European and the national level when it comes to enforcement matters. Both levels cannot be seen as separated from each other as the enforcement of European law is based on a system that actively integrates Member States and that requires the joint effort of both levels. Also federalism is inadequate to conceptualize the European enforcement structure. Contrary to the US, there is no power vested at the European level that allows it to introduce common enforcement instruments. Since the rigid black-

¹¹⁶ Gerven, “Private Law in a Federal Perspective,” 340.

¹¹⁷ Azoulai, “The Force and Forms of European Legal Integration,” 7.

¹¹⁸ Ibid.; Gerven, “Private Law in a Federal Perspective,” 340. See also: N. Walker, “The Idea of Constitutional Pluralism,” *EUI Working Paper Law No. 2002/1*.

¹¹⁹ Azoulai, “The Force and Forms of European Legal Integration,” 8.

¹²⁰ C. Joerges and C. Schmid, “Towards Proceduralization of private Law in the European Multi-Level System,” in *Towards a European Civil Code*, ed. A.S. Hartkamp et al. (Wolter Kluwer, 2010), 291-92.

¹²¹ Azoulai, “The Force and Forms of European Legal Integration,” 11.

¹²² Presentation of K. Tuori “On Legal Hybrids” taking place at the Workshop “A Self-Sufficient European Private Law - A Viable Concept?” (4-5 May 2012, European University Institute, Florence, Italy).

box model fails to capture many legal phenomena of transnational and European law, legal pluralists have documented *hybrid* legal spaces, where there is an overlap of the legal orders occupying the same social field.¹²³ Similarly, *Joerges* and *Schmid* recognise *diagonal* conflicts when the individual levels cannot address a specific problem alone but both need to co-operate to find a solution.

Looking at the case-studies from a legal integration perspective, it becomes clear that theories based on hierarchical thinking or seeing the national and European level on equal footing cannot conceptualize the interplay between both levels. Seeing the European and the national level on an equal footing would deny the force that the European level has in shaping the national level. The Court of Justice intervenes strongly into national law to ensure the existence of an effective remedy where a European right is at stake as illustrated in the in the *Putz/Weber* case regarding the seller's defence of absolute disproportionality and in the *Janecek* case regarding the German *Schutznormtheorie*. However, the Court of Justice did not establish autonomous European remedies but left space for the national level to fill out the substantive content of the remedy. Consequently, it becomes clear that the European level cannot guarantee the enforcement of European law alone but depends on the co-operation of the national systems for the enforcement of European law. Both legal orders are closely intertwined and are able to frustrate an effective co-operation.

Part IV: Overall Conclusion

As shown by the case-studies, the Court of Justice of the European Union moved beyond the standard formula of the principles of equivalence and effectiveness. It requires a "shaping" of the national system in order to guarantee the availability of a remedy when a European right is at stake. The national system is "upgraded" in order to ensure the *effet utile* of the respective substantive area at stake.¹²⁴ This could imply a deep intervention into the national legal order. However, no uniform remedies are created among the national legal systems as each national legal order determines individually how it shapes its remedies in compliance with the European standard. This particular interplay between the European level and the national level cannot be grasped by the conceptual and systematizing framework provided by current legal integration theories. Indeed, it has been shown that the remedies created by the interplay of both levels are characterised by a *hybrid* nature.

Finally, the hybridization processes have to be analysed from a normative perspective. Hybridization processes might be the way forward to strengthen the enforcement of social rights granted by European law to individuals in line with the principle of effective legal protection as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. However, the European influence on the national level has to be also balanced against other general principles like legal certainty and the flexibility advantages of directives.¹²⁵ Moreover, the existence of hybrid remedies could raise even greater implications for the rule of law.¹²⁶ The rule of European law requires that European law is European-wide applied and enforced. Legal remedies have a crucial role for the enforcement of European law and the implementation of European rights. Substantial gaps in enforcement matters have the potential to jeopardy upholding the rule of law in the European Union. Consequently, ultimately, in view of the different normative values, it needs to be determined whether it is possible to conceptualize the appropriate role of the European and the national level in enforcement matters and particularly, the appropriate degree of intrusion by one level on the other.

¹²³ P.S. Berman, "Global Legal Pluralism," *Southern California Law Review* 80(2007): 1158.

¹²⁴ Reich, "Horizontal liability in EC law: Hybridization of remedies for the compensation of breaches of EC rights."

¹²⁵ Unberath, "Case comment on Joined Cases C-65/09 Weber & C-87/09 Putz," 804.

¹²⁶ According to Article 2 TEU and as already set down by the Court of Justice in its judgement in *Les Verts* in 1986, the European Union is founded upon the rule of law. Case 294/83, *Patri écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339.

2) Standardisation

EUROPEAN STANDARDISATION IN HEALTHCARE: TOWARDS CONVERGENCE THROUGH SELF-REGULATION

*Barend van Leeuwen**

I. Introduction

It has become more common for patients to move across borders to receive medical treatment. Under the umbrella of the right to freely receive services in another Member State, the Court of Justice of the European Union (“the Court”) has progressively defined a right for patients to receive healthcare services in another Member State from the one in which they are affiliated to the healthcare system. The scope of this right has been clarified in a series of cases, which have now been codified in the 2011 Directive on the application of patients’ rights in cross-border healthcare (“the 2011 Directive”).¹ The 2011 Directive regulates and facilitates the movement of patients. It does not attempt to substantively regulate the treatment of patients once they have moved abroad. This is because the European Union (“the EU”) only has a limited public health competence.² The EU has no competence to regulate issues of quality of care of medical treatment. It has nothing to say about the number of beds which should be available to patients, about the level of training of medical personnel, or about the specificities of the after-care provided to patients. These areas are still within the exclusive competence of the 27 Member States.³ Nevertheless, the question is whether, after the “constitutionalisation” of the right to cross-border healthcare, the movement of patients within the EU is going to result in European standards on quality of care. The 2011 Directive already obliges Member States to make their national quality standards accessible to service recipients from other Member States. Furthermore, it encourages the exchange of national standards.⁴ This exchange, in the context of more cross-border movement of patients, could subsequently lead to the adoption of European standards on quality of care. Since legislative action is not possible, such standards would have to be adopted through other means.

This paper will look at the adoption of European quality standards through standardisation. It is written in the context of a research project on the regulatory function of private law in the EU. One of the vertical projects focusses on the ability on standardisation to realise a degree of convergence of the regulation of services in the EU through private law. As such, the European quality standards will finally have to be incorporated in contract law and tort law. Because of the lack of legal competence of the EU to regulate the delivery of healthcare services, the hypothesis which is being tested in this

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¹ Directive 2011/24/EU of the European Parliament and the Council on the application of patients’ rights in cross-border healthcare.

² Article 168 of the Treaty on the Functioning of the European Union (“TFEU”) now provides for a complementing competence in the area of public health, and encourages cooperation between the Member States to improve the complementarity of their health services in cross-border areas. However, Article 168(7) expressly provides that “Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of resources assigned to them”.

³ As confirmed in Article 4(1) of the 2011 Directive.

⁴ Article 4(2)(a) and Article 10(1) of the 2011 Directive.

paper is whether standardisation, as a bottom-up regulatory tool, can do an *effective* job in increasing the convergence of the regulation of healthcare services in the EU Member States – a job which legal harmonisation in this situation cannot do.

First of all, the context and impact of the right to cross-border healthcare will be introduced. Secondly, the paper will look at the theory of convergence. Convergence has been given quite a specific meaning in the discussion on the Europeanisation of private law. This definition will be adapted and applied to the regulation of healthcare services in the Member States through private law. The next step will then be to see what the role of standardisation could be in the context of cross-border healthcare. Finally, two case studies will be discussed to link the theory to what is happening in practice. It will be submitted that standardisation has potential to increase the convergence of healthcare regulation in the EU Member States. However, in order to maximise this potential it is necessary that the medical profession accepts European standardisation as a regulatory tool and that public authorities support, or at least facilitate, a European standardisation process.

II. The Context of Cross-Border Healthcare and Convergence

The Context and the New 2011 Directive

Traditionally, patients go to their local hospital to see a local doctor. Healthcare has a strong territorial element. This is not surprising: patients do not want to travel long distances for medical care, they like to build up a relationship with their doctor and they prefer to have quick access to medical care. This local, territorial element of healthcare has not gone away. However, some developments in the healthcare sector have resulted in a new “type” of patient. The two main developments could be described as the “consumerisation” of the patient and the privatisation, or liberalisation, of healthcare services. The consumerisation of patients means that patients are becoming more and more like consumers. This implies an element of choice, and an element of “shopping for care”. It can no longer be assumed that patients will go to the hospital next door – if there is a hospital a few hours away which offers specialist care of a higher quality they will often opt for that hospital. This means that healthcare services are, to a certain extent, being removed from their territorial nature. Furthermore, patients have more access to information about the contents, the risks and the consequences of medical treatment. The result of that increase in information is that patients become more demanding towards doctors, and will not hesitate to ask for a second opinion if they are not pleased with the diagnosis or proposal for treatment. Again, this could mean that patients will travel some distance to obtain a second opinion. In parallel to the consumerisation of the patient, there is also a process of liberalisation and privatisation in the healthcare sector. A number of Member States have introduced a degree of competition in their healthcare systems, and more healthcare services are now being offered by private healthcare providers.⁵ In a way, they profit from the process of consumerisation. Private healthcare providers use modern ways of advertising their services. Furthermore, in order to gain entry to the market and to compete with public healthcare providers, they frequently offer their services at lower prices. This raises questions about the quality of the services offered. Moreover, private healthcare providers often operate in a field which is not as strictly regulated as public healthcare. Therefore, it has proven difficult to protect patients against dangerous medical treatment of a low quality, particularly in a cross-border context.

As a result of all these developments, the Court has been forced to discuss a number of cases in which patients wanted to move abroad to receive healthcare services. The Court included the right to medical care within the scope of the free movement of services, which is now found in Article 56 TFEU. It

⁵ Markus Krajewski, “Healthcare Liberalisation in the EU and the WTO” in Christian Joerges and Josef Falke (ed), *Globalisation and the Potential of Law in Transnational Markets* (Oxford, Hart Publishing, 2011), 243.

took the Court a good number of cases to define the exact scope of the right to receive medical treatment abroad.⁶ It was recognised that, as a result of the special nature of healthcare services, the sector needed a specific legal solution. Therefore, healthcare services were excluded from the scope of application of the Services Directive 2006.⁷ The case law of the Court has now, to a significant extent, been codified in the 2011 Directive. It includes articles on the responsibilities of the Member States, on the reimbursement of cross-border healthcare and on cooperation between the Member States.⁸ The 2011 Directive expressly provides that it remains for the Member States to regulate the quality of healthcare.⁹ Whilst there is facilitation and regulation of the movement of patients, substantive issues on the quality of treatment are outside the scope of the Directive. At the same time, Member States are encouraged to exchange national standards on quality of care issues. Such an exchange could lead to the convergence of national quality standards. This is not too different from the solution adopted in the Services Directive 2006. Article 26 of this Directive provides that the European Commission (“the Commission”) and the Member States are under an obligation to encourage services providers to take voluntary measures to increase the compatibility of services in a particular sector.¹⁰ This is because it is believed that an increased degree of compatibility of the underlying substantive regulation of the services will assist the free movement of service recipients. This is where the theory of convergence enters into the arena. Standardisation could then be the tool to increase such convergence. It is expressly recognised as a regulatory tool to increase the compatibility of services in Article 26(5) of the Services Directive 2006.

Convergence in the Court’s Case Law

Before the potential of standardisation as a regulatory tool to increase convergence is assessed, it is necessary to look at the impact of the case law on the free movement of patients and at the 2011 Directive. In which areas has the case law (decided under Article 56 on the free movement of services) already resulted in a degree of convergence in the regulation of healthcare services in the 27 Member States?

The series of cases already referred to above have, to a certain extent, opened up a European market for healthcare services. Although the Court has been careful not to intrude on the regulatory autonomy of the Member States, and to affect the way in which the Member States have organised their healthcare systems, the case law has had a convergent effect in a number of areas. The most important areas which can be identified are the following:

⁶ In particular, see Case C-120/95, *Decker v Caisse de maladie des employés privés*, [1998] ECR I-1831; Case C-158/96, *Kohll v Union des caisses de maladie*, [1998] ECR I-1931; Case C-368/98, *Vanbraekel and others v Alliance nationale des mutualités chrétiennes*, [2001] ECR I-5363; Case C-157/99, *Geraets-Smits v Stichting Ziekenfonds and Peerbooms v Stichting CZ Groep Zorgverzekeringen*, [2001] ECR I-547; Case C-385/99, *Müller-Fauré v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen and van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, [2003] ECR I-4509; Case C-56/01, *Inizan v Caisse primaire d’assurance maladie des Hauts-de-Seine*, [2003] ECR I-12403 and Case C-372/04, *The Queen ex parte Watts v Bedford Primary Care Trust and Secretary of State for Health*, [2006] ECR I-4325.

⁷ Article 2(2)(f) of Directive 2006/123/EC of the European Parliament and Council on services in the internal market.

⁸ Articles 4-6 (responsibilities of the Member States); Articles 7-9 (reimbursement of cross-border healthcare) and Article 10-15 (cooperation in healthcare).

⁹ Article 4(1) of the 2011 Directive.

¹⁰ Article 26 of the Services Directive refers to certification, labelling, co-operation between professional bodies, independent assessments and standardisation.

Procedural requirements for prior authorisation of healthcare abroad

In principle, it is possible for Member States to impose a system of prior authorisation for patients who seek hospital treatment in another Member State. However, the Court has made it clear that Member States must have transparent procedures for cases in which authorisation can be required. Decisions of the decision-making body must be open to judicial review or some sort of quasi judicial review proceedings, and they must be taken within a reasonable time frame.¹¹

Substantive requirements for prior authorisation of healthcare abroad

Similarly, as a result of the case law, the substantive criteria which Member States use in deciding whether or not to authorise treatment in another Member State have to a significant extent been converged. The Court held in *Geraets-Smits and Peerbooms* that the Dutch criterion of whether a treatment was “normal in the professional circles concerned” had to be interpreted from an international perspective: treatment sufficiently tried and tested by international science.¹² Relevant (international) scientific literature had to be taken into account. This means that Member States, in dealing with a request for prior authorisation, must look at treatments from an international point of view, and cannot stick to national medical practice if this is unduly restrictive. The consequence of this is that the pallet of treatment options available to patients becomes broader and has to be interpreted from an international (and possibly European) perspective.

Secondly, the criterion that treatment abroad was a medical necessity (which in practice meant that the treatment could not be offered without undue delay in the home Member State) was justified as long as the decision-making body took all the specific circumstances of the case into account.¹³ Member States are no longer justified in referring to acceptable lengths of national waiting lists as an outright justification to refuse authorisation to receive healthcare abroad. They must always make an individual assessment based on the current circumstances of the patient.

The result of these substantive criteria is that Member States are obliged to make individual assessment of patients who seek authorisation of treatment abroad, and that Member States are obliged to take international medical practice into account. This implies that Member States – at least at the level of prior authorisation – can no longer close their eyes for medical practice in other Member States.

Waiting lists

The individual assessment of the undue delay criterion (or medical necessity) has also had an impact on how Member States manage their waiting lists. It is no longer appropriate to refuse treatment abroad on the basis that the length of the waiting lists is acceptable. Each case requires an individual assessment of the circumstances of the patient. This has obliged Member States to introduce a certain flexibility in their management of waiting lists, and where necessary to pro-actively seek cross-border treatment options. The *Watts* case is a very clear example of the impact of EU free movement law on the management of waiting lists.¹⁴ The result of that case is that the English National Health Service (“NHS”) now regularly sends patients to other Member States for treatment.¹⁵

¹¹ *Geraets-Smits and Peerbooms*, above n 6, para 90.

¹² *Idem*, paras 97-98.

¹³ *Idem*, para 104.

¹⁴ *Watts*, above n 6.

¹⁵ Jonathan Montgomery, “Impact of European Union Law on English Healthcare Law”, in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005), 154.

Transparency of costs of treatment

Finally, the fact that non-hospital care has to be reimbursed and that prior authorisation can never be justified for those cases means that healthcare systems such as the NHS have to make the costs of the specific treatments transparent and accessible. Otherwise, it would be difficult or impossible to know to what extent treatment abroad will be reimbursed. The result is that Member States must make the costs of treatments accessible to patients.

Convergence in the 2011 Directive

The 2011 Directive codified the case law on the free movement of patients. The articles on reimbursement of healthcare in another Member State from the one in which the patient is affiliated to the healthcare system closely follow the rules laid down by the Court. The same is true for the rules on prior authorisation. The situations in which cross-border healthcare can be subject to prior authorisation are exhaustively listed. An interesting difference is that the definition of hospital treatment, which can, in principle, be subject to prior authorisation, is healthcare which involves overnight accommodation in hospital.¹⁶ As a consequence, it appears that outpatient treatment in hospital can no longer be subject to prior authorisation.

In a number of respects, the 2011 Directive goes further than the case law of the Court.¹⁷ As such, the Directive attempts to realise convergence through harmonisation in a limited number of areas. It should be noted that the Directive has only been adopted in early 2011, and that the deadline for transposition in national law is 25th October 2013. Therefore, the actual effect of the Directive in practice cannot yet be measured.

Quality standards

The Directive obliges Member States to provide cross-border healthcare in accordance with standards and guidelines laid down by the Member State of treatment.¹⁸ This does not directly encourage any convergence of quality standards, let alone the creation of European quality standards, but it does mean that Member States must have quality standards in place. Member States which have insufficient or no quality standards will be required to adopt such standards for the purposes of cross-border healthcare. If national standards are not available, Member States could decide to adopt international or European standards. Naturally, the effect of these standards would not be limited to healthcare provided to patients coming from other Member States. Article 4(1) of the Directive also provides that Member States must take the principles of universality, access to good quality care, equity and solidarity into account in providing cross-border healthcare. This could mean that Member States are required to provide healthcare of a certain minimum level of quality, and could even be required in certain circumstances to adapt their quality standards to provide healthcare of a higher quality.

Accessibility of quality standards

In addition to having quality standards in place, these standards must also be accessible to patients from other Member States.¹⁹ Member States must establish information points which can provide

¹⁶ Article 8(2)(a)(i) of the 2011 Directive.

¹⁷ For a more detailed analysis, see Stephane de la Rosa, "The Directive on Cross-Border Healthcare or the Art of Codifying Complex Case Law", (2012) *CMLR* 15-46 and Wolf Sauter, "Harmonisation in healthcare: the EU patients' rights Directive", *TILEC Research Paper*, No.6, 2011.

¹⁸ Article 4(1)(b) of the 2011 Directive.

¹⁹ Article 4(2)(a) of the 2011 Directive.

patients in other Member States with relevant information on the standards and guidelines which are in place in the Member State of treatment.

Information requirements

In terms of convergence specifically relating to quality of care, the 2011 Directive goes quite far in the information requirements imposed on healthcare providers. Article 4(2)(b) obliges healthcare providers to help patients to make an informed choice. This information includes information on:

- a) Treatment options
- b) Availability of healthcare
- c) Quality and safety of healthcare
- d) Prices and invoices
- e) Registration status and insurance of healthcare professionals

These criteria all go some way towards providing a basis for informed consent. Consequently, the 2011 Directive protects patients who are considering cross-border healthcare by granting them a number of information rights. As such, the protection focusses on the service recipient – the patient in this case – and aims as much as possible to make the patient a well-informed consumer.

Complaints and insurance

Finally, the 2011 Directive obliges Member States to have transparent complaints mechanisms in place for patients.²⁰ Furthermore, the Member State is required to have a system of professional liability insurance in place.²¹

The Possible Role of Standardisation in Quality of Healthcare Regulation

Overall, it is clear that both the case law on the free movement of patients and the 2011 Directive have realised some convergence in the regulation of healthcare in the Member States.

The case law of the Court has affected both the procedural and substantive criteria used in assessing prior authorisation requests for cross-border healthcare. There has also been an indirect impact on the management of waiting lists in the Member States. The 2011 Directive has codified the case law, but has also imposed a number of additional information obligations on both Member States and service providers. This means that the concept of quality of care becomes more accessible and transparent. However, because of the lack of legal competence to regulate quality of healthcare, both the case law and the Directive are still based on the presumption that quality is a nationally defined concept. They do not directly interfere with the national definition of quality of care. However, patients should be informed about national quality standards, and Member States are encouraged to exchange quality standards.

In a European market for healthcare services, such an exchange could subsequently result in a need for a European definition of quality of care. This could be in areas in which there is a significant amount of cross-border movement of patients, such as aesthetic surgery or preventive health checks, or in areas in which the regulation of (private) healthcare services is very different in the various Member States. It has become more common for healthcare insurers and public bodies (depending on the nature of the Member State's healthcare system) to conclude contracts with healthcare providers in other Member States. In order to be able to assess the quality of these healthcare providers, it would be

²⁰ Article 4(2)(c) of the 2011 Directive.

²¹ Article 4(2)(d) of the 2011 Directive.

helpful to have a European quality standard. Similarly, healthcare insurers or public bodies may in certain circumstances refuse prior authorisation of healthcare abroad. Art 8(6)(c) of the 2011 Directive provides that concerns about the quality of the healthcare providers are one of the legitimate reasons to refuse prior authorisation. Again, therefore, there is an incentive in the Directive for quality to be regulated at the European level. Finally, patients considering cross-border healthcare would be assisted by knowing that a specific healthcare provider complies with a European quality standard.

Standardisation could be one of the tools to regulate quality at the European level. Therefore, the standardisation procedure and the standard as a regulatory instrument will have to be critically assessed. But before this is done, it is necessary to look at the theory of convergence, to provide a definition of convergence of healthcare regulation and to outline the role of private law in increasing such convergence.

III. Convergence of Healthcare Regulation and Private Law

The Traditional Discussion of Convergence in Private Law

In the academic discussion on the possibility of convergence in private law, convergence has been given quite a specific definition. The discussion on convergence has primarily focussed on the ability to converge national contract laws to facilitate cross-border transactions. This focus on the facilitation of cross-border transactions was confirmed by the Commission, which published its proposal for a Regulation on a Common European Sales Law in October 2011.²² The fundamental assumption on which this proposal is based is that unification of national sales laws will result in more cross-border activity. It is assumed by the Commission that the uncertainty of not knowing a foreign legal system is an obstacle to the use of cross-border transactions. Therefore, the aim of the instrument is to remove that obstacle by creating the possibility of a Common European Sales Law which is accessible to all parties and effectively removes a transaction from the specific national legal regime in which it takes place. Despite the fact that the application of the Regulation is of a voluntary nature, in that parties can choose to opt-in and make the Regulation applicable to their transaction, the Common European Sales Law represents an attempt to realise an ultimate form of convergence: a European legal framework which would effectively replace the use of national legal systems.

So far the academic discussion of convergence has focussed on convergence of, and through, legislation – convergence of legal rules. The strongest method of such convergence in law is harmonisation. When the EU harmonises a particular area of law, the various national legal rules are replaced by a uniform European rule which is directly introduced in the legal systems of the 27 Member States. After a process of harmonisation, the wording of that legal rule is the same in the various Member States. As such, harmonisation focusses at convergence in law, but does not necessarily address convergence in practice. The fact that the wording of the rule is the same in all Member States is no guarantee that the rule will be uniformly and consistently applied throughout the EU. The possibility of convergence has been described as an ideal, an illusion, by some academics. Certain authors would even deny the very possibility of convergence at all. Legrand has argued that a legal rule cannot truly and fully transfer from one legal system to another.²³ This is because the rule will always be received in a different system, with a different legal culture and a different tradition of interpreting the law. As a result, according to Legrand, any convergence of legal rules will remain an illusion.²⁴ The law in the books may appear to be similar, but the practical application of these rules

²² Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 11.10.2011.

²³ Pierre Legrand, "The Impossibility of Legal Transplants", (1997) *Maastricht J. Eur. & Comp. L.* 111.

²⁴ *Ibid.*, p 120.

will always remain different as a result of the differences in legal cultures. As a consequence, there will be no uniformity in the application of the rule at all. Similarly, Teubner has described the reception of a foreign legal rule into a different legal system as a “legal irritant”.²⁵ The result of that irritation is that the transfer of the legal rule will never serve its purpose and will not realise its full potential. The difficulties with attempting to transplant rules from one jurisdiction to another have led Smits to argue that our focus should be on the arguments which are taken into account in reaching a decision.²⁶ Smits has argued that these arguments, and the process of reaching a decision, are more important than whether or not the same rules are applied or whether the same outcomes are reached.²⁷

The arguments of Smits come closest to identifying the difference between what could be described as “top-down” convergence – convergence through harmonisation – and “bottom-up” convergence – for example, convergence through standardisation. “Top-down” convergence directly imposes a uniform legal rule on the 27 Member States, usually through harmonisation. However, to realise a degree of convergence in practice it is not always necessary to directly turn to the adoption of a binding legal rule – non-binding instruments could potentially do the job just as effectively as, or perhaps even more effectively than legally binding instruments. The advantage of relying on voluntary self-regulation to bring about convergence is that self-regulatory instruments are deeply rooted in practice, and that convergence would be a “bottom-up” development. This would be very much in line with the strategy proposed by Walter van Gerven.²⁸ Although his focus seems to be on “bottom-up” convergence through judicial interpretation (the judiciary would be the principal actor), the proposed “Open Method of Convergence” could just as well apply to self-regulatory instruments as standardisation. And in the end, the judiciary would be relied on to adopt such European standards in private law disputes.

Whilst convergence through harmonisation is a process which imposes a particular rule on the 27 Member States, convergence through standardisation does not directly impose a rule. Firstly, the very reason why a standardisation initiative is started at the European level is because the sector itself believes that there is a need for a European standard. As such, the process is very much started “bottom-up”, whilst legal harmonisation is a “top-down” process. Secondly, as will be discussed in more detail below, the end-result of the standardisation process is not a legally binding rule which has to be applied in the various Member States. The standard can be used to decide the appropriate standard in a contractual dispute, in a clinical negligence case or in disciplinary proceedings. The choice to use a European standard as the contractual or tortious standard of care would be a voluntary choice made by a court or tribunal. The European standard would only be used if it was an authoritative document which adequately reflected what standards were required from healthcare providers in the 27 Member States. It would have to realistically describe what standards could be expected from healthcare providers. Such a standard would only be used in legal proceedings if it was a practically workable standard, recognised in all Member States. As a result, a European standard would obtain binding legal force through the voluntary choice to incorporate it into national law. Convergence through standardisation does not directly change the wording of legal rules, but rather provides a European source of law which can be referred to in legal proceedings. This would subsequently lead to a converged standard in the 27 Member States – a standard which has not been imposed “top-down” but which has been voluntarily incorporated “bottom-up”.

²⁵ Gunther Teubner, “Good Faith in British Law or How Unifying Law Ends up in New Divergences”, (1998) *Modern Law Review* 11.

²⁶ Jan M. Smits, “Contract Law in the European Union: Convergence or Not?”, *Tilburg Institute of Comparative and Transnational Law Working Paper* No. 2008/1.

²⁷ *Ibid.*, p 20-21.

²⁸ Walter van Gerven, “Private Law in a Federal Perspective”, in Roger Brownsword et al. (eds.), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011), 337.

Convergence of Quality of Care Regulation in Healthcare

In looking at the possibility of convergence in the healthcare sector, the focus will be on issues which fall within the domain of quality of care of medical treatment. The result of the lack of EU competence is that such issues will never be regulated by EU legislation. The argument that issues of quality of care could be regulated under the EU's internal market competence is difficult to defend.²⁹ This means that any regulation of issues of quality of care at the European level will have to be realised through other means than legislation – convergence through legal harmonisation is excluded. Self-regulation, which is in any event a frequently used tool in the healthcare sector, is one of the alternative possibilities.

There can be no doubt that the regulation of healthcare services is very different in form, or in law, in the various Member States. The regulatory frameworks are a complex mixture of public regulation, through legislation or public regulations, and private self-regulation. In most Member States there is legislation which establishes a general duty of care of healthcare providers. In some Member States the details of that duty of care are left to self-regulatory instruments such as codes or protocols, while in other Member States the details are also provided by public regulations. Therefore, healthcare regulation at the national level consists of both a public and private layer. Healthcare is a sector in which it is accepted that the sector itself has more technical and medical knowledge than the public sector, which in principle makes self-regulation a legitimate regulatory tool. Convergence of healthcare regulation through standardisation would initially aim at convergence of that self-regulatory layer of the regulatory framework. European standards would replace national or regional protocols or codes. However, it should not be excluded that convergence within the self-regulatory layer could eventually result in convergence of the publicly regulated layer as well. This could be because the public authorities have participated in the standardisation process, or because a standard is subsequently adopted by public authorities in binding legal instruments. Public authorities are already getting involved in the standardisation process and in certain circumstances consider standardisation to be a useful regulatory tool. The involvement of public authorities in the standardisation process does not necessarily result in a hybrid public-private law instrument. A standard will still be a non-binding instrument. However, at the same time, this hybridisation of public and private regulation, usually referred to as co-regulation, has an impact on the strict borders between public and private regulation in the healthcare sector. These borders could become more hybrid and fluid, which could in turn result in more potential for convergence through standardisation in both the public and private layer of healthcare regulation.³⁰

It is important to note that the extent to which the national frameworks which regulate healthcare services allow for private self-regulation varies significantly across the 27 Member States. It is the result of a choice which has been made by the Member States – certain Member States are more enthusiastic about self-regulation than other Member States. For example, in France, the regulation of healthcare issues, in particular those focussing on quality of care issues, is the responsibility of the Haute Autorité de Santé, an administrative body which has been set up by the Government to improve the quality of healthcare. Although it is not a Government body, it is governed by public law and works closely with governmental bodies.³¹ Members are appointed by the Government. Similarly, in the United Kingdom, the Care Quality Commission is responsible for assessing and monitoring the quality of care provided by healthcare service providers. This assessment and monitoring process is based on government standards. However, in the Netherlands, the Healthcare Inspectorate is perfectly content to leave the regulation of quality of care issues to the sector itself. They choose to adopt these

²⁹ Derrick Wyatt, "Community Competence to Regulate Medical Services", in Michael Dougan and Eleanor Spaventa (ed.), *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005), 131-144.

³⁰ See also Jean-Christophe Graz, "International Standards and the Services Economy" in Christian Joerges and Josef Falke (ed), *Globalisation and the Potential of Law in Transnational Markets* (Oxford, Hart Publishing, 2011), 221.

³¹ Loi n° 2004-810 du 13 août 2004 relative à l'assurance maladie.

standards and refer to them in their contact with the healthcare service providers. This very brief and basic example shows that there are different extents to which self-regulation in the healthcare sector is accepted, and autonomous, in the various Member States.

As a result of these differences, the material scope of self-regulation in healthcare, what I would call the *margin of operation* of self-regulation, varies among the EU Member States. As a consequence, the potential for convergence of healthcare regulation through standardisation will depend on how wide the margin of operation of self-regulation is. In Member States with more strictly publicly regulated healthcare systems, the potential for standardisation to converge healthcare regulation may be smaller and may be more dependent on involvement of public authorities in the standardisation process to encourage the hybridisation of the public and private layers of healthcare regulation.

Convergence of Quality of Care Regulation through Private Law

The next step is to describe how quality of care regulation could be realised through private law. The private law dimension of this paper is not only that standardisation is an instrument of private law-making, but also that these standards find their way into private law – in particular, contract law and tort law. Similarly to the creation of a Common European Sales Law, private law is being instrumentalised to create a better-functioning European market for healthcare services. As a consequence, the focus is on the regulation of quality of healthcare services through private law.

First, quality can be regulated through contractual agreements. Compliance with a European quality standard can be made an express term of the contract. Alternatively, the required contractual standard of care can be interpreted by reference to a European quality standard. The circumstances in which a court or tribunal are more likely to refer to a European standard are those in which cross-border movement of patients frequently takes place, or when national standards are out of date or inadequate. What are the examples of healthcare contracts which can regulate quality of care?

- (i) Contracts between healthcare insurers/public authorities and healthcare service providers: insurers (for example, in the Dutch system) or public authorities (for example, in the English system) conclude contracts with healthcare providers. One of the terms of a contract could be compliance with a European quality standard.
- (ii) Contracts between healthcare providers and patients: the contractual standard to be expected from a hospital or institute can be – expressly or impliedly - determined by reference to a European quality standard.
- (iii) Contracts between insurers and patients: the contracts between patients and insurers could impose an obligation on the insurer that care provided to the patients will comply with a European quality standard.
- (iv) Contracts between healthcare providers and healthcare professionals: for example, consultants working in a hospital (whether as employees or self-employed) could be required to comply with the training requirements of a European standard.

Second, the regulation of quality of healthcare could occur through tort law. The standard used to assess the conduct of healthcare professionals in clinical negligence proceedings could be a European quality standard. Similarly, although not strictly private law, a European quality standard could be used to determine the required standard of care of a healthcare professional in disciplinary proceedings or complaint procedures against medical practitioners.

In addition to the scope of self-regulation in healthcare (the *margin of operation* of self-regulation in healthcare), already referred to above, which will determine how common and accepted self-regulation is in the healthcare system of a particular Member State, another important element is the *quality* of self-regulation. This is crucial to the potential of standardisation to increase the convergence of quality of healthcare regulation. The judiciary in all Member States uses certain qualitative criteria to determine whether or not a privately created standard can be incorporated in law in contractual or clinical negligence proceedings. Amongst other factors, the quality of a self-regulatory instrument

depends on the number of parties which have participated in the adoption of the standard (how representative of the sector were the participants?) and the purpose of the standard (does it actually serve the public interest or was the standard adopted for purely commercial reasons?). If the standard does not fulfil certain quality criteria, it is unlikely that it will be used in contractual or negligence cases. As a result, it becomes even more important to closely assess the standardisation process at the European level.

The Substance of Quality of Healthcare Regulation and Convergence

Finally, it should be helpful to get an idea of the substance of quality of healthcare regulation, and which quality criteria could actually be converged through the introduction of European quality standards.

It is important to note that European quality standards aim to introduce minimum quality criteria. The standards cannot in any way be compared with maximum harmonisation. The introduction of a number of similar minimum quality criteria should guarantee a minimum level-playing field for healthcare services in the EU. That level-playing field should increase the safe movement of patients within the EU, and guarantee a minimum level of care in all 27 Member States. This means that there is no complete “equalisation” of the level of healthcare provided, but simply that providers are required to comply with a European minimum standard. Competition and diversity above that minimum standard will remain possible.

A number of quality criteria which can be standardised at the European level can be given:

1. Education/training: the requirements for the training of medical personnel could be converged. Convergence would not necessarily mean that the syllabi of the training would be completely similar, but it could mean that in order to be allowed to perform certain specific medical treatments there is a requirement that the doctor has received specialist training over and above the general training of doctors.
2. Facilities: this would include the facilities available to the patient and the instruments used in the treatment of patients. Convergence of facilities would result in the use of similar medical devices or instruments (an area in which there have already been extensive standardisation processes) and in the availability of a number of minimum facilities to patients. One could think about the maximum number of patients in one room, or access requirements for handicapped patients.
3. Communication/information: convergence of information and communication requirements would mean that there would be a minimum amount of information which the doctor would be required to inform the patient about. This could apply to the substance of the treatment as well as to the risks associated with the treatment. These requirements would be additional to those already required by the 2011 Directive.
4. Medical treatment: more controversially, a European standard could attempt to standardise issues focussing on the actual treatment of the patient. A standard could provide for a framework establishing which treatment should take place, and when. As will be seen below, such standards appear to be very controversial.
5. After-care and complaints: the regulation of the care of the patient after the treatment is widely divergent in the various Member States. Convergence of after-care would create a number of minimum requirements which the healthcare provider would be expected to comply with. After-care would include the possibility for patients to complain about their treatment, and the adequate facilitation of such complaints by the healthcare provider.
6. Monitoring of quality: convergence of monitoring requirements would impose a number of compulsory checks on healthcare providers. These checks could be both internal (by the healthcare provider itself) and external (through an independent assessment or visitation).

IV. European Standardisation

The Location of Standardisation in the EU Regulatory Framework

Standardisation is a tool of self-regulation to create non-binding standards. This means that a number of parties in a sector come together to agree on a set of voluntary standards. These standards are not intended to have any binding force “an sich”,³² but aim to guide the actions of parties which are active in the sector. Historically, standards have mainly been used in the area of free movement of goods. The Court’s judgment in *Cassis de Dijon*³³ had a deregulatory effect, which required a response from the goods sector itself. Technical standards were the ideal means to realise a degree of compatibility in the sizes, materials and weight of products. Therefore, standardisation has become prominent through the free movement of goods. These technical product standards were adopted in a tight regulatory framework which meant that they obtained a quasi-legal status.³⁴

As part of the Commission’s policy to increase the free movement of services, standardisation is now also being used to increase the compatibility of services within the EU.³⁵ Standards on the quality of services could increase the incentive for cross-border movement of both service providers and service recipients. This is again the rationale on which Article 26 of the Services Directive 2006 is based – whilst the facilitation of free movement in the EU is in principle a good thing, some substantive regulation of the services will assist in increasing free movement. However, unlike the technical product standards referred to above, quality of services standards are not adopted in a clear regulatory framework. They do not obtain the quasi-legal force of technical product standards. As a result, the “success” of services standards is very much dependent on the willingness of parties in the sector to subscribe to them, and on the judiciary to refer to these standards in private law disputes.

How does standardisation work in practice? Each Member State has its own national standardisation organisation. These organisations coordinate national standardisation initiatives. The initiative for a process of standardisation is never taken by the standardisation organisation itself. It is usually a particular sector which takes the initiative to start a standardisation process. The standardisation organisation subsequently takes up responsibility for the coordination of the process, and fulfils a mainly administrative role. Invitations are sent out to all parties which could possibly be interested in participating in the standardisation process. The determination which parties could be interested is made by the standardisation organisation itself. The parties which decide to participate usually have to pay a fee, since there is very limited public funding for standardisation.³⁶ This is not surprising given the fact that it is in principle a form of private self-regulation. Standardisation can take place both at the national level – where national standards are created – and at the European level – where European standards are created. There is even an International Organisation for Standardisation, the ISO. European standards have to be implemented as national standards and take primacy over any existing inconsistent national standards. This is not the same for international ISO standards. If a standardisation process takes place at the European level, the European standardisation organisation CEN assumes the administrative role as coordinator of the process. First, it is assessed whether or not

³² Although they are in principle non-binding, the specific legal status of a standard in national law differs in the various Member States. See Harm Schepel, *The Constitution of Private Governance* (Oxford, Hart Publishing, 2005), 101-143.

³³ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

³⁴ Directives adopted under the New Approach normally provide that compliance with a technical standard raises a presumption of compliance with the requirements of the Directive. References to these technical standards have to be published in the Official Journal of the European Union before the presumption of compliance can arise.

³⁵ See Commission Communication, *A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020*, Brussels, 1.6.2011, COM(2011) 311 final.

³⁶ For example, the fees for participating in the Dutch NEN mirror committee for the project on “Aesthetic Surgery Services” are €3000 for professional organisations and public bodies, €2000 for companies and €1000 for NGOs, research institutes.

there is sufficient support for the initiation of a standardisation process.³⁷ If this is the case, a CEN Technical Committee will be formed with representatives of each Member State. Furthermore, the national standardisation organisations will create national “mirror committees” which closely scrutinise the progress of the CEN Technical Committee. These mirror committees send representatives to the European committee, which effectively exists of delegates of the national mirror committees. The task of these representatives is to convey the national position on a particular standard, with a view to seek consensus at the European level. This means that the process of European standardisation is always led and guarded by national representatives.

At the European level, there are basically two ways in which a standardisation process can be initiated. First of all, the conventional way is for businesses in a particular sector to take the initiative to start working on a standard. This is usually described as “bottom-up” standardisation. The second way is for the Commission to take the initiative to start a standardisation process.³⁸ In such a case, the Commission issues a mandate to the European standardisation organisation CEN to start working on a standard in a particular field. This standard could be used to supplement existing or new legislation, or to fill the gaps in a legislative instrument. As a consequence, a standardisation process can also be initiated “top-down” by a mandate of the Commission. It could be questioned whether a top-down approach has less potential to realise convergence in practice, as the initiative to start the process has not been taken by the sector itself. However, it should be noted that it is still the sector itself which is in charge of the standardisation process. Although the Commission could mandate the initiation of the standardisation process, the process itself is still driven and controlled by the sector itself. None of the current standardisation processes in the healthcare sector have been mandated by the Commission. In the reform process of Directive 98/34 one of the issues which is currently on the table is whether or not the Commission shall have the power to mandate standardisation processes in the healthcare sector. There are strong voices against such a mandate in the healthcare sector. The result would be that standardisation initiatives in the healthcare sector can only be started “bottom-up”. This would presumably be to recognise that the EU has no legislative competence in the field of quality of healthcare services, and should not even be allowed to initiate self-regulation on quality of healthcare, and also because of a lack of political will to encourage European initiatives in the healthcare sector.

The Parties Involved in the Standardisation Process

With the exception of a mandate of the Commission, each process of standardisation is started by the sector itself. This usually means that a process is started because a sector feels a particular need for a common response to a problem which is encountered in that sector. Traditionally, this meant that the businesses in a particular production industry came together to agree on technical product standards, for example on which type of materials to use for a particular product.³⁹ Standardisation was an effective means to increase the compatibility of the product, which resulted in a better functioning single market for that product and in increased competition. As a result, standardisation was the result of a perceived need for convergence in a sector. Therefore, convergence can be considered to be one of the underlying values on which the standardisation process is based.

³⁷ By Resolution BT C75/2009, BT approved that both of following criteria are to be met for acceptance of such proposal for new work (in new area):

- A two-thirds majority of the votes cast (abstentions not counted) are in favour of the proposal;
- Five (or more) Members express commitment to participate.

³⁸ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.

³⁹ This is not too different from the process described in: Lisa Bernstein, “Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions”, (2001) 99 *Michigan Law Review* 1724.

At the same time, businesses focus on their own business interests, which were the main motivation to start a standardisation process. Historically, the public interest and consumer interests were less important in the standardisation process. There is no compulsory involvement of certain organisations or bodies which think outside the box of business interests. However, this sole focus on business interests is gradually decreasing and consumer organisations are now commonly involved in the standardisation process. There is even a European organisation, ANEC,⁴⁰ which aims to be the voice of the consumer in the European standardisation process. Moreover, national public bodies are more frequently involved in the standardisation process, by sending representatives to participate in national mirror committees. Furthermore, there is an increased amount of public funding for standardisation processes in some Member States. These developments all help to improve the legitimacy and transparency of the standardisation process. However, at present, there is no coherent and structured way of involving public authorities in the standardisation process.

The institutional implications of the development towards more public involvement are important, as they imply that standardisation is taken out of its private context and applied in the public sector. They signify a move from “pure” self-regulation towards co-regulation.⁴¹ In effect, the obligation on Member States in Article 26 of the Services Directive 2006 to encourage standardisation initiatives is taken one step further, and Member States become actively involved in the standardisation process. This is evidenced by the recent initiative for a CEN Workshop Agreement on Quality Criteria for Health Checks. The initiative for such a Workshop Agreement was taken by the Dutch Ministry of Health. Therefore, it appears that public bodies are now using standardisation as a means to protect the public interest and to increase consumer protection. This will be discussed in more detail below.

Which parties are generally involved in a standardisation process in the healthcare sector? It is not such a homogenous sector as, for example, the car industry or the construction industry. Standardisation of healthcare brings together medical practitioners, insurers, patient organisations, private clinics and public (regulatory) bodies, such as inspectorates. This means that the parties which are involved in the process may have very different interests, and certainly have very different perspectives on the purposes of standardisation. As a consequence, any standards created will be based on consensus between all parties involved.

It should be noted that standardisation through CEN is not a very well-known regulatory tool in the healthcare sector. It has been used to standardise the use of medical devices and instruments, but issues of quality of medical care have until recently remained outside the scope of standardisation. If an attempt is made to agree on quality standards, which include not just the organisational process or quality management of care but also the medical treatment of patients, medical practitioners usually refer to scientific guidelines. These guidelines are prepared by scientific associations of medical practitioners, and are always evidence-based. A consensus-based approach flies in the face of doctors, who fear that this approach will lead to an inferior standard of care. They do not want to have to make any concessions on medical issues. One solution could be to incorporate existing scientific standards in a European standard. Another solution could be to involve European scientific associations in the standardisation process and to make them expressly approve of the adopted standard. However, the response of medical practitioners is usually that for them a European standard would not have any additional benefit. It could be said that this argument misses the point of standardisation, which is to bring all parties involved together to work on higher quality of care. In particular, in the healthcare sector, it is always the interests of the patient which should be the paramount concern of the stakeholders.

⁴⁰ Association Normalisation Européenne pour les Consommateurs (ANEC), an international non-profit organisation established under Belgian Law.

⁴¹ As advocated for by Fabrizio Cafaggi, “Private Regulation in European Private Law” in Hartkamp et al., *Towards a European Civil Code*, (Nijmegen, Ars Aequi Libri, 2012).

To conclude, the fact that standardisation is driven by the sector itself has a positive impact on its potential to bring about convergence. In a way, convergence in practice is the very aim of every standardisation process. However, the healthcare sector poses some particular problems. The change from evidence-based to consensus-based guidelines is greeted with scepticism by medical practitioners, who fear that the adoption of such standards will lead to lower standards. Since the application of standards is voluntary, their success in the healthcare sector depends to a significant extent on the willingness of medical practitioners to cooperate in the creation of the standards and in subscribing to the standards. As a consequence, it will be crucial to find a *modus operandi* to successfully integrate medical practitioners' concerns in the standardisation process.

The Procedure for Standardisation

Once a proposal has been given the green light after a voting process, a CEN Technical Committee starts to work on a European standard. Very often there is already a source document, with the structure of a proposed standard, before the negotiations are started. This document is taken as the starting point of the future European standard. The national mirror committees control the process of European standardisation and send national representatives to the CEN committee. In this way the national interests are protected throughout the standardisation process. It is extremely important that the national positions are heard and known, since the effectiveness of a standard very much depends on the willingness in the various Member States to subscribe to the agreed standards.

It is not necessary for all Member States to be involved in a standardisation process. It is possible for a more limited number of Member States to be actively involved in the creation of a standard – the minimum requirement is five Member States. The final standard will have to be adopted as a national standard in all Member States and requires the repeal of any inconsistent national standards. Nevertheless, it could only have been a small number of Member States that has actively participated in the process. The choice to abstain from participation in the standardisation process might well have been voluntary, but is likely to have an impact on the subsequent application of that standard in the non-participating Member State.

Importantly, the standardisation process is confidential and not open to the public. Both the CEN committee and national mirror committees meet in private. No documentation is made publicly available, except for the first draft standard which is published on the website of the national standardisation organisations. Parties which are interested in the standard can comment on the proposal. Draft standards are usually available online for a couple of months. Announcements inviting comments are sent to parties which have previously expressed an interest in the standard or which have been selected by the national standardisation organisation as an interesting party to receive comments from. Except for a message on the national standardisation organisation's website, there are generally no public announcements inviting comments from the public.

Despite this short public intermezzo, the curtains of the standardisation process remain very much drawn. Therefore, unlike in a legislative process, there is no – or an extremely limited – public debate in the process. From an "input" perspective, this affects the democratic legitimacy of the standardisation process. This lack of public involvement continues after result of the process: the final standard, once published, is not publicly available. It is a product which can be bought by those parties which are interested in subscribing to the agreed standard. Again, this favours those parties with a substantial amount of money available to buy standards – in particular, commercial parties. Moreover, it reduces public awareness of the standard. The fact that a standard becomes a product which is not easily accessible constitutes an obstacle to access for both healthcare service providers and for patients. From the perspective of healthcare service providers, the process has an inherent bias in favour of those parties which have the financial means to participate in the standardisation process itself. Moreover, it means that service providers with more significant financial means will more easily have access to the standard. From the perspective of patients, if they are thinking about going to

another Member State for treatment, they may very well want to be able to know what sort of standards are used in that Member State. If a CEN standard has been adopted, but this standard is not publicly available, that effectively prevents patients from getting to know an instrument which has attempted to increase the convergence between national healthcare regulation in the different Member States. If patients had known about the existence of the standard, they could have been more inclined to travel abroad. Finally, if a standard is to be used by the judiciary as the standard of care in private disputes, it must have earned its status as an authoritative document which adequately represents what is happening in practice. The fact that a CEN standard is a product which has to be bought makes it more difficult for both healthcare providers and patients to ensure that a standard is broadly and voluntarily complied with before it is “upgraded” in private law.

At the same time, the private and confidential nature of the process could mean that parties are able to reach more consensus on the substantive quality criteria. It could be argued that the “output” of the process, which should improve safety and quality standards for patients throughout Europe, legitimises the relatively limited transparency of the process. But a focus on the output of the process still requires the standards to actually reach healthcare providers and patients – they should at least be made aware of the existence of the standards. There have been certain developments towards more transparency of the standardisation process. A recent example is the CEN Workshop Agreement on Quality Criteria for Health Checks, already referred to above. In this particular case, participants are being funded by the Commission. One of the requirements of the public funding is that all information and documentation on the workshop is available online. As a result, public funding is used to force the participants to make the standardisation process – in this example only leading to a Workshop Agreement – more public and transparent. This could be an important development to raise public awareness, but it still dependent on how easily consumers or patients find their way to the information which is available online. Furthermore, public funding remains relatively limited and the current project appears to be mainly publicly funded because the initiative came from the public sector, i.e. the Dutch Ministry of Health.

What is the effect of the limited public involvement in the standardisation process and the restricted access to the standard on its ability to increase convergence of healthcare regulation in the 27 Member States? If convergence is defined as an increasing similarity of the terms used in the substantive regulation of healthcare services, is it really necessary that there is a degree of transparency and democratic accountability in the process for convergence to take place? Is it necessary and helpful to transpose and apply terminology which is normally used in the democratic legislative process to the standardisation process? The answer to that question must be that it depends on the circumstances in which standardisation is used and the function of the standardisation process. Standardisation in the healthcare sector focusses on the protection of patients in a single market for healthcare services. The aim is to provide a level-playing field for healthcare services in the EU. The safe movement of patients will be improved if patients know of European standards on quality of care issues. The incorporation of European quality standards in law relies on the willingness of the sector and the judiciary to refer to European standards as the appropriate standard of care in contractual or negligence cases. A lack of transparency and accountability could mean that the judiciary is less inclined to refer to such standards.

The End Result: The Instrument “Standard”

Prima facie standards do not have any binding force in law. As CEN puts it rather eloquently, they derive their authority from the fact that they have been created by the stakeholders in the sector through a process of consensus.⁴² As has been described above, standards can find their way into private law in a number of ways. Moreover, and more dramatically, standards can also be directly

⁴² This statement is made in virtually every CEN presentation on what standardisation is and what standards are.

incorporated in legislative instruments. This practice of incorporation in legislation has resulted in litigation in the Netherlands which focusses on the extent to which incorporated standards should be made publicly available to citizens and businesses to enable them to be aware of the content of the legislation. The case raises important issues about the legal status of such incorporated standards and the application of copyright protection legislation to standards incorporated in public legislation.⁴³

Traditionally, legal regulation and standardisation operated in different arenas. Standardisation enabled businesses to agree on certain specific standards within their sector. The fact that the agreed instruments had no binding legal force and remained very much within the sphere of business regulation meant that the wording of standards was very sector-specific. These standards were seldom the subject of legal disputes, and if they came up in legal proceedings their interpretation was usually not too difficult. There can only be minimal disagreement about the meaning of certain sizes or materials of a product. As such, it can be said that the standards did not even look like any sort of legal instrument, and they were unlikely to be the subject of dispute in legal proceedings.

Standards on the quality of services are inherently different in nature. They do not use the same technical wording. Any attempt to define what quality of care is involves a normative judgment which goes beyond mere technical product standards.⁴⁴ This poses a real challenge for standards on quality of care, and in particular for standards on quality of healthcare. It will be difficult to agree on the wording of certain definitions through consensus at the European level. This could be a factor which has a negative impact on the ability to improve convergence of national healthcare regulation through standardisation. Whilst product standards cannot easily lead to multiple interpretations, standards defining quality of care could lead to more disputes about the exact meaning of the provisions.⁴⁵ If national judges were increasingly required to interpret quality of care standards, this could lead to different interpretations throughout the EU.

At the same time, the voluntary nature of standardisation has a positive impact on the potential for convergence. The fact that standards are not legally binding means that the parties which are involved in the creation of a standard might be inclined to agree on more ambitious standards. If they had been agreeing on legally binding regulation, they could have been much more careful. The fact that a breach of a standard does not immediately lead to legal proceedings is an important factor in assessing its ability to create convergence. In combination with the private nature of the deliberations, the stakeholders may be more willing to agree certain criteria which they would otherwise not have included. It gives a sector the ability to increase the level of care without the fear of immediate legal consequences in cases where parties fail to adhere to a particular standard. If standards are subsequently incorporated in law through judicial interpretation, this is because the parties themselves have decided that the standards adequately describe the standard of care which can be expected.

Furthermore, because of their voluntary nature, standards can play an important role in the regulatory framework. They can be used to supplement or build on existing legislation. Where a lack of consensus has resulted in a legal lacuna, standards could fill the gap in an attempt to provide a more complete framework of protection. If convergence cannot be reached through legislative action, standardisation serves as a useful alternative. In more controversial policy areas, like healthcare, it could sometimes be considered to be a safer option to choose standardisation.

In conclusion, the voluntary nature of standards has a positive impact on the ability to create convergence of national regulation. This is mainly due to the fact that they can be used to supplement existing legislation, and that they can be used in areas where there is insufficient public consensus, or

⁴³ The Advocate General of the Hoge Raad, the Dutch Supreme Court, delivered his Opinion on 30th March 2012: LJN: BW0393, Hoge Raad, 11/01017.

⁴⁴ Hans-W. Micklitz, “*Services Standards: Defining the Core Consumer Elements and their Minimum Requirements*”, Study Commissioned by ANEC, Brussels, April 2007, p 10.

⁴⁵ Lisa Bernstein, above n 39, p 1732-1733.

simply no competence, to act by way of legislation. Finally, the voluntary nature of standards could result in more ambitious standards being set, which would be another incentive for convergence. The fact that the wording of standards on quality of care might be more difficult and challenging compared to product standards remains problematic, but so long as sufficient time is taken, and sufficient consensus is reached by those parties involved in the creation of the standard this should not necessarily be an obstacle to convergence.

V. Healthcare Standardisation in Practice

Three Categories of Healthcare Standards

Standardisation of healthcare services is a relatively new phenomenon. The healthcare sector is already familiar with standardisation of quality management systems and medical devices, but standardisation of the quality of the service itself only started a few years ago. Most standardisation projects in the healthcare sector are still ongoing. Furthermore, the number of projects on healthcare services is not extremely high: there are about ten quality standards which have been developed or are being developed. Therefore, it is difficult to make any definite observations at this moment in time. Nevertheless, it is possible to distinguish three different categories of healthcare standards. The distinction has been made on the basis of the *aim* of the standardisation project, or the *problem* which it seeks to address:

Regulating the non-regulated professions:

A number of professions which are very differently regulated in the 27 Member States have decided to create European quality standards. The main examples are chiropractors, osteopaths and hearing aid specialists. The levels of regulation of these professions differ widely across the EU. For example, osteopaths are a regulated profession in only four Member States. The regulators in these Member States have to apply the 2005 Directive on the recognition of professional qualifications⁴⁶ when professionals from Member States in which they are not regulated seek entry to the regulated profession. This has created difficulties in assessing the level of training of these professionals. As a result, there is a need for a European quality standard. The purpose of this standard, which is currently being developed, is to lay down the level of training required in the EU. Although the focus of these standards is on education and training, they go further in that they also standardise the delivery of the service to the patient.

Dealing with cross-border healthcare

A second category of standards aims to deal specifically with the consequences of cross-border healthcare. The main examples are a standard for aesthetic surgery services and a workshop agreement on quality criteria for health checks. In both sectors patients regularly travel abroad to receive (insured or non-insured) care. Frequently, such care is provided in private clinics. It has proven difficult to assess the quality of private clinics abroad. Furthermore, there are national differences in how much training a doctor should have before they can perform particular treatments. After their move “outbound” to receive care patients return “inbound” to their home healthcare system with the results (or lack of results) of the care received in another Member State. As such, an additional burden is imposed on the healthcare system in the home Member State. The purpose of standardisation in these sectors is to enable both insurers and patients to get a better idea of the quality of services abroad and to protect the integrity of the healthcare system of the home Member State.

⁴⁶ Directive 2005/36/EC on the recognition of professional qualifications

Solidarity and training in an enlarged EU

This third and final category contains just one example, which will be discussed in more detail below. This was the initiative for a European standard on cleft lip treatment. The purpose of this standard was not to facilitate the internal market for healthcare services, but more to deal with the limits of the internal market for cleft care. Families with babies born with clefts in the new Member States cannot really travel to other Member States for treatment. The purpose of the standard was very much for the new Member States to learn from the experience and skills in the old Member States. A common European quality standard would assist both healthcare providers and patients in new Member States in working towards higher quality of care for babies born with clefts. As such, the initiative was very much inspired by solidarity and development aid at the European level.

Two of the examples described above will now be discussed in more detail.

Quality Criteria for Health Checks

In December 2011 an initiative was started for a Workshop Agreement on Quality Criteria for Health Checks.⁴⁷ A Workshop Agreement is more informal than a standard and takes less time to complete.⁴⁸ Since the current initiative was only started in December 2011, it is not yet possible to make any observations about the substance of the Workshop Agreement. However, the background to the initiative offers an interesting perspective on standardisation of healthcare regulation and the possibility of convergence of healthcare regulation. First of all, the problem which was faced by the Dutch Ministry of Health will be described. Secondly, it will be discussed how the Workshop Agreement could assist in dealing with that problem and how that discussion links to convergence of healthcare regulation.

In the era of the “consumerisation” of the patient, health checks are a common phenomenon. Many Member States have national preventive screening systems, but these do not always satisfy individual patients. They can then go to private institutions that offer individual health checks. They are often compensated by their own health insurers for such checks. Many of the health check providers screen for cancer, which is most important to the majority of (potential) patients. In the Netherlands, there is very restrictive legislation on which service providers can perform individual preventive health checks outside the nationally coordinated screening policy.⁴⁹ Such providers have to obtain a licence if they screen for cancer, use ionising radiation or screen for serious diseases which cannot be treated. In all these instances a licence is required, which is difficult to obtain. Instead of attempting to obtain a licence, health check providers simply establish themselves in a Member State with less restrictive legislation. As a result, there are no private health check providers in the Netherlands. The Netherlands is the only EU Member State with such restrictive legislation. Because consumers are still curious about their general state of health, they travel abroad to undergo health checks, usually to Germany. In the other Member States the consumer can be transformed in a patient, if the results of the checks establish physical problems or an illness. In such a case, the patient will normally return to the Netherlands to seek treatment within the Dutch healthcare system. The experience in the Netherlands is that patients frequently return with results of tests which are not trusted or deemed reliable by the Dutch healthcare system. As a result, all checks will have to be done again. Moreover, patients sometimes return with false positives obtained in their health checks abroad. Both scenarios mean that

⁴⁷ “CEN Workshop Business Plan: Health Services – Basic Quality Criteria for Health Checks – CEN/WS68”, approved in the meeting in the Hague on 2nd December 2011, p 1-2, accessed at www.epaac.org on 28th January 2012.

⁴⁸ A Workshop Agreement does not have the same authoritative status as a standard. The procedure is more open, in that participants can join until the Workshop Agreement draft is mature. There are fewer physical meetings, and the overall duration is 5 to 18 months. A standardisation process usually takes at least 36 months. A Workshop Agreement has a validity of three years, after which the participants can decide to use the agreement for a “real” CEN standard.

⁴⁹ Wet op het bevolkingsonderzoek (Population Screening Act), Staatsblad 1992, 61).

a significant burden is placed on the Dutch healthcare system, which has to perform all necessary checks as a result of the lack of trust in the quality of the checks performed abroad. In addition to issues of capacity and finances, there are also psychological consequences of a false positive result against which the Dutch government would like to protect its citizens. A number of studies have taken place in the Netherlands to discuss and investigate the possibilities to deal with this problem.⁵⁰ Because of the fact that the Netherlands is the only EU Member State with such restrictive legislation, it is in a way isolated and limited in finding a solution. It is against this background that the Workshop Agreement for Quality Criteria for Health Checks was started.

At this early stage of the process, a number of observations can be made. First of all, it should be noted that this is a rare example of a national government taking the initiative for a standardisation process. The Dutch Ministry of Health has initiated the process and will also be actively participating in the creation of the Workshop Agreement. It is a new development that the actual initiative for a standardisation process comes from public authorities. It automatically transforms the process from self-regulation into co-regulation. It also means that one can question whether such a standardisation process could really be described as “bottom-up” standardisation. Although the sector itself will still be controlling the process, apparently the need to agree on a standard was not so urgent that the initiative came from the sector itself. It seems that the sector needed some encouragement from the public authorities. Moreover, it is relevant that the initiative has come from one national government which has a legislative framework which is relatively isolated in the EU. It is possible that the Dutch government is attempting to protect the underlying motivation of its legislation through the standardisation process. This national background to the project could have a detrimental impact on its ability to increase convergence at the European level.

Secondly, the purpose of this project is not to increase the movement of patients. The project is taking place in an area in which there is already significant movement of patients – at least from the Netherlands to other Member States – who impose an unnecessary burden on their home healthcare system on their return. Therefore, the project is intending to protect consumers against false positives, and to protect the integrity of the Dutch healthcare system. As a consequence, its dual purpose could be described as protection of patients who have received healthcare services abroad and protection of the integrity of the national healthcare system.

Finally, the project is funded by the Commission through EPAAC, the European Partnership for Action against Cancer.⁵¹ One of the requirements of the public funding is that all documents related to the creation should be publicly available. As a result, the current working documents can be accessed through the website of EPAAC. At the same time, the final Workshop Agreement will still be a product available through the national standardisation organisation. The increase in transparency and accessibility of the standardisation process are also caused by the fact that this process is leading to a Workshop Agreement. In a Workshop Agreement public participation is actively encouraged until the very last stage when the final agreement is being drafted. Although it is in principle a good development that all documents relating to a standardisation process are publicly available, one can question the additional benefit of a number of links on the website of a not particularly well-known European organisation.

From the perspective of convergence, it is interesting to note that this is a situation in which one Member State is attempting to protect its legislation and in a way to export its protective legislation to the other Member States. Therefore, any convergence would be between the Netherlands and the other Member States. It remains to be seen whether the national – as opposed to European – nature of the initiative will have an impact on the ability of the final instrument to converge regulation of health

⁵⁰ In particular, see Health Council of The Netherlands, *Screening: between hope and hype*, 2008.

⁵¹ The current documents are published on the website of the European Partnership for Action Against Cancer: www.epaac.eu.

checks at the European level. At the same time, the active involvement of public authorities in the Workshop Agreement process opens up the possibility of the final instrument to extend beyond the mere self-regulatory layer of health regulation.

Cleft Lip

In January 2011 the European Cleft Organisation (“ECO”), an organisation for patients born with cleft lips, submitted a proposal to CEN for a European standard on cleft care. The main purpose of this standard was “to ensure every child born with a cleft in Europe has the opportunity of realising their full potential”.⁵² The aim was to address the existing inequalities in the quality of treatment in different Member States. In particular, in some Eastern-European Member States parents of babies with clefts are frequently advised to abandon their babies. In addition, when babies are treated, they often receive inadequate, or even dangerous, treatment. According to ECO, this is one of the consequences of the liberalisation of healthcare in the new Member States. A European standard “would empower families to ask the right questions and work with professionals, lobbying for resources to deliver best practice”.⁵³ To confirm the support for the proposal in the new Member States, the Bulgarian standardisation organisation was chosen to lead the standardisation process.⁵⁴

In April 2011 representatives of all Member States voted on the proposal. Despite widespread support for the proposal, it was rejected on the basis of five Member States’ negative votes.⁵⁵ In particular, France and Spain expressed fundamental disagreement with the proposal. Germany and the Netherlands voted against the proposal with more detailed comments. It should immediately be noted that the opposition came almost exclusively from the old Member States. ECO organised a meeting in November 2011 to try and revive the proposal. The various comments from the Member States were discussed, and ECO now intends to organise meetings in France and Spain in 2012.

First of all, it is necessary to look at what exactly ECO attempted to do. They intended that the proposed cleft standard would be written by experts. It should closely follow existing national cleft guidelines, and ECO encouraged national stakeholders to submit such guidelines for consideration at the European level.⁵⁶ ECO expressed the intention to closely follow the UK’s standard developed by the Department of Health. They considered the CEN standardisation process as an alternative approach to developing best practice, and argued that an agreed CEN standard would carry weight in every Member State.⁵⁷

It should be emphasised that the ECO proposal was not made with a view to facilitate the Internal Market for healthcare services – the focus is not on free movement of patients. The standard would not aim to protect patients who move abroad, but could better be described as a development aid tool to improve the general quality of care of babies with clefts in the EU. Because of the need for continuity of treatment, as the treatment process usually takes a number of years, babies with clefts are not usually treated in hospitals in another Member State from the one in which they are living.⁵⁸ In addition, in most cases it would be too expensive for parents to seek treatment in another Member

⁵² “Why a Standard for European Cleft Care?”, presentation by Mr Gareth Davies of ECO, Brussels, 8th November 2011.

⁵³ Ibid.

⁵⁴ “Writing the Standard: Peer Credibility”, presentation by Mr Gareth Davies of ECO, Brussels, 8th November 2011.

⁵⁵ Voting Results: “Creation of a new CEN Project Committee on ‘Healthcare services for cleft lip and/or palate’”, CENBT/8561, Brussels, April 2011.

⁵⁶ “What Existing Guidelines Can We Draw From?”, presentation by Mr Gareth Davies of ECO, Brussels, 8th November 2011.

⁵⁷ “Why Use CEN?”, presentation by Mr Gareth Davies of ECO, Brussels, 8th November 2011.

⁵⁸ Gareth Davies, Executive Director of ECO, interview with author, Florence, 14th March 2012

State. As a consequence, the standard would seek to address a problem which cannot be addressed by free movement of patients.

Why did five Member States vote against the proposal? The conclusions of the meeting in November, intended to revive the proposal, shed some light on the concerns in certain Member States.⁵⁹ The strongest opposition came from France. The French position was that patient safety is regulated by public authorities and by public regulations. It was within the exclusive competence of the Haute Autorité de Santé to adopt recommendations for good practice.⁶⁰ The Spanish position was very similar. In particular, Spain argued that there were already scientific protocols in place. CEN standards would generate distortion among medical practitioners, patients and public authorities.⁶¹ In both France and Spain public authorities have dominated the discussion on the necessity of a CEN standard and have used their influence to block the start of a standardisation process. The German rejection of the proposal was based on existences of regulations and guidelines in Germany which were deemed to be sufficient to regulate quality of care issues. On that basis there was no perceived need in Germany for a European standard.⁶²

Finally, the position of the Netherlands was the most elaborate. The most fundamental objection of the Netherlands was that medical issues should be guided by evidence-based guidelines. Consensus-based guidelines would not be of any benefit to the patient. Consequently, the Netherlands requested that CEN standards be approved by European scientific organisations before coming into force. Secondly, it was argued that a European standard could result in a lower quality of care. This would be the result of an attempt to reach Europe-wide consensus, which would have an impact on the level of care currently provided in the Netherlands. It was very much doubted whether consensus-based CEN standards would be the right instrument to deal with problems in the healthcare sector. Thirdly, the Netherlands criticised the scope of the proposal. It was proposed that a recent Dutch guideline could be shared with European colleagues.⁶³

A critical assessment of these objections leads to a number of conclusions. First of all, in certain Member States, in particular in France, there is public opposition against the use of a private self-regulatory instrument to regulate quality of healthcare issues. The nature of the proposal is significantly more medical than that of other standardisation processes which have been taking place in the healthcare sector. The French comments attached to the negative vote indicate that the regulation of quality of care – in particular focussing on patient safety – falls within the exclusive competence of the Haute Autorité de Santé. Consequently, the objection does not appear to be based on a possible conflict with existing public regulations, but more on the issue of competence. This links back to the distinction made above between the publicly and privately regulated layers of healthcare regulation. The French position suggests that the Haute Autorité de Santé wishes to maintain its exclusive competence to regulate quality of care issues focussing on patient safety. Any attempt by private regulation to intrude on that competence is blocked by the public authority. One conclusion could then be that for standardisation to regulate quality of care issues in France, it is absolutely crucial to have the public authorities on board, and that these authorities actively support the standardisation process. Another conclusion could be that standardisation should remain outside the domain of what in certain Member States is perceived to be within the public competence. The proposal for a cleft lip standard has certainly highlighted the fact that at least some degree of public acceptance and support appears to be necessary for European standardisation of quality of healthcare

⁵⁹ “Some conclusions: cleft stakeholder meeting”, presentation by Mr Guido de Jongh of CEN, Brussels, 8th November 2011.

⁶⁰ “Formal responses by the Proposer”, document published on by ECO after the presentations in Brussels on 8th November 2011, p 5, accessed at www.ecoonline.org on 28th January 2012.

⁶¹ *Ibid.*, p 6.

⁶² *Ibid.*, p 5-6.

⁶³ *Ibid.*, p 7.

to be successful. After all, in this case the French authorities have contributed in a significant way to the rejection of the proposal.

The second common objection to the cleft lip standard was that there were already sufficient guidelines in place, and these national guidelines would be sufficient to protect the quality of care. In addition, any further standards should be evidence-based. This is an objection based on the need for a CEN standard: many Member States do not see the need for European regulation, and certainly not for a CEN standard. They also fear that any European standards would be inferior to their own. This objection misses the point of standardisation: it should provide a minimum standard which would be applicable throughout Europe. It would still be possible for individual Member States to go beyond the CEN standard. Importantly, the very existence of a standard could lead to higher quality of care in new Member States. For the old Member States, the CEN standard would perhaps not always be an ambitious way of agreeing on new standards, but it would rather be a way of assisting in ensuring a minimum level of care throughout the EU. With more and more free movement of persons, and patients, this should in the end be beneficial to all Member States.

Any objections based on the consensus-based nature of CEN standards could be taken away by incorporating scientific guidelines in the CEN standard. In particular, reference could be made to certain existing scientific guidelines to elaborate on medical terms in the standards. Furthermore, a CEN standard could be approved by a European scientific organisation to improve its legitimacy from the point of view of the medical profession. The point that countries are willing to share their national guidelines seems to suggest that any convergence can only take place on the basis of existing national guidelines. Therefore, it is essential that in the CEN process all relevant national guidelines will be sufficiently taken into account. An exchange of national guidelines should be a compulsory part of the standardisation process.

VI. Conclusion

Standardisation has potential to increase the convergence of national healthcare regulation. This conclusion is primarily based on the voluntary bottom-up nature of the standardisation process in the healthcare sector, and on the potential of standards to fill the gaps of legal regulation – in effect, to go beyond the reach of legal harmonisation. It is particularly helpful in the healthcare sector in which the EU has no legislative competence to act. The bottom-up nature of standardisation in the healthcare sector usually means that there is a need in a sector for a European response to a particular problem.

However, the standards will only really result in convergence if they are subsequently being applied in practice. This application is twofold: first, a standard should be applied by the sector itself. It is only if the sector itself considers a standard applicable that the judiciary will be willing in private law cases to adopt a European standard as the required standard of care. This standard will only be adopted if it complies with criteria under national law for self-regulation to be given binding force. Transparency and representation are commonly used to assess a self-regulatory instrument. As a consequence, the private nature of the standardisation process can act as an obstacle to convergence. CEN standards will only be widely used if healthcare providers and patients are aware of them, and actively participate in the creation of European quality standards. Therefore, both the process and the result of a European standardisation process should be made more public and transparent. It is a good development that public authorities are becoming more involved in the standardisation process. Public funding can act as a catalyst in realising more transparency.

The failure to agree on the proposal for a cleft lip standard shows that the CEN process is not yet generally accepted as a way of agreeing European standards which deal with quality of healthcare issues. The two main challenges are to get public authorities involved in the standardisation process, or at least to make them accept that standardisation can be useful to regulate quality of healthcare issues, and to make CEN standards as a regulatory tool acceptable to the medical profession by

incorporating scientific guidelines or by seeking approval of scientific organisations. Such a solution would deal with the opposition among medical practitioners against consensus-based, as opposed to evidence-based, standards of care. A more conservative solution would be for standardisation to remain outside the domain of patient safety in public hospitals, which in certain Member States is perceived to be outside the scope of private self-regulation. It remains to be seen whether certain Member States persist in their objections against private regulation in matters of quality of healthcare.

Standardisation initiatives will continue to take place in an increasingly European market for healthcare services. The 2011 Directive was adopted only a year ago, and the impact of the Directive on the movement of patients and the regulation of national healthcare systems is as yet unclear. It is against this background of a European right to freely receive healthcare services in another Member State that national healthcare systems will increasingly be confronted with problems which reach beyond the safe borders of the Member State. Given that there is no EU competence to adopt legislation on quality of healthcare issues, standardisation could be a useful alternative to provide a European response to cross-border problems encountered in the healthcare sector.

3) Sectoral Regulation

TOWARDS THE SELF-SUFFICIENCY IN EUROPEAN REGULATORY PRIVATE LAW (I) THE CASE OF EUROPEAN TELECOMMUNICATIONS SERVICES LAW

Marta Cantero Gamito *

Introduction

The purpose of this paper¹ is to verify the *self-sufficiency of European Regulatory Private Law*.² As a result, this paper will be used as a first stage of analysis by displaying a broad picture of the thesis topic of my research. I have decided to opt for Telecommunications Services as the model upon which the self-sufficiency hypothesis is to be tested. To that end, this paper is focused on the analysis of such sector in an exhaustive way, in order to find out whether it can be considered a *self-standing order*.

Special attention is to be paid to the analysis of the most important ends concerning scheme, such as the shift in consumer protection within regulated markets from an Internal Market approach to a Universal Services orientation, going beyond the traditional sphere of Private Law. I am not interested in technological issues or aspects related to equipment concerning telecommunications' unbundling. Instead, my research only focuses on the Private Law dimension, i.e. the contractual implications of telecommunications law, from a Consumer Law perspective. I am not concerned either with the financing of Services of General Economic Interest; rather, I am more attracted to the idea of how the European legislator is encroaching in the field of contract law -particularly consumer contracts- through vertical rules governing these services.

Methodologically, this paper begins by providing an idea of what I mean by a self-standing order and what this logic involves within the self-sufficiency hypothesis. Despite this paper is about telecommunications services, it pretends to be a transversal concept in order to be applied to other branches belonging to the European Regulatory Private Law as a whole. Once the idea is developed, and taking into account that this research is aimed to be exhaustive and comprehensive, this paper will deal with law-making, substantive law, and implementation and enforcement issues.

First, as to law-making, this paper aims to present a general outlook of the law-making process in the case of Services of General Economic Interest and, particularly, in telecommunications services. Therefore, here are mentioned –briefly- different aspects related to the competence of the EU (Treaty provisions according the approach chosen by the legislator), methods and instruments to regulate these services, as well as the institutions involved in this process. In this part, I have firstly introduced a section concerning the dual approach pursued by the EU policy in the field of Services of General

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¹ This paper is part of the research carried out within the Research Project '*The Visible Hand of European Regulatory Private Law (ERPL) -The Transformation from Autonomy to Functionalism in Competition and Regulation*' and the original ideas of this paper result from there. Therefore, any merit derived from this contribution is fully applicable to this project and, in particular, to its principal investigator, Professor Hans W. Micklitz. All errors and omissions remain, however, the solely responsibility of the author.

*This contribution constitutes a draft version of the first outcome of the research. As a result, it is a work still *in progress*, reason why comments are more than welcomed.

² For a deeper analysis on the self-sufficiency hypothesis and the concept of "European Regulatory Private Law", see Micklitz, H.-W. (2010), 'The Visible Hand of European Regulatory Private Law', in Eeckhout and Tridimas (eds), *Yearbook of European Law 2009*, 28, pp. 3-60. Also visit the Project's website at <http://blogs.eui.eu/erc-erpl/>.

Economic Interest what might be the causal event for the introduction of private law provisions within the sectorial regimes. The purpose of this part is, therefore, to demonstrate how the legislative development for private law now involves new methods, instruments and actors as opposed to the formation of the traditional private law, which was mainly carried out by the Nation State.

Secondly, concerning the substantive law, this paper addresses some substantive law provisions related to contracts for the supply of telecommunications services. Here lie the achievements of the European legislator, who, under the Internal Market configuration of these services, also regulates contractual aspects. The dual approach between market oriented (competition, Internal Market) and social/welfarist (universal service requirements) objectives, leads to a clash of values within the EU policy. Thus, the particular configuration of these markets –pursuing also social/welfarist values different from the current European Consumer Law- promotes its autonomy outside the consumer *acquis* and the national private law orders.

Thirdly, this paper deals with implementation and enforcement issues. The implementation of these rules could usefully be analyzed in order to perceive how the EU is setting aside national legal orders as a result of the direct application of the EU rules through, for example, overregulation. Here, different actors are also involved in the implementation process and, therefore, displacing the role of Member States. Thus, the idea of supremacy could be here applied in order to assess the virtual independence of these services; created and applied at EU level. Furthermore, as to enforcement in the case of telecommunications services, National Regulatory Agencies, and other bodies different from Court and the judiciary power, are gaining growing importance in the enforcement of the EU legislation, which seems to be moving from judicial to administrative (and *soft*) enforcement. As a result, the aim of this part will be to assess whether we could talk about an autonomous enforcement of the EU rules concerning to telecommunications services as opposed to the enforcement of Member States' private legal orders.

Finally, by analyzing the issues mentioned above, we will –on a preliminary basis- conclude whether the telecommunications example really conforms to the self-sufficiency idea upon which this paper is built. In other words, the main purpose of this paper will be to test the emergence of a new self-sufficient European (Regulatory) Private Law different from the general *acquis communautaire* and - what is more- independent from the national private legal orders.

A Self-Standing Order

This research will look at the extent to which the European legislator is involved in the shaping of a new European private legal order which is “self-sufficient” as a result of being composed of different “self-standing” sectorial regimes. This seems particularly evident in those areas belonging to the European Regulatory Private Law, where the intervention of the legislator is more obvious, as is the case of the Services of General Economic Interest.

In the interaction EU-Member States, new forms of governance are emanating that are replacing the traditional ones. Thus, through the promotion of new instruments of law-making, Member States are gradually losing their relevance in the legislative development. For example, under the liberalization wave of the former public services, the European Union is taking an important role in the law-making process. This participation –mainly related to the harmonization of the Internal Market- also affects contract law to some extent. In this regard, Kelemen employs the expression “*juris touch*”, as a metaphor of the King Midas' legend, to illustrate how the European Union transforms into law approximately everything that it touches.³ By doing so, the European legislator is regulating not only certain areas concerning the establishment of the Single Market, but it is also interfering in the

³ Kelemen, R.D. (2011), *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Cambridge, Massachusetts, Harvard University Press, p. 19.

different national private legal regimes. Moreover, the European legalization is increasingly being carried out by a high degree of harmonization which also implies less leeway for Member States. This “European domination” is also supported by the principle of precedence of the European Union Law, which guarantees the superiority of European law over national law.⁴ Furthermore, as Jansen & Michaels point out, ‘Europeanization reduces the importance of the member states and their private law because they must yield sovereignty to the European Union’.⁵

As a result of the liberalization process, there is a vast amount of rules concerning what we now know as “regulated markets”. Besides this European regulatory *avalanche*, Services of General Economic Interest have not been regulated horizontally. Instead, the regulation has been carried out by a *sector-related approach*, resulting in different sectorial regulations. This *verticalization* is due to the functionalist approach pursued by the legislator, who “pigeonholes” according to the service concerned. Thus, the different sectors (energy, financial services, telecoms, transport, postal services, etc.) are regulated in an isolated way and functioning as *watertight compartments*. The regulation of each vertical regime comprises different issues, from the liberalization of the sector, to particular provisions affecting contractual matters. This interference in the private law dimension implies its virtual independence from the general European *acquis*, mainly concerning consumer contracts.

These different sectors could be, therefore, considered *self-standing* because -perhaps rather obviously- they are able to stand by themselves. They are no longer mere set of rules established by the European legislator whose enforcement depends heavily on the implementation by Member States. Instead, through the meticulous configuration of the Internal Market, the European Union is forging complete systems which do not allow national states’ room for maneuver, insofar as the sectorial regimes themselves comprise detailed instructions on how to implement and enforce their legal provisions. Moreover, the new emerging legal regimes are now implemented and enforced according to the instructions given by the European Union, who applies “EU’s dogmas” –if I may say so- under a *cooperative network* at different levels (namely, law-making, implementation and enforcement). Thus, via the sectorial regulation raised in pro of the harmonization of the Internal Market, the EU seems to have been weaving a spiderweb at various levels. Consequently, as it is observed along this paper, we might talk about the rise of a regulatory network, an implementation network and an enforcement network aimed at the cooperation among the Members States and the EU in the establishment of a proper Internal Market when it comes to Services of General Economic Interest. Yet, in this interplay EU-Member States, there is a kind “false” *interdependence* insofar the EU is actually the leading voice in this cooperative relationship. Further, these cooperative networks derive mainly from the EU legislation itself.

The idea of self-standing (autonomous) regimes is also based on the assumption that they are also *all-inclusive* legal orders⁶, including provisions which range from the actors responsible of national regulation and implementation, to enforcement issues, passing by the regulation of some contractual aspects. They are self-organized sectors. Accordingly, as this paper will attempt to argue, they are a legal order which is entirely nourished by European law. From law-making to enforcement, telecommunications law (our example) in Europe is European construed and European applied, i.e. it is *fully Europeanized*.

⁴ This principle has been enshrined by the ECJ in the case *Costa v. Enel* (C- 6/64, [1964] ECR 585). In this case, the Court declared that the laws issued by European institutions are to be integrated into the legal systems of Member States, who are obliged to comply with them.

⁵ Jansen, N., & Michaels, R. (2007), ‘Private Law Beyond the State? Europeanization, Globalization, Privatization’. Duke Law School Legal Studies, Research Paper No. 137, p. 21.

⁶ See Lindhal, H. (2010), ‘A-legality: Postnationalism and the Question of Legal Boundaries’, *The Modern Law Review* 73(1), p. 32.

All of this together, results in the emergence of a *self-sufficient* system of private law (ERPL), embodied in the vertical rules –in our example, the sectorial rules concerning the different Services of General Economic Interest- that are paving the way towards its autonomy with regard to the European Private Law that we knew so far, and to the national private legal orders. Thus, the new European private legal order coming from these areas can be considered self-sufficient since the different sectorial regimes constitute *integral systems* which include particular elements and tools (such as, *inter alia*, access rights) that are not found elsewhere due to the special design of the provision of services within regulated markets. More specifically, the provisions concerning consumer protection contained in these regimes outdo the horizontal consumer law via the specialization of the consumer protection within these markets. Therefore, we can talk about vertical consumer protection to make reference to telecommunications users, electricity and gas customers, postal services users, air, train, or bus passengers and so forth.

Between Competition (Autonomy) and the Social (Regulation). The Dual Approach in Services of General Economic Interest

Services identified as Network services -particularly, telecommunications services and the supply of electricity, gas, and water⁷- are included within the concept of Services of General Economic Interest (hereinafter, SGEIs).⁸ Traditionally, SGEIs have been provided by the State. However, since the 1980s, the European Community has been pressing for the liberalization of these markets, and many formerly state-owned companies have been gradually privatized. In addition, in the course of this liberalization, national monopolies were broken up and the privileges were drastically reduced, making competition possible. The purpose of the liberalization has been to create competition and, thus, more cost-efficient services. The relationship with the recipients has, thereby, been transmitted from the public to the private law domain. Accordingly, the provision of the service falls within private law. Yet, these services constitute economic activities of particular importance to citizens and they are thereby subject to public intervention. Its nature as regulated markets services entails, therefore, a particular configuration of the contracts for the provision of these services, the freedom of contract being, in some way, limited. Hence, the implemented regime pursued the model of the regulatory State. In this model, the provision of the immediate service is entrusted to a private company, whereas the State guarantees that private providers comply with their supply obligations.⁹

For the sake of the Internal Market, the regulation of Services of General Economic Interest is coming from the European Union. The provision of such services (i.e. the relationship user-provider) is, thus, faced with the particular picture of the European Private Law. In fact, despite several attempts, the European Union does not have a single European Contract Law, resulting in the regulation of different contracts in an isolated manner. In addition, freedom of contract is not expressly recognized in European Union Law. Nonetheless, in spite of this lack of recognition, Basedow observes that the principle of contractual freedom can be construed in connection with the protection of competition, as a result of its interrelation with the EC Treaty's postulation of an open, competitively structured market.¹⁰ In other words, 'private autonomy as an instrument for allocation of national economic resources as long as the participants interact with one another on an approximately equal level –which

⁷ This paper mainly addresses Telecommunications Services, as part of the Services of General Economic Interest. However, I have omitted any further allusion to the classification of the Services of General Economic Interest as this task involves a more detailed analysis into the conceptual dimension of such services and this is not the purpose of this paper.

⁸ See the Green Paper on Services of General Interest, COM(2003) 270 final, p. 7.

⁹ Rott, P. (2005), 'A New Social Contract Law for Public services?—Consequences from Regulation of Services of General Economic Interest in the EC', *European Review of Contract Law*, 3, pp. 323–345.

¹⁰ Basedow, J. (2008), 'Freedom of Contract in the European Union', *European Review of Private Law*, 16, pp. 901–923.

is often not the case'.¹¹ Following the argument of Basedow, *when this is not the case*, the State – within the Internal Market, the EU- takes measures to lift the weaker party to a similar level. In the case of SGEIs, these measures may consist of, for instance, information duties¹² (enhancing competence), universal service requirements (protecting the social), or both.

The market liberalization was envisaged to entail a new outlook for services provided within regulated markets as former public services. In fact, as a result of competition, the opening of these markets would mean an improvement in the position of services users, as a larger supply creating choice, better prices and an increase in quality. With the liberalization, new telecommunications service providers have recently flourished which has implied greater competition. Now, telecommunications users are able to look for better deals taking advantage of greater competition. However, the reality is that, as a result of the market-opening up, there were –and there still are- people who stand outside of these markets and Universal Service requirements were, thereby, established. The necessity of preserving access conditions in liberalized markets has led to the use of private law principles in combination with others traditionally from economic public law or social policy (obligation to contract or tariffs control, for instance). The consumer protection on these services is, thus, derived from a combination two different approaches.

Since there was no explicit EU competence in relation to the Universal Service, it had to be created out of existing EU Treaty competition rules and the principles and instruments dealing with the creation of the Internal Market.¹³ In fact, the rules that govern these services are mostly based on Article 95 EC Treaty (now Article 114 TFEU), related to the *establishment and functioning of the Internal Market*. In this regard, rights such as information duties, right to switch, right to termination, cancellation, withdrawal, etc., are oriented to fostering competition. These rights function as a counterbalance for consumers and encourage its *efficient* actuation in the market. Nevertheless, the provision of SGEIs is also subjected to public/universal service obligations, due to its character as essential services/facilities. These obligations lie at the heart of the human rights dimension, protecting the most vulnerable consumers; whereas private law is traditionally considered to encourage the functioning of the competitive market under a contractual dimension. As a result, the rules governing these services pursue a dual approach: to enhance competition within the Internal Market (*Internal Market approach*), and –at the same time- to protect other social/welfarist values (*Universal Service approach*).¹⁴

With regard to the Internal Market approach, the provision of mandatory rules is intended to empower users of SGEIs. Thus, rights such as information, cancellation, choice, termination, withdrawal, switching, etc., are oriented to encouraging competition by giving the consumers the necessary tools to participate in the market *efficiently*.

¹¹ Ibidem, p. 904.

¹² In this case, I do not pretend to go further into the debate concerning the real recipients of disclosure regulation and the different dichotomies that are part of the Wilhelmsson analysis, in Wilhelmsson, T. (2004a) 'Varieties of Welfarism in European Contract Law Blunt Dichotomies on Contractual Values'. *European Law Journal*, 10(6), pp. 712-733.

¹³ Braun, J.-D. & Capito, R. (2009) The emergence of EC Telecommunications Law as a new Self-standing field within Community Law, in Koenig, C.; Bartosh, A.; Braun, J.D and Romes, M., *EC Competition and Telecommunications Law*, 2nd edition, Wolters Kluwer, pp. 41-52. See also Davies, J., & Szyszczack, E. (2011) Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest, in E. Szyszczack, J. Davies, M. Andeanes & T. Bekkedal (Eds.), *Developments in Services of General Interest*, The Hague. T.M.C. Asser Press, pp. 155-178.

¹⁴ See Rott, P., (2007). 'Consumers and services of general interest: Is EC consumer law the future?' *Journal of Consumer Policy*, 30(1), pp.49-60.

On the other hand, there is a more interventionist stream (a clear visible hand) granting other rights more in the line with the *European social model*.¹⁵ In this case, market failures cannot be corrected only by the establishment of rights and remedies aimed at the promotion of competition; rather, it is also necessary to protect the most vulnerable customers. This approach is derived from the premise that, unfortunately, the forces of the market are not able to produce a satisfactory outcome all the time. Then, room is left to authorities to interfere in order to fulfill the gaps to accomplish with public policy objectives. Thus, for example, access rights, affordable access, physical access, continuity, prohibition of disconnection, etc., were granted due to the crucial importance of such services which could lead to social exclusion. Therefore, it is not an intervention based on the enhancement of competition within the Internal Market, but rather a regulatory market interference granting new rights -related to the accessibility to the service- nonexistent within the European consumer *acquis* or the different national private legal orders.

Universal Service is, consequently, an idea introduced by the European Community in order to guarantee the effective accessibility of essential services, by maintaining a provider of last resort in order to keep services qualified as Universal Services as accessible as they were when provided by the State itself.¹⁶ Therefore, the access to the service is achieved by imposing Universal Service Obligations (hereinafter, USOs) which are aimed to guarantee that everyone has access to certain essential services of high quality and at prices that they can afford.¹⁷ Further, according to the European Commission, Universal Service is a concept for preventing social exclusion.¹⁸ Hence, the configuration of a service as a Universal Service implies 'the right of everyone to access certain services considered as essential and imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price'.¹⁹ These assumptions entail interventions within the freedom of contract which go beyond the traditional private law. In the telecommunications field, an illustration of this intervention is Article 1.2 Universal Service Directive²⁰: '[t]his Directive establishes the rights of end-users and the corresponding obligations of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition (...)'. Another example can be found in Article 3 of the Directive 2009/73/EC concerning common rules for the internal market in natural gas²¹, which enable Member States to impose public service obligations on undertakings operating in the gas sector, related to security of supply, regularity, quality and price. The freedom of contract has, thereby, been strongly limited in

¹⁵ The European Social Model was recognized by the Nice European Council 2000. (See Ross, M. (2009), The value of Solidarity in European Public Services, in Krajewski; Neergaard; Van de Gronden (Ed.), *The Changing Legal Framework for Services of General Interest in Europe*, pp. 81-100. The Hague, T.M.C. Asser Press).

¹⁶ See Communication from the Commission (1996), Services of General Interest in Europe. COM(96) 443 final. Available at http://ec.europa.eu/consumers/cons_int/serv_gen/serv_int_gen06_en.pdf.

¹⁷ Ibid. p. 2.

¹⁸ *Inter alia*, Conclusions of the European Commission Communication on 'Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC, 23.11.2011, COM(2011) 795 final, p. 12.

¹⁹ See Green Paper on Services of General Interest, COM (2003) 270, 21.5.2003, paragraphs 50 to 54. See also Micklitz, H.-W., (2011) Universal Services: Nucleus for a Social European Private Law, in Cremona, M. (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, pp. 63-102; and Rott, P. (2005).

²⁰ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on *universal service and users' rights relating to electronic communications networks and services* (OJ L 108 , 24.04.2002, pp. 55-77) and now amended by the Directive 2009/136/EC (OJ L 337 18.12.2009 , pp. 11-36).

²¹ OJ L 211, 14.8.2009, pp. 94-136.

favor of the most vulnerable consumers who, if not able to access, could be subject to discrimination or social exclusion.

The different European rules that govern the provision of services in regulated markets comprise both private and public law mechanisms. As a result, the mix between private and public instruments, in conjunction with the absence of a coherent welfarist values system in the EU regulation, trigger – as Wilhelmsson points out- ‘an inherent and inevitable *tension* in the welfare-state concept itself’.²² So, the challenge for the legislator is to successfully combine the enhancement of competition with the preservation of Universal Service requirements.²³

All this leads to the existence of rules concerning private relations -such as contracts for the supply of a service categorized as Service of General Economic Interest- which establish not only mandatory provisions concerning private law, but also make use of the establishment of public/universal service obligations –which are more akin to public policy. A clear example of this statement can be found in Recital 47 of the Directive 2009/73/EC concerning common rules for the internal market in natural gas²⁴, which establishes that ‘[t]he citizens of the Union and, where Member States deem it to be appropriate, small enterprises, should be able to enjoy *public service obligations*, in particular with regard to security of supply and reasonable tariffs’. These public service obligations are contained in Article 3 of the Directive 2009/73/EC, establishing that Member States may impose on undertakings *public service obligations* which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, comprising energy efficiency, energy from renewable sources and climate protection. Article 3 of the Directive 2009/72/EC concerning common rules for the internal market in electricity²⁵ is drafted in similar terms. Likewise, the Directive 2002/22/EC (Universal Service Directive), allocates its entire Chapter II to Universal Service obligations.

In sum, the dual approach in SGEIs is relevant to epitomize the movement towards the self-sufficiency of the European Regulatory Private Law. On the one hand, the Internal Market approach yields new elements to private law. A clear example could be the right to switch of provider. On the other hand, the Universal Service approach has nothing to do with the traditional private law, where the freedom of contract was the ultimate rationale. Quite the contrary, the Universal Service approach strives for the maintenance of a provider of last resort by imposing *obligations to contract* as a safety net for vulnerable consumers. There is room for social policy elements within the European Private Law, in contrast to the private law contained in the 19th Century Codes.²⁶ Thus, the fact that sectorial regulation comprises contract law provisions specifically designed for the provision of telecommunications services involves that service users’ protection *stays out* of the horizontal (as opposed to the vertical rules) consumer protection. Accordingly, the rules contained in vertical regimes concerning consumer protection function independently of the general consumer *acquis communautaire*. This might be induced by the Universal Service approach and the protection of the

²² Wilhelmsson (2004a), p. 715.

²³ This conflict related to the European *social market economy* has been addressed by the Court of Justice within the Viking case judgment (Case C-438/05, International Transport Worker’s Federation, Finnish Seamen’s Union v. Viking Line ABP, OÜ Viking Line Eesti), observing that ‘[s]ince the Community has ... not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy’ (para. 79). For a deeper analysis see Azoulai, L. (2009) ‘The Court of Justice and the Social Market Economy. The emergence of an ideal and the conditions for its realization’. *Common Market Review*, 45, pp. 1335-1355.

²⁴ OJ L 211, 14.8.2009, pp. 94-136.

²⁵ OJ L 211, 14.8.2009, pp. 55-93.

²⁶ Micklitz (2011).

vulnerable consumer.²⁷ Otherwise, the mere reference to the General EU Consumer Law (Internal Market oriented) by the sector-related rules would have sufficed to govern those rights and remedies that this section has accommodated within the Internal Market approach. Accordingly, regulated markets' contract law provisions are isolated from Consumer Law. The self-sufficiency idea causes that the provisions concerning consumer contract in this vertical sectors also secede from traditional private law insofar measures such as obligation to contract to preserve access conditions are not found anywhere within traditional private law which is contained within the different national private legal regimes.

By way of normative thought, this dual (and self-sufficient) approach has -in general terms- benefited consumers. It has implied an improvement in the position of both, the average and the vulnerable consumer. The former has taken advantage of competition, whereas the latter still maintains guaranteed access to (minimum) services.

Telecommunications Services and Law-Making

The law-making process is characterized by several features, *inter alia*, the aim pursued by the legislator, the administrative structure of the entity who is competent to create and enforce the law, the way in which the law-making process is carried out, the instruments employed, and the competence upon which the regulation is based.

Services of General Economic Interest, in general, and telecommunications services, in particular, could be a clear example of *Eurolegalism*²⁸; a mode of governance through two linked causal mechanisms.²⁹ Kelemen refers to the process of *deregulation* and juridical *reregulation* linked to the creation of the Internal Market. In this regard, he points out that liberalization, together with the establishment of the EU Single Market, has weakened traditional approaches to regulation at national level. Additionally, this deregulation has been coupled with reregulation at European level, meaning that the national regulations which obstructed the functioning of the Internal Market have been replaced with European rules.³⁰ Kelemen accuses the latter of not being similar to the national ones that they surrogate. Additionally, the second mechanism that leads to this adversarial legalism is the 'EU's fragmented institutional structure and its impact on EU policymaking'.³¹

The regulation of SGEIs has been carried out mainly under the Internal Market competence Treaty provisions (Article 114 TFEU, former Article 95 EC Treaty). Further, it has been accomplished under a sector-related approach which has given rise to the emergence of different vertical sectors. Since the EU took the lead of the liberalization process, the harmonization of these services within the Internal Market has been the guiding light in the legislative development. This trend, together with the sector-related approach and linked to the involvement of expertise authorities, has implied the emergence of new methods and actors in the regulatory process. Consequently, from a private law perspective, this phenomenon has displaced the current law-making process for private law far away from the traditional approach where the Nation State was the main -and only- character.

²⁷ The *vulnerable* consumer is far away from the *average* consumer, who can be properly protected under the Internal Market approach.

²⁸ Kelemen (2011).

²⁹ *Ibid.*, p. 8.

³⁰ Thus, for example, there are more than a hundred of different directives, decisions, regulations, recommendations and resolutions concerning telecommunications.

³¹ Kelemen (2011), p. 8.

European Union's Competence

In the case of telecommunications services, the process of liberalization was initiated by the Commission in 1987³², with the adoption of the Green Paper on Telecommunications³³, which led to the full liberalization of the sector in 1998. The market opened to competition under Article 86 EC Treaty (now Article 106 TFEU). The European legislator has mainly focused on enhancing competition and the establishment of the Internal Market. By so doing, the EU legislation reveals its reliance on the market. Hence, not only are all the relevant Directives in the field of telecommunications based on the internal market competence of Article 95 EC Treaty (now Article 114 TFEU), but also their content confirms its clear market orientation.³⁴

As to harmonization, it aims to ensure equivalent regulatory systems and consistent application of the European rules in all Member States. Companies should compete on equivalent terms and consumers benefit fully from the liberalization of the market. This harmonization has also been achieved under the Article 95 EC Treaty, which enables the Council and the European Parliament, upon a proposal from the Commission, to adopt legislative measures aimed at the establishment and functioning of the Internal Market by harmonizing Member States' laws.

Liberalization, harmonization and the application of competition rules were, therefore, the three pillars of the opening-up and reorganization of the telecommunications services in order to achieve the overall objective of European policy in this sector: 'to develop the conditions for the market to provide European users with a greater variety of telecommunications services, of better quality and at a lower cost, affording Europe the full internal and external benefits of a strong telecommunications sector'.³⁵

Instruments and Participants

As Ogus has pointed out, in an era of so-called 'de-regulation', governments have been searching for modes of regulatory control which are 'less onerous, more flexible and draw on the knowledge and experience of service providers'.³⁶ In fact, the European Union is making use of new regulatory devices –as opposite to the traditional ones- in the law-making process. This new approach includes innovative instruments and procedures, like for example co-regulation, co-operation or comitology.³⁷

According to Micklitz, co-regulation is '(...) another regulatory mechanism of the new toolkit, launched within the framework of the Internal Market programme. The overall idea is to broaden the scope for combining mandatory legislation at EC level and non-binding rules developed by private parties and/or organizations'³⁸, for example, codes of conduct or operating standards.³⁹ Co-regulation

³² Communication from the European Commission of July 30, 1987, "Towards a dynamic European Economy: Green Paper on the development of the common market for telecommunications services and equipment", COM (87) 290.

³³ Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for Regulation - Towards an information society approach, COM (97) 623 final. (Not published in the Official Journal).

³⁴ See Rott (2007).

³⁵ Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290 final, page 3 (Introduction). For a deeper analysis see Queck, R., de Streel, A., Hou, L., Jost, J., & Kosta, E. (2010). The EU Regulatory Framework Applicable to Electronic Communications, in L. Garzaniti & M. O'Regan (Eds.), *Telecommunications, Broadcasting and the Internet. EU Competition Law & Regulation* (3rd ed.), London: Sweet & Maxwell, pp. 3-262.

³⁶ Ogus, A. (2009), 'The regulation of services and the public-private divide', in Cafaggi, F. and Muir Watt, H. (eds.) *The Regulatory Function of European Private Law*; Edward Elgar, Cheltenham (UK) pp. 3-15.

³⁷ Micklitz (2010).

³⁸ Ibid. p.11.

is thereby characterized by a particular combination of state and non-state regulation. In the Commission's view, 'co-regulation combines binding legislative and regulatory action with measures taken by the actors most concerned'.⁴⁰ As to telecommunications services, Recital 48 of the Universal Service Directive (2002) recognizes that co-regulation could be an 'appropriate way of stimulating enhanced quality standards and improved service performance'.

In the European telecommunications panorama, National Regulatory Authorities (NRAs) play a key role in the law-making process. Harmonization at European level requires detailed regulatory interventions and the NRAs are, among many other competences, responsible for the implementation of the principles contained in the harmonization measures. NRAs were introduced in the EU legislation with the full liberalization. They are defined as the body or bodies charged by a Member State with any of the regulatory tasks assigned by the specific Electronic Communications Regulatory Framework.⁴¹ In order to carry out their obligations, they have been given broad regulatory powers and instruments to intervene, for instance, in the contractual relationships between undertakings for the use of the network (wholesale contracts) or in the provision of the service to end-users. However, in order to avoid potential conflicts of interests, the EU legislation demanded that NRAs be separate from the rest of the national administration.⁴²

The interplay between the national legislature and NRAs raises the question as to which of them is assigned the balancing of the different objectives of the Community regulatory framework. In this regard, the CJEU⁴³ –following the opinion of Advocate General Maduro⁴⁴– has declared that it is clear from the provisions contained in Article 8(4) of the Access Directive, Article 17(2) of the Universal Service Directive and Article 8 of the Framework Directive that

'NRAs are required to promote the regulatory objectives referred to in Article 8 of the Framework Directive when carrying out the regulatory tasks specified in the common regulatory framework. Consequently, (...) it is also for the NRAs, and not the national legislatures, to balance those objectives when defining and analysing a relevant market which may be susceptible to regulation'.

The co-operation between NRAs is emphasized in the regulatory framework in order to achieve a genuine a consistent market for telecommunication in Europe. At the top of the NRA network is the Body of European Regulators for Electronic Communications (BEREC)⁴⁵, which has replaced the former European Regulators Group (ERG). BEREC is made up of a Board composed of the heads of the 27 NRAs and is assisted by a permanent office (hereinafter, the Office). The Office is a Community Body managed by a Management Committee in which all NRAs and the Commission are

(Contd.) —————

³⁹ In this regard, the Article 33(2) Universal Service Directive establishes that '[w]here appropriate, interested parties may develop, with the guidance of national regulatory authorities, mechanisms, involving consumers, user groups and service providers, to improve the general quality of service provision by, inter alia, developing and monitoring codes of conduct and operating standards'.

⁴⁰ White Paper on European Governance, COM (2001)428 final.

⁴¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

⁴² Thus, for example, the Framework Directive establishes in its Article 3(2) that 'Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control'.

⁴³ In the Case C-424/07, *Commission v. Germany*, 3 December [2009] ECR I-11431 (See paragraphs 90-92).

⁴⁴ Delivered on 23 April 2009 (See paragraphs 61-64).

⁴⁵ This Body was set up by the Regulation Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, pp. 1-10.

represented. The Office is partially funded by the Community.⁴⁶ It provides a forum of discussion between the Commission and the NRAs in order to foster the Internal Market for telecommunications services. Further, the BEREC is the body responsible for ensuring a *consistent* application of the EU regulatory framework for electronic communications.⁴⁷ The BEREC is, therefore, aimed to be a European agency which acts as a meeting point for the co-operation of regulators. Thus, for example, according to the Framework Directive (Article 3), Member States shall ensure that NRAs take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets.⁴⁸

In addition, in the configuration process of a genuine Internal Market of telecommunications, the establishment of common standards is decisive. Standards play an important role in the telecommunications industry. They are important to ensure the harmonized provision of electronic communication services. According to the Framework Directive⁴⁹, Article 17(2) establishes that Member States shall encourage the use of standards for the provision of services, technical interfaces and/or network functions, to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users. Standardization serves as a basis for encouraging the harmonized provision of electronic communications networks, electronic communications services and associated facilities and services.⁵⁰ As a result, an integral part of the EU policy is to achieve the Lisbon goals through better regulation and the simplification of the legislation. In this regard, the Framework Directive establishes that Member States shall encourage the implementation of standards and/or specifications adopted by the European Standards Organizations.⁵¹ These European Standards Organizations are listed in the Framework Directive: European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC), and European Telecommunications Standards Institute (ETSI). ETSI has contributed, for instance, to the EU law by producing many harmonized standards to be used in the enforcement of European Directives. In this regard, the Commission encouraged the establishment of the European Telecommunications Standards Institute (ETSI) in 1988.⁵² For example, ETSI developed the GSMTM standard, which reached 2.5 billion mobile connections.⁵³

Comitology is also part of the telecommunications regulatory framework. The Communications Committee (Cocom), established under the Framework Directive⁵⁴, replaced the Advisory Committee on the implementation of Open Telecommunications Network Provision (ONP) and the Licensing Committee which were set up under the 1998 regulatory package for telecommunications. The Cocom assists the Commission in carrying out its executive powers under the regulatory framework. It

⁴⁶ See Article 11 BEREC Regulation.

⁴⁷ Article 1 BEREC Regulation.

⁴⁸ Additionally, as is established in the BEREC Regulation, NRAs and the Commission shall take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC.

⁴⁹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009.

⁵⁰ Article 17 Framework Directive.

⁵¹ Article 17 Framework Directive.

⁵² Council Resolution of 28 April 1989 on standardization in the field of information technology and telecommunications (OJ C 117/1, 11.05.1989). For a more detailed analysis see Walden, I. (2009). *European Union Communications Law*. in I. Walden (Ed.), *Telecommunications Law and Regulation*. New York: Oxford University Press, pp. 167-209.

⁵³ More info available at <http://www.etsi.org/WebSite/AboutETSI/GlobalRole/Ourglobalrole.aspx>.

⁵⁴ Article 25.

exercises its functions through 'advisory', and 'regulatory with scrutiny' procedures in accordance with the Comitology Regulation.⁵⁵

The European Commission has also taken part in the law-making process by making extensive use of 'soft law' measures, both formal Recommendations⁵⁶ which have no binding legal force and informal guidelines and notices.⁵⁷ These measures are aimed to enhance harmonization within the Internal Market, providing a point of reference of good practices for national regulatory authorities.⁵⁸

Additionally, not only the aforementioned actors are taking part of the law-making process, but also trade and consumer associations are engaged in the legislative development. For example, Article 33 of the Universal Service Directive⁵⁹ establishes that NRAs are required to take into account the views of end-users, consumers and telecommunications service providers. To this end, Member States are responsible of ensuring that NRAs establish a proper consultation mechanism to guarantee that the interests of these stakeholders are properly taking into account.

As aforementioned, the regulatory framework for telecommunications contains contract-related rules. The inclusion of private law provisions in the telecommunications has implied a shift in the traditional approach of law-making in private law. Traditionally, the regulation of private law was carried out by the legislative power in a narrow sense (i.e. the parliament) in combination with some minor interventions by the executive. Nonetheless, the regulation of telecommunications services involves new instruments and actors as opposed to the traditional ones. As we have just seen, co-regulation, co-operation and comitology are used as regulatory tools in the telecommunications' legislative development. Accordingly, the legislative power now does not correspond only to a concrete actor (individually considered, the legislature), but it lies also on the hands of different actors (NRAs, expertise and standardization bodies, committees, stakeholders, etc.). All of them become the new private law-maker.

Substantive Law: Contractual Implications in Telecommunications Services

Provided that there is a contractual relationship between the user and the service provider, the provision of Services of General Economic Interest falls within contract law. Consumer law provisions are also applicable to these contracts, insofar as SGEIs users are household customers, i.e. they act as consumers.⁶⁰ As a result of the dual approach pursued by the legislator, the regulation of telecommunication services has influenced contracts in two ways. On the one hand, the Internal Market approach has developed contractual elements oriented to the empowerment of the consumer. On the other hand, the Universal Service approach has strived for the protection of the most vulnerable consumers, despite there still being no single definition of what a vulnerable consumer is.⁶¹

⁵⁵ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.02.2011, pp. 13-18).

⁵⁶ As for example the Commission Recommendation 2005/698/EC on accounting separation and cost accounting systems under the regulatory framework for electronic communications (OJ L 266, 11.10.2005).

⁵⁷ For instance, Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector (OJ C 233, 06.09.1991).

⁵⁸ Walden (2009).

⁵⁹ As amended by the 2009 Package.

⁶⁰ Rott (2009).

⁶¹ Concerning the lack of vulnerable consumer definition, see Stuyck, J. The Notion of the Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable Under Such a Regime, in Howells, G., Nordhausen, A. and Parry, D., (2007) *The Yearbook of Consumer Law 2007*, Ashgate.

The Internal Market has been the driving force behind the European consumer contract law. Thus, as Micklitz suggests, ‘contract law in the European Community is just one device among other areas of law and politics to foster European integration which means in essence –again and again- to complete the Internal Market’. In other words, consumer contract law is turned into a ‘subordinate mechanism to contribute to a higher political objective –that of realizing the Internal Market’.⁶² That is what Micklitz means by the Concept of *Competitive Contract Law*. Competitive contract law implies that ‘the contract law rules are shape so as to allow effective competition between suppliers in the Internal Market’.⁶³

In the case of Services of General Economic Interest, the EU rules concerning these services are used as a Trojan horse to achieve the objective of the Internal Market by opening up markets and creating competition. Micklitz labels these rules as “instrumental” and “protective”.⁶⁴ Protective in the sense that they are supposed to protect consumers by keeping certain universal/public obligations to ensure minimum accessibility just as when they were still services provided by the State. But, on the other hand, the real purpose behind these rules is its *instrumentalization* to set up a genuine open and competitive European market of Services of General Economic Interest. In fact, Wilhelmsson has also pointed out that the consumer protection justification has been used by the European legislator to strengthen the Internal Market through areas that it lacks of competence. Thus, the rulemaking process has been based on an interesting combination of the consumer interest argument and Internal Market reasoning.⁶⁵

As to contracts for the provision of telecommunications services, by opening the telecommunications market, the European legislator is also shaping the content of the contract. Article 1.2 Universal Service Directive is a very clear paradigm of this interference in the field of contract law. This article states that ‘[t]his Directive establishes the *rights* of end-users and the corresponding *obligations* of undertakings providing publicly available electronic communications networks and services. With regard to ensuring provision of universal service within an environment of open and competitive markets, this Directive defines the minimum set of services of specified *quality* to which all end-users have *access*, at an *affordable price* in the light of specific national conditions, *without distorting competition*. This Directive also sets out obligations with regard to the provision of certain mandatory services’.

There are, thereby, many interventions in the private law dimension such as: the right to a contract, information and transparency duties, right to switch provider, tariff controls, net neutrality, caps on roaming tariffs, access, continuity, etc. Accordingly, we can easily note the implications for the private law dimension and, in particular, for the freedom of contract. This section will attempt to briefly analyze some of these contractual parameters in the telecommunications sphere.

Access

As a result of the dual approach pursued by the European legislator in the configuration of Services of General Economic Interest, users were granted not only with empowerment rights, but also with provisions that take into account the situation of vulnerable customers. Thus, in order to ensure that liberalization would not lead to a situation where some social groups would be excluded from basic telecommunications services, the legislator also settled legislation granting Universal Service rights, such as –for instance- access, affordability, quality and continuity. By so doing, the European

⁶²Micklitz, H.-W., (2005) ‘The Concept of Competitive Contract Law’. *Penn State International Law Review*, 23(3), pp.549-586.

⁶³ *Ibid.*, p. 555.

⁶⁴ *Ibid.* pp. 561-562.

⁶⁵ Wilhelmsson, T. (2004b). ‘The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law’, *Journal of Consumer Policy*, (3), 317-337.

legislator is encroaching on the field of contract law insofar this concession also interferes in the user-provider relationship. In particular, the right to access restricts the supplier's freedom of contract but also his freedom to not contract with specific individuals by creating the obligation to contract.⁶⁶ In his article, Basedow points out that interventions in the freedom of supply are more infrequent than interventions in the freedom of demand.⁶⁷ However, the supply of electricity, gas or telecommunications services are some examples that may illustrate this intervention within the freedom to enter into a contract.

As for telecommunications, this interference is manifested as a *right to contract*, being recognized in the Universal Service Directive which establishes that 'Member States shall ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, *have a right to a contract* with an undertaking or undertakings providing such connection and/or services (...)'.⁶⁸ According to the wording of the Article 3(1) Universal Service Directive, 'Member States shall ensure that the services set out in this Chapter are made *available* at the quality specified *to all end-users* in their territory, *independently of geographical location*, and, in the light of specific national conditions, *at an affordable price*'.⁶⁹ This obligation has, therefore, two implications: *economic access*, on the one hand; and *physical access*, on the other.⁷⁰ Economic access refers to the accessibility rights of the more economically vulnerable citizens, and physical access entails accessibility to the network infrastructure, regardless of the location where the customer is.⁷¹ Concerning the former, economic access is linked also to the idea of affordability, whereas for the latter, the use of telecommunications services requires the previous installation of the line in remote areas.

Access rights involves particular implications to the for the private law dimension –specifically freedom of contract- not previously addressed by the general consumer *acquis*. Access rights are intended to guarantee a certain level of availability of the service which results in a number of obligations for the providers nonexistent outside Services of General Economic Interest's scope or within the national private legal orders. Accordingly, as a result of the universal service idea, all end-users -who request it- will have a right to a contract for the provision of the services covered by the universal service's scope. This statement entails two effects. First, the service is not provided automatically. Interested users will have to specifically demand the supply of the service which only will be provided, therefore, under request. And second, the requested service must be listed as a universal service to be subject of the granted access rights. Thus, users are not granted with access to the service, but rather with a *right to the provision of the service upon request*. This means that network providers designated as having Universal Service Obligations will not be allowed to refuse the provision of 'universal' telecommunications services to those who request it, regardless their geographical location or economic situation.⁷² In this regard, access rights can be considered a *self-sufficient* tool, since provisions ensuring accessibility and right to a contract for the provision of telecommunications services come out of the logic of the traditional (autonomy-based) private law.

⁶⁶ Rott, P. (2007), p. 332.

⁶⁷ Basedow (2008), p. 906.

⁶⁸ Article 1 Directive 2009/136/EC, amending Article 20 Directive 2002/22/EC.

⁶⁹ Emphasis added.

⁷⁰ See also Micklitz (2011).; Rott (2005); and Rott, P. (2009) "The user-provider relationship: informed choice and user protection through private law", in *The Changing Legal Framework for Services of General Interest in Europe* (pp. 215-232). The Hague, T.M.C. Asser Press.

⁷¹ Article 4(1) Universal Service Directive: 'Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking'.

⁷² Article 3 Universal Service Directive.

Affordability

Within the universal service system, tariffs for the use of telecommunications services are to be paid by users. However, the universal service idea demands it to be *affordable*. Affordability is another new concept within the field of contract and consumer law, being the result of the obligations derived from the Universal Service approach. Affordable price is ‘a price defined by Member States at national level in the light of specific national conditions, and may involve setting common tariffs irrespective of location or special tariff options to deal with the needs of low-income users. Affordability for individual consumers is related to their ability to monitor and control their expenditure’.⁷³ As a result, Member States have to ensure that prices are not excessive and must encourage users to control their expenditure.

Affordability of tariffs and control of expenditure are regulated in the Universal Service Directive, articles 9 and 10 respectively. Considering that prices are entrusted to market forces, as a result of liberalization, National Regulatory Authorities are the responsible for the monitoring of the evolution and level of retail tariffs of the services falling under the universal service obligations. To this end, NRAs will take into account, particularly, in relation to national consumer prices and income.⁷⁴

One of the particularities of telecommunications services is the “bill shock”. Excessive bills may happen and when the user is not able to face the payment of such bills he may be exposed to disconnection, which will distort the aim of universal service requirement. In order to avoid such an event, Member States shall ensure that designated undertakings with Universal Service obligations, allow subscribers the possibility to monitor and control their expenditure.⁷⁵

Continuity

Access rights are also coupled with the idea of continuity. Thus, continued access to services implies that contracts guaranteeing access cannot be easily terminated.⁷⁶ This is particularly important where the termination of a contract exposes the user to risks such as “confinement” or social exclusion as a result of the importance of telecommunications services nowadays.⁷⁷ According to the 2002 Universal Service Directive, except in cases of persistent late payment or non-payment of bills, consumers should be protected from immediate disconnection from the network on the grounds of an unpaid bill and, particularly in the case of disputes over high bills for premium rate services, should continue to have access to essential telephone services pending resolution of the dispute. Member States may decide that such access may continue to be provided only if the subscriber continues to pay line rental charges.⁷⁸

Quality

Quality is a key objective in the Universal Service idea. Unlikely to the former service provided by the State, where the good quality was not precisely an essential requirement, here it becomes a crucial parameter since quality standards are established by standardization bodies. In this regard, Member

⁷³ 2002 Universal Service Directive, Recital 10 and Recital 15.

⁷⁴ Universal Service Directive, Article 9(1).

⁷⁵ Article 10(2). The information concerning facilities and services billing have to be described according to the parameters established in Annex I, Part a.

⁷⁶ Rott, (2009), p. 225 and (2005), p. 333.

⁷⁷ See Conclusions of the European Commission Communication on ‘Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC, 23.11.2011, COM(2011) 795 final, p. 12.

⁷⁸ 2002 Universal Service Directive, Recital 16.

States should ensure that Universal Services are made available with the quality specified to all end-users in their territory.⁷⁹ Pursuant to the Universal Service Directive amendment, '[a] competitive market should ensure that end-users enjoy the quality of service they require, but in particular cases may be necessary to ensure that public communication networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks'.⁸⁰

Quality parameters at European level are established by the European Telecommunications Standards Institute (ETSI).⁸¹ These are minimum requirements, since additional quality parameters to services for disabled end users and disabled consumers can be established at national level by NRAs.⁸² However, the establishment of such additional requirements has to be compatible with EU law in order to avoid that Member States enacts rules that may affect the provision of the service from other Member States on their national territory and disturbing, thereby, the proper functioning of the internal market.

As a manifestation of the importance of quality within competitive markets, the third regulatory package includes a right to compensation which applies if contracted service quality levels are not met.⁸³

Transparency and Information

The tool for the establishment and maintenance of competition on the consumer side is the choice of the best service provider.⁸⁴ But it has to be an informed choice. Information duties are oriented to consumers to make qualified decisions and informed choices. Thus, pre-contractual information, suppliers' duties of information, information rights, transparency and so forth are collected in the rules governing these services as being important rights and obligations to comply at the time of celebrate this kind of contracts. Thus, the accessibility to full, truthful and up-to-date information is a paramount to the consumer in order to be able to choose, in an efficient way, the best provider according to its needs. Information duties are, therefore, the counterpart for the effective implementation of consumer rights. As Prof. Micklitz states, 'competitive transparency is deeply rooted in competition law'.⁸⁵

In the case of telecommunications, the provisions contained in the Universal Service Directive are related to the availability of transparent and adequate information on offers and services, as well as price and tariffs.⁸⁶ Additionally, obtaining adequate information on possible limitations or traffic management, for example, enables consumers to make informed choices.⁸⁷ Actually, according to the BEREC, the greater part of consumer complaints collected by NRAs are related to the discrepancy between advertised and actual delivery speeds for an internet connection.⁸⁸

Additionally, telecommunications services providers, according to Article 21(3) must also; 1) provide information on tariffs and pricing conditions; 2) inform subscribers of any change to access to emergency services or caller location information; 3) inform also about any change to conditions limiting access to and/or use of services and applications; 4) provide information on any procedures

⁷⁹ 2002 Universal Service Directive, Recital 7.

⁸⁰ 2009 Universal Service Directive, Recital 34.

⁸¹ See Annex III, 2002 Universal Service Directive and 2009 Amendment.

⁸² 2002 Universal Service Directive, Article 11(2).

⁸³ Universal Service Directive, Article 20(1), f.

⁸⁴ Rott (2005), p. 334.

⁸⁵ Micklitz (2005), p. 567.

⁸⁶ See Universal Service Directive Recital 32 and Article 21(1).

⁸⁷ Commission Communication on The open internet and net neutrality in Europe, p. 7.

⁸⁸ Commission Communication on The open internet and net neutrality in Europe, 19.4.2011, COM(2011) 222 final.

put in place by the provider to measure and shape traffic so as to avoid filling or overfilling a network link, and on how those procedures could impact on service quality; 5) inform subscribers of their right to determine whether or not to include their personal data in a directory, and of the types of data concerned; and 6) regularly inform disabled subscribers of details of products and services designed for them. For this purpose, NRAs, if they deem it appropriate, may promote self- or co-regulatory measures prior to imposing any binding obligations.

Considering the importance of information and transparency duties, telecommunications' users are granted with a right to withdrawal, without penalty, upon notice of proposed modifications in the contractual conditions, if they do not accept the new conditions.⁸⁹

Right to Switch

Switching is another necessary tool which contributes to the functioning of competition. Complementarily to transparency and informed choice, the right to switch involves a clear manifestation of a market perfectly competitive. In the case of network industries, the user-provider relationship is usually regulated by long-term contracts. In this regard, long-term contracts present a barrier to competition, since competition requires the possibility of changing the provider.⁹⁰ Hence, the different Directives concerning network services provide provisions related to the right to switch service provider.

According to the Commission, effective consumer rights are essential to ensure that liberalization successfully delivers real choice and gives consumers the confidence to switch supplier if they wish to do so.⁹¹ Stimulating consumer interest in alternative supply offers is expected to play a part in creating competitive markets as well. Past experience has shown that consumers will only be active on the market place if they are confident that their rights continue to be protected, in particular when switching operator.⁹²

As a result, in terms of Private Law, 'competition shall be fostered by increased information obligations and by facilitating the change of service provider'.⁹³ In addition, in order to take full advantage of the competitive environment within the electronic communications sector, consumers should be able to make informed choices and to change providers when they want.⁹⁴ Therefore, transparency and the right to switch are crucial elements to the functioning of competition. In fact, the European Commission in its recent Open Internet and Net Neutrality Communication has also expressly recognized:

The EU regulatory framework aims at promoting effective competition, which is considered the best way to deliver high-quality goods and services at affordable prices to consumers. For competition to work, consumers must be able to *choose* between a variety of competing offerings on the basis of clear and meaningful *information*. Consumers must also be effectively able to *switch* to a new provider where a better quality of service and/or a lower price is offered, or where they are not satisfied with the service they are receiving, e.g. where their current provider imposes restrictions on particular services or applications. In a competitive environment this acts as a

⁸⁹ Universal Service Directive, Article 20(1).

⁹⁰ Rott (2009).

⁹¹ Commission Communication, *Towards a European Charter on the Rights of Energy Consumers*, 5.7.2007 COM(2007)386 final, p. 2.

⁹² *Ibid.* p. 3.

⁹³ Rott (2009).

⁹⁴ Universal Service Directive (2009), Recital 47.

stimulus to operators to adapt their pricing and abstain from restrictions on applications that prove popular with users, as is the case with voice over IP (VoIP) services.⁹⁵

Moreover, the Commission is of the opinion that the rules on transparency, switching and quality of service that form part of the revised EU electronic communications framework should contribute to producing competitive outcomes.⁹⁶

EU legislation also takes into consideration very practical issues that could prevent customers from changing their providers: *number portability*. Number portability is a 'key facilitator of consumer choice and effective competition in a competitive telecommunication environment', as confirmed by Recital 40 Universal Service Directive. The 2009 package was significant for the switching process. In this regard, the Article 30(4) Universal Service Directive establishes that the '[p]orting of numbers and their subsequent activation shall be carried out within the shortest possible time. In any case, subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within *one working day*'. Moreover, operators must offer users the possibility to subscribe to a contract with a maximum duration of 12 months. The new rules also make sure that conditions and procedures for contract termination do not act as a disincentive against changing service provider. On the other hand, Recital 24 of the Universal Service Directive amendment states that '[w]ith respect to terminal equipment, the customer contract should specify any restrictions imposed by the provider on the use of the equipment, such as by way of 'SIM-locking' mobile devices, if such restrictions are not prohibited under national legislation, and any charges due on termination of the contract, whether before or on the agreed expiry date, including any cost imposed in order to retain the equipment'.

Nonetheless, the provisions concerning the change of provider or its facilitation do not come only from the sector-related legislation. These provisions can also be derived from the general consumer *acquis* applicable to these relationships. For example, Article 11 of the Unfair Commercial Practices Directive claims that European citizens shall be effectively protected from being pressurized through misleading and aggressive practices⁹⁷ to, for example, switch operators. In addition, Article 9 of the same legal text recognizes that any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another trader may be qualified as an unfair commercial practice.

As a result, all the measures introduced by the legislator in this matter are envisaged to enhance competition –the aim of the Internal Market- by facilitating not only the change of provider, but also the switching process itself, in order to remove possible barriers to the switch procedure if the user wishes so.

Implementation and Enforcement

The different regimes governing Services of General Economic Interest have also particular features concerning the bodies responsible for its implementation into national law and enforcement procedures. The analysis of the implementation process and enforcement practices of the EU

⁹⁵ Commission Communication on *The open internet and net neutrality in Europe*, 19.4.2011, COM(2011) 222 final, p.4 (Emphasis added).

⁹⁶ Ibid. Conclusions, pp. 8-10.

⁹⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (hereinafter, Unfair Commercial Practices Directive) OJ L 149, 11.6.2005, pp. 22-39.

regulatory framework for telecommunications is here used as an illustration of the features which characterize the application of the private law rules contained in the sectorial regimes as opposed to the application of the traditional private law contained in the national codes or the consumer *acquis*.

Kelemen points out that the fragmentation between the EU and the Member States, linked to the scattering of powers between EU institutions, generates problems that encourage the adoption of laws with ‘strict, judicially enforceable goals, deadlines and transparent procedural requirements’.⁹⁸ Likewise, due to the limited implementation and enforcement capacities of the EU law, the European legislator –as understood in a broad sense- has ‘an incentive to create justiciable rights and to empower private parties to serve as the enforcers of EU law’.⁹⁹

Implementation of the EU Regulatory Framework

The achievement of a genuine Internal Market for telecommunications involves the participation of different bodies from European to local level. Here, a number of actors are involved: Member States, National Regulatory Authorities, the BEREC, the EU Commission, the Court of Justice of the European Union and National Courts.

First, the EU Regulatory Framework for Electronic Communications is mainly composed by Directives which has to be transposed by the Member States. The rules governing network services comprise provisions concerning the implementation of the laid down rights and obligations by Member States in their national legal orders.¹⁰⁰ These tasks correspond, on a shared basis, to NRAs and Member States and the different rules contained in the regulatory framework distribute between the Member States and the NRAs many competences. Further, to achieve the proper application of the Regulatory Framework, it is required the co-operation and co-ordination among the different NRAs. Thus, pursuant to Article 7(2) Framework Directive, NRAs have to cooperate between them and the Commission in order to guarantee the consistent application of the regulatory framework. In addition, NRAs were required to be independent. Thus, when they were introduced into the EU law with the full liberalization in 1998, the EU legislation encouraged NRAs to be separated from the national administration. And, in order to guarantee that NRAs would exercise their powers in the EU interest, an elaborate system of supervision was put in place, whereby NRA draft decisions concerning the Significant Market Power (“SMP”) regime are submitted to the Commission for comment; the Commission can veto alternative market definitions or SMP assessments.¹⁰¹ Thus, the Regulatory Framework entrusted to NRAs the task to ensuring the accomplishment of the EU rules. In this regard, NRAs obtain a ‘certain European status’, since that task implies that they turn against their national administration in case of breaching of EU provisions.¹⁰² They are no longer merely *national* organs. Rather, they serve to the ends of the Internal Market’s harmonization. On the Member States’ side, apart from other specific competences, they shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to the Universal Service Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified.¹⁰³ Accordingly, the distribution of powers among NRAs and Member States seems to be envisaged to mutual monitoring in the implementation of the EU rules for telecommunications.

⁹⁸ Kelemen (2011), p. 8.

⁹⁹ Ibid.

¹⁰⁰ Article 15a (‘Implementation and enforcement’), introduced by the Universal Service Directive 2009 Amendment.

¹⁰¹ Framework Directive, Article 7.

¹⁰² Nihoul and Rodford, pp. 339-340.

¹⁰³ Article 15a introduced by the Universal Service Directive 2009 Amendment.

Second, according to the European Commission, one of the missions of the BEREC is to assist the Commission and the NRAs in the implementation of the EU regulatory framework for telecommunications.¹⁰⁴ This body is aimed to improve the harmonization and consistence of the application of the telecommunications via the delivering and dissemination of opinions, common positions, recommendations, decisions and best practices.¹⁰⁵

Third, the European Commission goes beyond the drafting of legislative proposals and also takes part in the implementation process. In addition to the different Directives and Regulations, the EU regulatory framework for electronic communications also comprises *guidelines* and *recommendations* from the Commission. These instruments have specific legal basis in the different directives, such as Article 15 of the Framework Directive, which states that the Commission shall adopt recommendations on relevant product and service markets and the publication of Guidelines for market analysis and the assessment of significant market power within the market adoption procedure. Article 19 of the Framework Directive also enables the Commission to issue recommendations to Member States on the harmonized application of the provisions contained in the EU rules. Although these instruments are not directly binding, these provisions concerning the market adoption and harmonization procedures imply that NRAs have to carry out these tasks by taking utmost account of this recommendations and guidelines.¹⁰⁶ Here, we could mention a really recent example of the European Commission pressing for the transposition of the EU rules in a certain way. In fact, it is the first time that the Commission has issued a recommendation under Article 7a of the Framework Directive ('Procedure for the consistent application of remedies'). This procedure (paragraph 4) enables the European Commission –whose doubts have been previously confirmed by the BEREC– to cooperate with the NRA in the implementation process. In the case concerned, the European Commission requires OPTA (Dutch NRA) to amend or withdraw a fixed and mobile termination rates¹⁰⁷ proposal because it would negatively affect consumers in the Netherlands. This decision follows a three months investigation by the European Commission, and being its position supported by the BEREC. OPTA proposed in 2010 termination rates according to the 2009 *Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU*¹⁰⁸. However, in August 2011, these rates were overturned by the Dutch Trade and Industry Appeals Tribunal as a result of an appeal by some telecommunications operators. The new termination rate was then –as prescribed by the Dutch Court– fixed under a different methodology that includes costs not directly related to call termination. It triggered an investigation by the European Commission¹⁰⁹ which has concluded by a request of modification of the provisions on termination rates to adjust them to the European design.

Moreover, due to its condition as the guardian of the TFEU, the European Commission, according to Article 258 TFEU, is enabled to take legal actions to initiate infringement proceedings against those Member States who do not implement -or implement improperly- the EU telecommunications rules.¹¹⁰

¹⁰⁴ http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/berec/index_en.htm.

¹⁰⁵ Article 2 BEREC Regulation.

¹⁰⁶ See Articles 7, 15(4) and 19(1) Framework Directive.

¹⁰⁷ According to the European Commission, termination rates are the rates which telecoms networks charge each other to deliver calls between their respective networks. These costs are ultimately included in call prices paid by consumers and businesses.

¹⁰⁸ C(2009) 3359 final, 07.05.2009.

¹⁰⁹ The official report on the Commission Investigation available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/130&format=HTML&aged=1&language=EN&guiLanguage=en>.

¹¹⁰ For recent examples concerning the initiation of infringement proceedings against 16 Member States which have failed to fully implement third package of EU telecommunications rules into national law within the deadline (25 May 2011).

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Finally, the Court of Justice of the European Union acts not only as a EU law enforcer, but also plays a role in the implementation of the telecommunications' regulatory framework as the ultimate arbiter of European legal instruments.¹¹¹ Thus, the CJEU may interfere in the implementation of the EU telecoms rules under different competences provided by the Treaty: infringement proceedings, judicial review proceedings, annulment proceedings and preliminary rulings.

In this regard, we might conclude that the European Union is overshadowing national and local positions. The implementation measures and actions taken by national authorities must be in line with the model established by the European Union.¹¹² Otherwise, the measures adopted might run the risk to be overruled or amended under European standards. From the Dutch example we even could draw that the Commission is above national courts by repealing their decisions.

Enforcement Issues

With regard to the enforcement of the EU telecommunications law, there are two particular questions which should be mentioned here. On the one hand, there is an 'EU's tendency to pursue policy objectives through EU's "rights-based" approaches'.¹¹³ This trend seeks to encourage the private enforcement of EU law.¹¹⁴ On the other hand, there seems to be a shift from judicial to administrative enforcement¹¹⁵, which is encouraged by the rules concerning SGEIs coming from the EU. In short, the EU right-based approach encourages citizens to make use of their "EU rights" but, in turn, these claims are increasingly taking place out-of-court by dispute settlement mechanisms. Additionally, the Framework Directive provides an 'organizational structure in which the national regulators are integrated into a unitary administrative structure for the enforcement of Union Rules'.¹¹⁶

Rights and remedies: The EU's "rights-based" approach

The EU rules concerning regulated-markets grants rights to private parties. Thus, for example, the section devoted to substantive law of this paper exposes the main parameters contained in the Universal Service Directive when it comes to the provision of telecommunications services for consumers. Here, the most important is the idea of access. As aforementioned, the accessibility to the service must be guaranteed at an affordable price and under certain quality conditions. Nonetheless, these rights are laid down on a Directive (secondary EU Law) and, therefore, they are not directly applicable. They need to be implemented into national legislation.¹¹⁷ To this end, the specific Universal Service Obligations (hereinafter, USOs) elements and the rules concerning quality and affordability of the Universal Service are laid down in decrees or NRA's decisions. The justifications to such move responds to reasons of adaptability with relatively ease, since the rules and parameters

¹¹¹ Walden (2009), pp. 175-176.

¹¹² On the implementation of the regulatory framework for telecommunications see a full list on the different EU's press releases on infringement proceedings at http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/infringement/releases/index_en.htm.

¹¹³ Kelemen (2011), p. 45-46.

¹¹⁴ Ibid. p.28.

¹¹⁵ Micklitz (2010), pp. 44-45.

¹¹⁶ See Hofmann, Rowe and Türk (2011), *Administrative Law and Policy of the European Union*. Oxford University Press.

¹¹⁷ See above concerning implementation.

concerning quality and affordability may change.¹¹⁸ Hence, the enforcement of the USOs corresponds, in general, to NRAs, who may impose fines when it comes to an undertaking which does not comply with its obligations.¹¹⁹ However, the Universal Service Directive itself established certain remedies in case of non-compliance. Thus, for instance, the consumer has a right to compensation¹²⁰ where the quality of the service provided does not correspond to the contracted quality levels. Also, the Directive makes available a right to withdrawal¹²¹ from the consumer contract, without penalty, in case of modification of the contractual conditions.

Yet, amongst the different rules concerning the provision of telecommunications services, there are also Regulations which, because of their binding nature, confer rights to citizens without the requirement of being transposed into national law. Here, we could talk about “EU’s rights”, since they can be directly enforced. We find an illustration of these rights on the example of prices cap for Roaming tariffs, which are contained in a Regulation. Therefore, these retail tariffs enjoy direct applicability. Despite mobile services are not –by now- included in the Universal service scope, the regulation of Roaming is also an important part of the telecommunications EU rules. These rules also affect to the content of the contract since rules on Roaming seek to gradually reduce the prices for roaming connections. In this regard, the issue of roaming charges gains relevance when EU citizens move to another EU Member State. The new proposal on Roaming Regulation, which has entered into force on 1st July 2012, establishes new Roaming cap-tariffs for voice –both, make and receive a call- and SMS. As to Data Roaming services, the currently in force Roaming Regulation does not set maximum retail tariffs. However, by way of minimum regulation, the Roaming Regulation imposes transparency obligations on mobile operators concerning those retail tariffs.¹²² Moreover, the new proposed Roaming Regulation already contains maximum retail tariffs –for the first time. The decline in the prices of data –as well as in voice and SMS- will be progressive. In addition, people traveling *outside the EU* will receive a text message, email or a pop-up window notifying them of approaching to EUR 50 of data downloads or to a previously agreed amount. Once the limit is reached, consumers should confirm the approval to continue with data roaming services. In addition, the new European Regulation allows mobile phone users to choose a separate contract for roaming with another carrier abroad. Thus, a consumer may opt for an alternative operator abroad that offers cheaper prices than those already contracted in his country, with the advantage of being able to keep –free of additional charges- the same phone number. This possibility will be a reality as of 1st July 2014. Also new in this regard is the introduction as an additional measure of access to data services provided directly by the operators of the visited country, which will be based on LBO (local break out). This measure allows a person to contract only the data to an operator in the country you are traveling, while maintaining the voice and SMS with your operator. It is also proposed that the provision of the service shall be very simple (without necessarily formalizing a contract, only, for example, buying a card at a kiosk). As a result, the LBO will provide that, while on vacation on a European country, any visitor can use, for example, the Smartphone and the table, outside but enjoying domestic prices.

¹¹⁸ ‘BEREC Report on Universal Service– reflections for the future’ (June 2010), available at [http://www.erg.eu/streaming/BoR%20\(10\)%2035%20BEREC%20Report%20on%20USO_final.pdf?contentId=546910&field=ATTACHED_FILE](http://www.erg.eu/streaming/BoR%20(10)%2035%20BEREC%20Report%20on%20USO_final.pdf?contentId=546910&field=ATTACHED_FILE); p. 6.

¹¹⁹ On the different Member States’ systems imposing fines in case of non compliance with the USOs by undertakings see ‘BEREC Report’ (Ibid.), pp. 28-29.

¹²⁰ Universal Service Directive, Article 20(1), f.

¹²¹ Ibid., Article 20 (4).

¹²² Ibid. Recital 40.

In the field of passengers transport -including transport by air¹²³, sea¹²⁴, train¹²⁵, and bus and coach¹²⁶-, the EU has also opted for the use of Regulations. These rules also grant rights to passengers in case of delay, cancellation or accident. Additionally, they contain specific provisions concerning the enforcement of such rights.

Procedure. The shift from judicial to administrative (and soft) enforcement

The EU rules on regulated markets are opting for out-of-court dispute resolution. The EU was not competent in the area of Alternative Dispute Resolution (hereinafter, ADR) and, therefore, it employed soft law mechanisms to establish minimum-quality criteria on ADR.¹²⁷ However, with the introduction of the 'area of freedom, security and justice' by the Treaty of Amsterdam in 1999, the EU Community extended its competence into the area of civil justice systems.¹²⁸ Since that time, it has been gradually pushing the harmonization in this field.¹²⁹

In the case of telecommunications services, out-of-court dispute resolution is encouraged in the Universal Service Directive. Thus, according to its Article 34(1), 'Member States shall ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services arising under this Directive and relating to the contractual conditions and/or performance of contracts concerning the supply of those networks and/or services'. Such a procedure should be available for disputes between users and providers of services under the Universal Service Directive and the disputes related to the contractual conditions and/or performance of contracts concerning the supply of those network or services.¹³⁰ The means of initiating such procedures should be clearly contained in the subscription contract.¹³¹ Independent dispute resolution bodies must be established and need to be consistent with the minimum principles established by the Commission on the out-of-court settlement of consumer disputes.¹³²

The enforcement of these rules is following a tendency towards administrative enforcement by National Regulatory Authorities which are now responsible for the enforcement of the rights laid down by the EU rules. These authorities act as EU law (administrative) enforcers. Additionally, NRAs are responsible for the provision of information concerning out-of-court mechanisms. In fact, they are,

¹²³ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, (OJ L 46, 17.2.2004, pp. 1–8).

¹²⁴ Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L 334, pp. 1-16).

¹²⁵ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, pp. 14–41).

¹²⁶ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, pp. 1-12).

¹²⁷ For example, the European Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC) and the European Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

¹²⁸ Hodges, C., Benoehr, I. and Creutzfeldt-Banda, N. (2012), *Consumer ADR in Europe*. Hart Publishing.

¹²⁹ The most recent outcome of such harmonization has been the culmination of this harmonization process into the EU Proposal for a Directive on Consumer ADR and a Proposal for a Regulation on Consumer ODR.

¹³⁰ Queck, de Streel, Hou, Jost, & Kosta (2010).

¹³¹ See Article 20(2) g Universal Service Directive.

¹³² These principles are listed in the Commission Recommendation 98/257 of March 30, 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

in many cases, even the dispute settlement provider.¹³³ In addition, we must consider the existence of sector-related ADR providers, e.g. the Spanish State Secretariat for Telecommunications and Information Society. Consumer and business organizations also provide alternative dispute resolution mechanisms, as do other public bodies independent from the NRAs. For example, OFCOM (UK's NRA) adopted a single complaints code of practice in order to simplify the complaints handling procedures; in Poland, the Polish NRA provides a consumer information call centre; and in the Netherlands complaints can be filled in online¹³⁴; as well as in through ANACOM¹³⁵, the Portuguese NRA. In short, there is a large catalogue of out-of court mechanisms for disputes in the telecommunication sector which is aimed to achieve a prompt settlement in accordance to the celerity that the market requires.

As to this movement towards out-of-court dispute settlement, the CJEU has considered that the establishment of a mandatory process of dispute settlement, prior to bringing a judicial action before the court, does not infringe the principles of equivalence, effectiveness and the principle of effective judicial protection. This was the ruling given by the CJEU in the Alassini Case¹³⁶, concerning the adoption by the Italian Government of a mandatory settlement procedure that had to be followed by the parties in the dispute prior to instigating court procedures. In this case the defendants argued that the actions against them were inadmissible because the applicants (consumers) had not first initiated the mandatory attempt to settle the dispute before the settlement bodies, as required under Italian law. Here the Court reasoning –following the Opinion of the Advocate General Kokott¹³⁷– was that

‘that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires’.¹³⁸

Therefore, by this ruling, the CJEU is contributing to this movement towards out-of-court dispute settlement. This matter is relevant for the self-sufficiency hypothesis because through the movement towards administrative enforcement, the enforcement of the EU rules comes to fall within the EU shadow as long as it becomes part of the enforcement network. This could also be considered a manifestation of an emerging “judicial activism”¹³⁹ coming from the CJEU, because this ruling has implied an inflection point in the case law concerning access to justice which aims to fill the remaining gaps of the EU law in relation to its implementation within the national private legal orders.

As a result, the case of telecommunications services could serve as an example of what Prof. Micklitz terms *de-judicialization*¹⁴⁰, insofar as the enforcement of the EU law is moving towards softer solutions coming from public bodies different from the courts. In fact, the vast amount of cases is no longer found in Courts. The new mechanisms of soft-enforcement and self-enforcement foster a shift in the traditional litigation scheme. NRAs and Consumer organizations, as well as others bodies –both

¹³³ According to the Commission, in a majority of Member States, out-of-court procedures have been provide by the NRAs (Nihoul & Rodford, 2011).

¹³⁴ Through Consuwijzer's webpage at <http://www.consuwijzer.nl/>.

¹³⁵ Available at <https://www.anacom.pt/bvirtual/index.jsp?do=edit&mode=edit&idform=FRECL-ANACOM&languageId=1&languageId=1&channel=graphic>.

¹³⁶ ECJ joint cases: C-317/08, C-318/08, C-319/08 and C-320/08, [2010] ECR I-02213.

¹³⁷ Ibid. Opinion delivered in November 19, 2009 (Paragraphs 36 and 57).

¹³⁸ See Paragraphs 53-58 Alassini Case.

¹³⁹ Expression used by Micklitz (2010); Renzulli, A. (2008) ‘Services of General Economic Interest: The Post-Altmark Scenario. *European public law*’, 14(3), pp. 339-432; and Kelemen (2011).

¹⁴⁰ Micklitz (2010), p. 19.

independent and public bodies-, are offering new ways to consumers who wants to settle a dispute related to the provision of telecommunications services. These practices range from the possibility to fill online complaints, to mediation and even arbitration services, and the compliance with their outcome is boosted under threat of inclusion into blacklists or publicly available negative ratings, for example. It has implied an important step in terms of access to justice for consumers.

Furthermore, the policy pursued in others sectors seems to chase the same path as telecommunications. Thus, the EU rules concerning postal, financial, transport and energy services also promote the enforcement of their substantive law via ADR.¹⁴¹

Conclusions. A Self-Sufficient Order?

All the sections here examined serve as a starting point for the verification of the self-sufficiency of European Regulatory Private Law. Thus, the trends in law-making, substantive law, implementation and enforcement contribute to a better understanding of the verticalization and substance of the sectors which shape the European Regulatory Private Law.

The telecommunications sector has become a heavily regulated sector in order to ensure its transition to competition. In terms of law-making, in the telecommunications market, which is marked by fast changes and many innovations, it seems reasonable to explore instruments that are more flexible than the traditional ones. As a result, telecommunications law in the European Union is characterized by new and more customizable instruments of law-making in order to serve market demands and the increasing number of actors participating in the law-making process. Likewise, the regulation of telecommunications is aimed at the establishment and functioning of the Internal Market, which is the driving force behind the regulatory development. Accordingly, the legislative power no longer lies in the hands of the Nation State alone, and this is particularly important if we consider that the telecommunications' regulatory framework also contains contract-related rules. Law-making now takes different forms, private law is manifested in different shapes, and the telecommunications sector constitute a vertically emerged legal order, whose creation and evolution –from a private law perspective- does not correspond to a traditional pattern. Hence, the self-sufficiency of the ERPL is perceived here, since all these features leave, therefore, little room to national states in the legislative development of private law.

The provision of former public services is now carried out by private companies through mandatory provisions concerning access conditions. The provision of these services has been, therefore, transferred to the market by relying in competition for the resource allocation. In this regard, some authors point out that by so doing, and 'when governments rely on market solutions to problems of securing social welfare, reducing the role of the State and using market competition to improve the efficiency of the supply of public goods, contracts become both an instrument of trade and an instrument of politics'.¹⁴² But not only are contracts becoming an instrument of politics, but also legal rules are increasingly becoming policy programmes, especially secondary EU law. Thus, by becoming more and more described, European directives are '*losing their character as legal rules*'; this is what Prof. Micklitz terms '*de-juridification* process'.¹⁴³ In addition, through the Internal Market configuration and the Universal Service requirements, the European Union is practically regulating whole contract's content and, consequently, leaving little discretion to Member States to do so. As a

¹⁴¹ For a deeper analysis on Consumer ADR in the different sectors and countries see Hodges *et al.* (2012).

¹⁴² Study Group on Social Justice in European Private Law (2004), 'Social Justice in European Contract Law: a Manifesto', *European Law Journal*, 10 (6), pp. 653-674.

¹⁴³ Micklitz (2010), p. 19.

result, the second Trojan horse would appear, under the Internal Market configuration camouflage, to replace national contract law.¹⁴⁴

Concerning the implementation of the EU telecommunications rules, the implication of many institutions in the implementation process, linked to the (national, not European) independence with which NRAs are required to carry out their activities, mean the narrow accommodation for national regulation and for the Nation State. As for enforcement, we must consider four signs that imply a new paradigm in the enforcement of the European Regulatory Private Law: first, the promotion of administrative enforcement at the expense of judicial enforcement; second, the encouragement towards private enforcement by out-of-court dispute settlement mechanisms but also different from administrative enforcement; third, the EU “rights-based” approach has also encouraged private parties to enforce their EU rights; and last –but not least–, the judicial activism initiated by the European Court of Justice to achieve the ends of the EU policy. Accordingly, the telecommunications example reveals that, first, the EU is setting the tone in the implementation of the rules for regulated markets; and, second, that the enforcement of such rules is moving towards new patterns –direct applicability of EU rights and soft enforcement via out-of-court dispute settlement.

In summary, the European Regulatory Private Law -in the telecommunications field- is a regulatory intervention justified on factors such as: technological development, innovation, globalization, competitiveness, expertise, celerity, markets opening, harmonization of the Internal Market, etc... But, on the other hand, it also takes the opportunity to safeguard the access to the service through mandatory provisions. Therefore, it is not an intervention based on the enhancement of competition within the Internal Market, but rather a regulatory market interference which the European consumer law approach –at least, in its current configuration- is not able to achieve. The regulation of substantive law provisions concerning the contractual performance of the service provider via European rules is particularly striking because the patterns analyzed along the paper seem to suggest that we are witnessing to the rise of a new private law regardless the Nation State (substantive law without the State)¹⁴⁵. At the same time, all the above factors lead to a series of transformation processes in the regulation of these sectors that trigger the preclusion of Member States in the legislative development. And, finally, the Member States’ leeway for the implementation of the EU rules has been undermined by the establishment of a *cooperative network* which, powered by the EU Commission, monitors the proper transposition of EU rules and urges its observance.

The new trends followed in the field of Services of General Economic Interest -particularly in telecommunications- in the tested areas, i.e. law-making, substantive law, implementation and enforcement, could confirm the emergence of a self-sufficient order different from the national private legal orders and, in addition, independent from the general European consumer *acquis*. Hence, the telecommunications example has helped to –preliminarily- conclude that the new patterns listed above seem to pave the way towards the self-sufficiency the European Regulatory Private Law, at least when it comes to the provision of services within regulated markets.

¹⁴⁴ Micklitz (2010).

¹⁴⁵ See Micklitz and Svetiev’s contributions to this working paper.

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Section IV: COMMENTS AND INTERVENTIONS

1) Mapping out the Landscape

MAPPING OUT THE LANDSCAPE

*Thomas Wilhelmsson**

I was asked to provide some comments mapping out the research landscape. The aim is to provide a meta-map of the maps already provided of the specific issues and parameters. I will not map any answers as those are expected from the project. Research is often about finding the right questions than the right answers. I am going to map a couple of questions that the discussions and the project have made very topical. According to my understanding, the aim of the project is the construction of the emergence of a new entity, being European Regulatory Private Law (ERPL). The project seeks to analyse the relationship between this new entity, ERPL, and national private law through four relationship-parameters.

The basic question is how we construct the system - the way you design society through thinking. The development of the law is constituted by the play between main rules and exceptions. There are different approaches to this issue. In the continental setting, you construct a system by formulating the general principles of the system. In the common law setting, you approach the issue from a different angle – distinguishing is an important technique of building a system.

There are many questions concerning systematization. The distinction between local and total coherence as analysed by Tuori in his paper becomes relevant. It is not clear to me whether the project is about establishing a more totalizing coherence/ideology or local coherence. Sometimes during the discussions, ERPL was seen as a new emerging self-standing system, which is locally coherent rather than consisting of special rules which have been made for certain services of general interest. There are some kinds of systematic generalizing principles, which constitute a local coherent system. However, reading the contribution of Micklitz, which criticises the DCFR for not understanding European private law, it seems that the project is rather seeking for a re-systematization of the whole block of private law. Since it is argued by Micklitz that we have a wrong perspective on private law, this raises not only questions about having a new sub-species of local coherence living according to its own rules, but also questions about trying to look at the whole area of European private law.

One perspective is to see ERPL as a locally coherent distinct entity, which does not interact with the rest of private law and to analyse the relationship between ERPL and national law according to the 4 parameters. Or one can also take a broader view and analyse the multi-lateral relationships between ERPL and general private law as well as national private law. A web of various relationships arises, where one can search for the 4 parameters.

If one aims for local coherence, the question arises as to the criteria to decide how “locally” you delimit the area. Why should we combine the “services” together? Or should we combine “general interest” together? Should we include then “financial services”? All services? What is the real *locus* for local coherence? The scope of the locus should be determined by the reasons that we are looking for coherence. If we act as researchers, we are interested in regularities of nature, human behaviour

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and legal behaviour. Then, we should look for issues where we find empirical regularities. There are different reasons for coherence. One reason for coherence can be communication. The human language is based on coherence. One cannot only communicate single events – one needs broader concepts to be able to communicate more information content. However, the project might need another dimension of coherence. I imagine that the most efficient way of coherence is that of gathering everything on one area as telecommunications and do not mix everything together. Legal certainty is ambiguous as to coherence. Certainty is decreasing if you look for broad coherence rather than a focused local coherence where every actor involved knows more concretely what is spoken about. Yet, as ERPL is intruding in a field where you had general norms before, actors will probably perceive strong feelings. There could be a justice argument that like situations/cases/things should be treated alike. To sum up, depending on what you are looking for, you might end up with different ways of localising local coherence.

The next question is the perspective that the project takes. The choice of perspective influences the relationship parameters. Different actors might have different perspectives. The perspective of a researcher is to look for rationality patterns meaning pointing out the central rationality and constructing areas based on rationality. If we look at ERPL, does the project expect to find similar rationality patterns between telecom, health, financial services etc? Or are the rationality patterns so dominant that they are overtaking the traditional rationales of private law? I have the impression that the project seeks for the latter one and thereby is seeking for a more total coherence. The perspective of the courts might be very different as they have a problem-based learning approach. Courts might be more open towards sectorial systematization, taking together issues which tend to appear in court in the same context. The perspective of the legislator is rather instrumentalist and functionalist. The project claims that instrumentalism/functionalist is the basic ethos of ERPL.

The third question concerns the systematization key. What puzzled me when discussing the dialectic between main rules and exceptions is how we pinpoint what are the main rules and what are the exceptions. Often it is very poorly explicated on what basis we pick some main rules and decide that the rest are exceptions. We seldom explain why we choose some key for the systematization. Consequently, why are services of the general interest the systematization key for ERPL? We are bound by conceptual traditions and our main rules are the traditional main rules. We need to be forced to make explicit the explanation about where we find the main rules. The main rules are found in our *Begriffshimmel*, which is part of our *Vorverständnis*. However, when we claim that something new is emerging which is threatening the old scheme of main rules and exceptions, then we are forced to explain why we think that this “new” is so important that it changes the balance of the traditional conceptual structure in some way. The project claims that ERPL challenges the traditional conceptual structures, which we find for example in the DCFR. How do we determine the systematic importance of something new emerging to claim that it overthrows the internal balance of the legal system? Is it the number of cases? Number of legal instruments? Economic importance? The importance for ordinary citizens? Can old principles be challenged by one landmark case? I often would like to know why this one case changes the whole landscape. What are the reasons for this case being so important? We have many cases which are not in conformity with the general principles and any general principle can be contested if you dig deep enough.

The project is claiming that the content of European private law is changing and that there is a clash between European private law and national private law. It might be too easy to define national private law as the traditional autonomy based Code and to contrast it then to new regulatory rules. There would be not so much of a clash if the project redefines national private law as to include such elements that you find in regulatory private law. In national private law, we also find regulatory instruments, even in the areas which are discussed by the project but they are not necessarily defined as part of private law. This also relates to the public/private law divide and what to do with European law that does not fit into this divide. It puts more pressure on redefining whole areas. Why is there a need to talk about private law at all? When analysing the four relationship parameters, is the project

looking at the *Begriffshimmel* and codifications as counterpart to the ERPL? The DCFR is written in the way of the *Begriffshimmel*.

The project claims that this new ERPL is based on an instrumental way of understanding the law. However, all EU law is based on an instrumental way of understanding the law/rationalities. While American law is instrumental in its basic approach, the European legal cultures are rather formalistic (both the continental legal systems and the English common law system are formalistic compared to the American instrumentalism). However, through European law but also because of other changes in approach, the European legal cultures are moving in the instrumentalist direction.

The relationships parameters are of a different kind and questions arise as to how to measure them. If it comes to convergence and hybridisation, the question is about the substance of the law and its conceptualisation. It is result-focused as you determine how it looks like in the legal systems. Also autonomy and self-sufficiency are content-oriented. However, resistance is a reaction of the actors involved and is not about how it looks in the law. Consequently, a different type of analysis is conducted and a different type of proof produced. Instead of having these four criteria on a different analytical level, I propose to divide them firstly in criteria about how the actors are reacting and secondly in criteria about how the result might be. For example, the actors are resisting and the result is a hybrid.

Lastly, the importance of a global perspective and the need to respond to the global perspective as well needs to be stressed.

European diversity is a good breeding ground for legal learning processes. It is a great advantage to have 27 legal systems in countries having relative similar social systems, which means that we can really learn from each other.

2) The Scenarios

THOUGHTS ON HYBRIDISATION

Norbert Reich*

These thoughts are an attempt to build on and re-adapt Kaarlo Tuori's speech on legal hybrids to the specific area of European Regulatory Private Law for the purposes of this research project. According to Tuori, at least three levels of legal hybrids can be distinguished, that is individual concepts, legal branches and systems. Rather than on systems, the focus of these thoughts mainly lies on individual concepts and legal branches, which appear as the most fruitful dimension for the purposes of the project. So far hybrids have been presented mainly as *horizontal*, though in the context of the European Union regulatory framework also the *vertical* dimension should be considered. In light of the regulatory objectives of the European order, classical distinctions vanish and traditional individual concepts such as contract and tort take novel shapes and functions: in particular, the protecting of autonomy loses centrality against new regulatory aims such as non-discrimination, consumer protection and so on which are meant to serve the general interest. It is possible to notice interference between the private and the public dimension concerning in particular the use of administrative remedies for private purposes. A particularly interesting recent case in this sense is *Invitel* [Case C-472/10], which originated from the preliminary reference of a Hungarian Court in a proceeding started by the authority which enforces consumer law taking collective actions against unfair contract terms. In that occasion, the CJEU has explained that a term which is deemed unfair should be non-binding for all consumers, including those who were not part of the proceeding. The Court said that national courts have by their own motion to ensure that consumers will not be bound by those terms, and in this way introduced new remedies which surpass the traditional theories elaborated in many national contexts (compare for German law the doctrines of *Rechtskrafteerstreckung*, *Einreidelösung* and so on). Public law remedies are digging into contract law as a spill-over effect.

Another aspect that deserves being addressed in this scenario is the impact of the on-going process of constitutionalisation of private law and, particularly, the impact of the Charter of Fundamental Rights. Article 47 of that charter may be particularly important in this sense. There is arguably a strong move towards constitutionalisation, which so far has been discussed at the national level (initially in German, lately also increasingly in the Netherlands). This aspect may be considered as an aspect of ERPL and this consideration leads to the second point: hybridization in legal branches. It is clear from Tuori's presentation that the days of the classical legal black-boxes are gone, and competition law is a good example for this. Nonetheless, if ERPL has to be established as a separate branch, what are then its specific characteristics, functions and mechanisms? How this interacts with public and private law? As a hypothesis, the constitutional move can be an aspect of that interaction. There are indeed links to certain constitutional premises in the Charter of Fundamental Rights, where we find principles such as consumer protection and rules which have to be implemented by EU or national law such as non-discrimination. Although these rules have to be counterbalanced by other rights and principles such as property, freedom of contract and so on, these represent the constitutional roots which keep together the idea of ERPL.

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What concerns methodology, an aspect that has to be assessed is 'balancing'. When we consider conflicting values which are rooted in different traditions, the classical problem-solving methods become somehow inadequate and a new need for balancing arises. This could be the methodological focus of the project. Another aspect to be taken in consideration is how the whole hybrid nature of the European Union, which has already been explained by Tuori, reflects on substantive community law and the branch of ERPL.

SELF-SUFFICIENCY

*Jonathan Zeitlin**

I want to develop a couple of points, building on the papers of Jan Smits and Annetje Ottow and my own comments. In the ERPL project the self-sufficiency scenario functions in a dystopian way. It seems normatively undesirable but it may be empirically occurring. Jan Smits argued that it could be normatively desirable because it would provide stability of norms for private actors. This was also mentioned by Annetje Ottow when she referred to legal certainty. However, I am sceptical about the normative justification for several reasons.

First of all, in such a fast-moving field, the idea that you can provide stability for the participants through a general set of norms seems illusory. Secondly, because of the interaction between the EU and the national level, if you try the self-sufficiency approach, it is likely to produce unintended consequences – the opposite of stability.

What is the emerging architecture of EU regulatory governance? From my perspective, the EU regulatory networks and agencies should be understood as frameworks for decentralised elaboration and implementation of EU framework rules in which there are systematic mechanisms for feedback and revision of rules and procedures via monitoring and peer review of implementation. This is experimentalist governance. There can be questions as to how far individual sets of arrangements in particular sectors fully fit this model, but we see a significant correspondence to that model in many sectors. We can see these governance systems, of which a characteristic is that the national level participates in the revision of the rules, as machines for learning from diversity or cross-fertilisation of national regulatory systems. I would see this as a mechanism for fruitful hybridisation rather than substitution.

It would be useful to underline one of the points that Yane Svetiev made about the competition network. That is that if we ask why the EU develops such an institutional framework, this is not only because of a lack of competence, but also because of a lack of capacity. We can see the European competition network (“ECN”) as a case in which the administrative overload in the approval of restrictive agreements leads to the creation of the ECN. In so far as this is a capacity issue, we should expect this to be a more general tendency across different areas of regulation. If we carefully analyse the emerging governance arrangements, such as ACER, the whole thing looks like a remarkable recursive structure for co-production and co-implementation of the rules governing these sectors. The European Commission could not generate those rules itself. BEREC is a weaker version of ACER – it is not accumulating substantial powers to substitute for national authorities, even if over time it might acquire more power by majority voting and might overrule the decisions of an individual national authority.

If one were to be concerned about self-sufficiency, one would want to look at financial regulation. There is a real effort to create a single European rule book, and there is a debate about how far we are seeing a continuation of an inadequate nationally dominated system, or a more centralised and uniform system which does not leave sufficient scope for national experimentation. The jury is still out on this. My view is that a middle position is more justified, in which we should see the new European authorities as strengthening pre-existing regulatory networks, but in which national institutions are still cooperating with the Commission. I believe that even the uniform EU rules will leave room for contextualised interpretation by national supervisors.

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I could develop an argument about the case of REACH, which looks like a highly centralised system. However, evidence suggests that national authorities are still very involved in which substances should be treated as priorities for high levels of regulation.

I will now make a few comments on the implications for national private law. We should not exaggerate the role of European integration. This already happened in the 20th century in areas such as labour law due to the inability of generalist judges to resolve technically complex issues through the mechanisms of contract and tort. This has been accentuated by the pace of innovation in product technologies and business-to-business relations. We can see this just as prominently in the US as we do in the EU. It is hard to attribute it to European integration. This point was well developed by Yane Svetiev. We should further avoid exaggerating the homogeneity of European systems before European integration. I could mention the example of the analysis by Alec Stone Sweet and Kathleen Stranz on the Mangold case in the *Journal of European Public Policy*. This was an intervention by the ECJ in internal conflicts in the German judicial system over the recognition of horizontal rights to contest age discrimination.

Finally, I would mention the role of national authorities in implementing EU rules. The examples given by Annetje Ottow were very interesting. They could be seen as an example of creative hybridisation between EU and national regulation. They could be diffused from one national system to another through peer review and ACER. In addition, they could spread horizontally across sectors at the national level.

I will end with the role of local courts. I would like to elaborate on Yane Svetiev's comments on the Hamburg gas case. We could interpret this as a destabilisation mechanism which can be invoked in cases of exclusionary decision-making. A safety valve or last resort procedure that can be invoked to challenge the system. It functions as a regulatory default penalty, making parties behave in a more inclusive way.

CONFLICT AND RESISTANCE

*Fernando Gómez**

I begin with a brief comment on penalty defaults. The virtue of a penalty default is that in equilibrium it is never applied. The idea is that the parties behave as they are supposed to behave, therefore, they avoid reaching the stage of the game in which the penalty is applied, so even if the result of imposing the penalty is undesirable for everyone, given that this lies off the equilibrium path ensures that the dismal outcome where everyone loses is avoided. This is something that comes from game theory, with interesting applications to public policy, to contract law, and to other areas.

I proceed now to a number of specific comments about conflict and resistance. To start, I will not "resist" the temptation to comment about a couple of issues that I think are incredibly suggestive and interesting from both yesterday's discussion and from the background papers.

First, I address the idea of how to understand resistance to the development and growth of the ERPL. Many would tend to say that looking at the small issues may mean that you lose the broad picture. Sometimes, however, if one focuses solely on the broad picture you may get the wrong one. So, I think it is important to understand the behaviour and incentives of the relevant actors that are crucial for explaining potential resistance and conflict with the emergence of the ERPL. Yesterday we listened to examples of resistance by the national judiciaries. Of course we observe a resistance by the Courts or by the national legal profession (for example, with regard to the CESL, there have been very critical papers from the legal profession in the UK, and other countries). These are just casual observations, however important. We do not have comprehensive and real evidence about how those individuals, actors and groups actually relate towards EU law and, more particularly, towards the set of European rules that bring us here. I think that definitely the national judiciaries are very important, the legal profession and also academia are also notably relevant players. The same is true about various interest groups: industries, consumers. They need to be analyzed as well as groups with different political interests, which vary from country to country. I have the strong feeling that we definitely need to understand more about the behaviour and incentives of those relevant actors. And I believe that empirical studies (looking at the facts) are the only way to really understand that.

Second, I was a bit surprised that we did not come up more explicitly yesterday -being a project coordinated by Hans Micklitz - with *distributional consequences*. In the sense that the Project may take a normative turn at some point: what explains the emergence of the resistance of the ERPL? I think that the distributional consequences are really important. It is not so obvious who is going to win or who is going to lose, what are the gains or losses for different economic groups, particularly in terms of impact on wealth distribution that some of these measures may have. Therefore, I think that it is definitely important to understand what the distributional effects of the process will be.

There are two important points that were nicely raised by Horatia Muir-Watt's contribution. One is the idea that the ERPL may produce interesting methodological debates. Prof. Muir-Watt mentioned that the French Courts were "horrificed" by the idea of balancing and using proportionality instruments. I think that the suggestion was really very nicely put, and I think that the ERPL is going to have an impact on how legal culture is used to address problems. For example, my personal view is that most continental lawyers would engage in a very "healthy" exercise by doing more balancing, and that it will undermine legal certainty. Because it is a false sense of legal certainty: legal certainty is chimerical. So, I believe these methodological issues, though perhaps less important from the point of

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view of social welfare consequences, are intellectually truly interesting, and definitely they may be lie in part at the roots of resistance by some groups. The second point that I want to recall, which was also raised by Horatia Muir-Watt, is the non-EU perspective. Again, it is very “healthy” to look at things from the outside and the outside’s consequences and the outside’s resistances and clashes that it may have. How we may “be happy” with the building of an ERPL? Another example would be to look at what the World Bank is now doing in terms of legal reform in many countries and imposing a very narrow view of what is good facilitative law and good regulation for the purposes of economic growth. I think we definitely need to look more at how some of the regulatory measures that are part of the package on the ERPL really fit or diverge. My impression is that there is substantial divergence.

One a different tone, this is something that did not appear in the debate so far, but I think that it is an extremely interesting point in Micklitz’s paper. It is about the distinctiveness of rights of the ERPL with respect to national private laws in the 19th Century. I would express my doubts to some extent, because as Micklitz emphasized concerning the 19th Century codifications, ideas such as autonomy and private ordering, but also that of building or creating a nation-state were important. But I think that especially for early 19th Century codifications, the idea of building a single (national, not European) market was also very important, in addition to creating a national spirit and awareness. Then, for those who wanted the French Code or the Spanish Constitution (with the aim of creating a single code for Spain and America, for the Spanish colonies, with the first Spanish Constitution in 1812), one of the basic rationales was not only creating a new national consciousness, it was also the elimination of legal fragmentation and legal diversity as serious obstacles to trade. This was also very much the rationale behind other 19th century codifications. And some people think this kind of mixed motivation is also currently present in the area of EPL (e.g. Hesselink). For example, these commentators think that the CESL not only eliminates barriers to trade, but helps to create a European citizenship. Thus, it is not so clear that the processes we observe nowadays are in reality so different because, at least, some of the goals seem to be closer than what appears at first glance.

3) The Applications

APPLICATIONS AND EXAMPLES

*Yane Svetiev**

In this intervention I comment on the papers providing the applications and examples in the areas of remedies, standardisation and telecommunications sectoral regulation. One common point is to recall that the hypothesised parameters, such as hybridisation, convergence, self-sufficiency (“HCS”) are not just being investigated in themselves, but as part of an overall hypothesis of the creation of a European private law, which distances itself from national private law and which is entirely independent of any EU codification exercises pursued in recent years. The underlying basis of this ERPL is functionalist and therefore it may be expected to track changes in the principal objectives of European integration. The suggestion is that the sources of this European private law extend beyond the consumer *acquis* to include the contract-related rules in sectorial regulation, the standardisation processes in services (which presumably in turn affect service contract provisions and tort liability), remedies involving private parties etc. In my view, these sources should be seen as the principal subjects of investigation of the individual projects. Only then, the second question is how to characterise the processes and outcomes – both in terms of the resulting private law rules, and in terms of their relationship with each other and with national private law.

Therefore the conceptual parameters (i.e. HCS) need not be understood (at least at this point) as normative concepts that need to be defended as such in the separate investigations. They are just possible or hypothesised characterisations of the emergent European private law rules and institutions. The different characterisations of these processes may be due to the different channels through which remedies, services standardisation and sectoral rule-making affect private law, or it may be due to differences in EU competence in the respective areas, or due to some other reason. Moreover these parameters may be complementary with each other (e.g., hybridisation could lead to convergence in private law remedies across different MS) or not (hybridisation may not result in convergence in remedial law due to the substantial scope of flexibility remaining to MS procedure). The parameters could also be inconsistent with each other (self-sufficiency may be viewed at a surface level as inconsistent with hybridisation, while apparently consistent with conflict and resistance). Moreover, these relationships are dynamic and may change; so the processes examined in the various examples may need to be traced over time to determine how best to characterise them (for e.g., minimum standardisation can lead to convergence as an initial outcome as laggards make up ground, but then divergence as new innovative solutions over and above minimum standards are experimented with).

Finally, the normative question (i.e., are these European private law developments in some sense good or not) comes last (i.e. once we understand what the developments are and once we have characterised them). To answer the normative question requires adopting a normative yardstick, i.e. how or by what criterion do we judge what is “good” or not. Possible normative yardsticks include (and this is not a comprehensive list): coherence² (a doctrinal concept), efficiency or consumer welfare³ (an economic concept), democratic legitimacy⁴ (political concept) etc.

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² Do the new rules fit with the existing private law? Do they create inconsistencies? Do they lead to like situations not being treated similarly?

Both in the descriptive and particularly in the normative analysis, the comparative dimension is also important. In this context, it is worth recalling that different institutions may perform different functions in different legal systems. As such, rules cannot be viewed in isolation, but we must consider that they may operate in combination with other complementary institutions (e.g., administrative arrangements, public law regulation, legal education etc.).

On the issue of normative evaluation, two further points are worth stressing. In the research project from the outset one aim emphasized from the outset is to avoid common (though often unstated) preconceptions that researchers in this field depart from. One preconception is that effective harmonization of rules (and application) is the key standard by which we judge “success” in European integration (the “Europeanist” view), the other is that national law is coherent, stable, legitimate, and that these are values requiring protection from an intruding legal order (the “nationalist” view). This can be one way to understand the notion of ERPL as “creative destruction”. It suggests that there may well be benefits from both central intervention and from allowing MS autonomy, not out of traditional sovereigntist concerns, but as a source of policy diversity in a complex world.

Therefore at this stage the focus is on understanding the underlying processes/mechanisms and how they give shape and content to the European private law. In the various individual projects these mechanisms have been identified as remedial institutions (influencing private law remedies), standardisation in services (shaping substantive provisions in services contracts and the contract and tort liability of service providers), as well as contractual rule-making in sectorial regulation. Part of the process of in-depth understanding involves identifying examples that cannot be easily explained from the traditional Europeanist or nationalist vantage point. These examples provide the substratum of the ERPL. Only once those processes and the way they influence private law, both at EU and MS level, have been understood, one can hope to characterise them and then to normatively evaluate them.

(Contd.) _____

³ Are consumers better off under ERPL rules or not? What about businesses? Which set of rules promotes technical and dynamic efficiency (i.e. innovation)?

⁴ Are the emergent rules technocratic or do they reflect substantial input from society? Do they allow for greater self-realisation of particular communities and individuals? How do they fare by comparison to national rules? What vision of the individual consumer/citizen do they embody?

European Research Council



This EUI Working Paper is published in the
framework of an ERC funded project hosted at the
European University Institute



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